

Moreover, as the removal has been reversed, the appellant is 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 her 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 Simonne Ali. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation until the 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:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and 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 7TH DAY OF DECEMBER, 2022

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 16602-17

CSC DKT. NO.: 2018-1193

**IN THE MATTER OF SIMONNE ALI,
CITY OF PLAINFIELD DEPARTMENT OF
PUBLIC AFFAIRS AND PUBLIC SAFETY.**

Ira W. Mintz, Esq., for appellant Simonne Ali (Weissman & Mintz, LLC, attorneys)

Little E. Rau, Esq., for respondent City of Plainfield, Police Department
(Ruderman & Roth, LLC, attorneys)

Record Closed: March 21, 2022

Decided: November 2, 2022

BEFORE **JOHN P. SCOLLO, ALJ:**

STATEMENT OF THE CASE

On Friday, April 14, 2017, Simonne Ali ("Appellant" or "Ali") was a civilian police aide and was working two consecutive shifts at the City's jail, which was located inside the Plainfield Police Department headquarters. During Ali's second shift, a detainee, Douglas Matthews (hereinafter "D.M." or "Matthews"), died while in custody in Cell Number Four due to a drug overdose. The City of Plainfield Police Department ("PPD" or "City") issued a Preliminary Notice of Disciplinary Action (PNDA) on August 8, 2017

(R-3). In its September 28, 2017, Final Notice of Disciplinary Action (FNDA) (R-2) the PPD sustained all the charges and removed Ali from her civilian position of police aide effective September 28, 2017. Ali appeals the determination and removal.

PROCEDURAL HISTORY

After the City of Plainfield Police Department and the Union County Prosecutor's Office investigated the April 14, 2017, in-custody death of D.M., the City brought various disciplinary charges against Ali. See the August 8, 2017 PNDA (R-3), served August 14, 2017. There was no departmental hearing. All the charges were sustained in the FNDA dated September 28, 2017. Ali was removed from her position effective September 28, 2017. Ali filed a timely appeal, and the matter was referred to the Office of Administrative Law and filed on November 8, 2017, under docket number CSV 16602-17, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The Tribunal held an initial telephone conference and a Pre-Hearing Order was issued.

Discovery disputes arose, and the Tribunal issued its June 21, 2018, Discovery Order.

On June 27, 2018, Judge Scollo, the City's attorney Little Rau, and Ali's attorney Ira Mintz toured the section of the Plainfield police headquarters containing the following locations: the work station (including television monitors) where police aides performed their duties; the adjacent booking and fingerprinting rooms where the police aides performed their duties; hallways between the aforesaid work station and the prisoner cells; and the prisoner cells and adjacent hallways. The tour included a visit to Cell Number Four. The hearing (including the giving of testimony and the marking and receipt of documents) began on October 31, 2018, and continued on November 2, 2018, November 5, 2018, and November 9, 2018. The hearing was scheduled to resume on February 28, 2019. However, this date was postponed due to this judge's medical condition. The hearing resumed on June 3, 2019, and continued on June 6, 2019, and June 7, 2019. During the June 7, 2019, hearing an issue arose, which led to the filing of

motions. Attorney Mintz asked Barlow three questions: (1) "Did you meet with Ms. Rau to prepare your testimony for today [at the hearing]?" (2) Did you and Ms. Rau go over the questions that would be asked of you today [at the hearing]?" and (3) "Did you and Ms. Rau go over the answers that you would give?" Mintz made it clear to the Tribunal that he was not going to inquire into the substance of the pre-hearing communications between Rau and Barlow. Over the City's objections the Tribunal ruled that the questions were proper. Barlow answered "yes" to the first two questions, but, after Attorney Rau instructed Barlow not to answer the third question upon advice of her counsel, Barlow responded, "I will not answer the question as per my counsel." Both attorneys filed motions.

On August 2, 2019, Attorney Mintz filed a motion on behalf of Ali to compel Barlow to answer the third question and to strike all of Barlow's testimony in the event that Barlow refused to answer the third question. Mintz took the position that Barlow was not Rau's client and was not a member of her litigation control group.

On August 5, 2019, Attorney Rau filed a motion on behalf of the City requesting the Tribunal: (1) to reconsider its rulings that Barlow should answer the three questions posed by Attorney Mintz; (2) to strike the three questions and the answers given to the first two questions; and (3) to bar Mintz from asking any similar questions to Barlow and to any of the City's remaining witnesses (i.e., to issue a protective order) on the grounds of attorney-client privilege, claiming that Barlow was Rau's client and part of her litigation control group.

In an Order dated May 6, 2020, this judge found that: (1) the City of Plainfield was Rau's client; (2) there was no reason to doubt that the information Barlow gave to Rau concerning her knowledge of the events of April 14, 2017 was consistent with her testimony given in court and that there was no obvious reason to doubt the account given by Barlow; (3) that Barlow's role in the matter was to provide a factual account of what she saw, heard, and did on April 14, 2017 at Plainfield Police Headquarters and that nothing in Barlow's testimony indicated that she was involved in determining or

formulating the City's legal position or legal strategy; (4) that there was nothing in Barlow's testimony that indicated that she was expressly or impliedly cloaked with the authority to make decisions for, or to speak for, or to otherwise bind the City; and (5) that there was no reason to doubt the account given by Barlow, in which she demonstrated that she immediately alerted higher-ranking police personnel about Matthew's unresponsiveness, that the higher-ranking personnel immediately took over the handling of the situation, that Barlow had no role in the efforts made to revive Matthews, and that Barlow's role at the scene promptly ended.

In that same May 6, 2020 Order, this judge, relying upon several prominent cases including Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed. 2d 584 (1981) and Niesig v. Team I, 76 N.Y.2d 363 at 371-72 (N.Y. 1990), concluded that not everyone whom Rau "met with" or who was "involved in disciplinary matters" is covered by the attorney-client privilege. I concluded that since the facts about Matthews' death were more readily available to people whose ranks were higher than that of Barlow, it was clear that upper-eschelon personnel had all necessary and available information regarding the death of Matthews in his cell. I concluded that since Barlow was not the exclusive source of factual information necessary for the City's counsel to determine or formulate the City's legal position or legal strategy, Barlow was not the City's "alter ego" and thus cannot be included in the group, set or class of people entitled to coverage by the attorney-client privilege as set forth under Upjohn. I therefore concluded that Barlow was not Rau's client. I further concluded that Barlow must answer Mintz's third question.

On May 18, 2020, Attorney Rau filed a Motion to Stay the May 6, 2020 Order with the OAL, pending an application to the Appellate Division for Leave to File an Interlocutory Appeal. On May 19, 2020, Attorney Mintz filed papers in opposition arguing that the City should have filed for a Motion to Stay with the Civil Service Commission within five days of the May 6, 2020 Order; that the time to file such a motion with the CSC had already expired (on May 11, 2020, five days after the issuance of the May 6, 2020 Order); and that the City had no right to file an application with the Appellate Division before exhausting its administrative remedies. On May 26, 2020 the City filed a Reply arguing

that it had the right to file the application for Leave to file an Interlocutory Appeal with the Appellate Division; that it did not have to exhaust its Administrative remedies; and it nonetheless filed a Motion to Stay with the Civil Service Commission. In its correspondence dated May 28, 2020, the CSC informed Attorney Rau that pursuant to N.J.A.C. 1:1-14.10(b) requests for interlocutory review must be submitted within five days of the order; that in this matter the order was dated May 6, 2020 and the request was submitted May 26, 2020 and therefore untimely; and as a result, no action would be taken on the matter. On June 15, 2020, I issued an Order denying the City's Motion to Stay, particularly noting the importance of the question "[U]nder what circumstances does an employee or an agent of an organization, a corporation or government entity become so identified with the interests of the organization, corporation or government entity (i.e., an *alter ego*) that he or she comes under the ambit of the attorney-client privilege?", which I answered in my May 6, 2020 Order. On June 18, 2020, the Appellate Division issued an Order denying the City's Motion for Leave to Appeal.

Due to the motions and the Covid-19 Pandemic, the testimony resumed two years later, on June 7, 2021. Attorney Mintz resumed his cross-examination of Debra Barlow, which was followed by re-direct and re-cross-examination. After Barlow's testimony was finished, the last witness for the Respondent-City to testify (on October 27, 2021) was Lieutenant Christopher Sylvester. The City then rested, reserving the right to call rebuttal witnesses in the event that Simonne Ali took the witness stand to testify. As it happened, Simonne Ali did not testify. After the conclusion of the Respondent-City's testimony, Attorney Mintz made an oral motion for acquittal, which was later submitted in writing, and Attorney Rau submitted papers in opposition to said motion as well as a cross-motion to Amend the Pleadings / Conform the Charges to the evidence. I denied the Motion for Acquittal and I denied the Motion to Amend the Pleadings / Conform the Charges in a written Order dated January 27, 2022.

Thereafter, the parties were given time to receive the hearing transcripts and to write their Summation Briefs. The Tribunal received the transcripts on various dates. The

Tribunal received both attorney's Summation Briefs on March 21, 2022 and the record closed.

The Initial Decision was due May 5, 2022. The Tribunal requested and received several extensions to June 22, August 4, September 18, and November 2, 2022.

THE TESTIMONY OF THE WITNESSES

The following is not a verbatim recitation of each witness's testimony. Rather, it is a summary of testimony, which I have found to be important in deciding the fact issues and legal issues presented in this matter.

Testimony of Lt. William Tyler, Plainfield P.D., October 31, November 2 & 9, 2018

On direct examination, Lieutenant William Tyler testified that he was hired by the Plainfield Police Department in 1988 as a patrolman and rose to the rank of lieutenant. He is presently the Bureau Commander for the Office of Professional Standards a/k/a the Internal Affairs Unit and served as the Police Department's Accreditation Manager during a recent successful accreditation process with the New Jersey Chiefs of Police Association. He testified about Plainfield's internal investigation of the events of April 13-14, 2017 surrounding the death of Matthews and of Ali's performance of her duties at that time; the duties and responsibilities of police aides; the rules and procedures for the performance of face-to-face checks (also termed "inspections") of detainees; the physical layout of the applicable portions of the Plainfield Police Station (booking area, police aide area, hallway to cell blocks, locations of the cells and time stamp machines, etcetera), his limited review of video footage and his discussions with others who had reviewed the videos more extensively, and his review of the jail logs and paperwork utilized by police aides in the performance of their duties.

Tyler testified that he was out-of-state on the date of the incident, April 14, 2017.

Tyler testified that between the April 14, 2017 incident and August, 2017 the matter was being investigated solely by the Union County Prosecutor's Office for evidence of criminality. Tyler testified that after the UCPO determined that there was insufficient evidence of a crime, it sent the matter back to the municipality for administrative review. In August, 2017, Police Director Carl N. Riley assigned Tyler to begin an investigation of Simonne Ali's actions during her double shift spanning 11:30 p.m. on April 13, 2017 to 12:15 p.m. on April 14, 2017.

Tyler testified that he relied on information given to him by Detective Adam Green and Detective Anthony Romeo, both of whom had downloaded and preserved the cell block, main hallway and police aide area videos. Tyler ordered Sergeant Christopher Slaughter to review the videos. He learned additional facts of the incident by speaking with Sergeant Slaughter, after Slaughter reviewed the videos. Tyler learned additional facts from Captain Kevin O'Brien, Sergeant (now Lieutenant) Fusco, Lieutenant Sylvester, and the UCPO's Detective Oliver Kalebota and by reviewing documents written by or compiled by the UCPO and the Plainfield P.D. Tyler read Kalebota's Investigation Report dated June 13, 2017 and read the transcripts of Kalebota's questioning of Simonne Ali and Deborah Barlow. Tyler did not interview either Ali or Barlow. Tyler stated that he reviewed some, but not all, of the videos.

Tyler testified that during a conversation with Lieutenant Sylvester in September, 2017 (after the issuance of the PNDA), Sylvester stated that he had warned Ali about her general work performance. Tyler asked Sylvester to memorialize his counselling of Ali in a "Official Report" marked as Exhibit-28.

Based upon his review of documents prepared by others and his review of some of the videos, Tyler prepared his own report, which is entitled "Internal Affairs Investigation Report" dated August 3, 2017 (Exhibit 7). In that report, Tyler compiled the facts he gathered.

In her direct examination, Attorney Rau questioned Tyler about whether he was familiar with the Plainfield Police Department's detention procedures. He responded in the affirmative that he was familiar with the N.J.A.C.'s rules and regulations, the Department's General Order, and with the training of police aides regarding the detention of prisoners. Tyler testified that Plainfield Police Division General Order Volume 5, Chapter 7, Roman Numeral 8, Section C (hereinafter "the General Order") dated October 21, 2016 (Exhibit-22), which is based on N.J.A.C. 10A:34-4.1(b) (hereinafter the "Regulations"), requires that face-to face checks of detainees must be done every thirty minutes regardless of what else is going on. (See Tyler's Testimony 10/31/18 at p.125.) When asked about the importance of the half-hourly checks in comparison to an aide's other duties, Tyler explicitly stated, "The face-to-face [checks] take priority over everything." (See, Tyler's Testimony 10/31/18 at ps. 127-128.) Tyler went on to state that it was mandatory that prisoners be checked (i.e., inspected face-to-face) every thirty minutes even if the police aide was busy with other duties. (See, Tyler's Testimony 10/31/18 at p.135 and at p.207.) He testified that if a police aide was busy doing booking, photographing, or fingerprinting of detainees, or even if she were taking a radio call or phone call from a police officer on the road, a police aide was still required to stop doing such duties and inspect the detainees or ask someone else to do the inspections of the detainees.

Tyler was asked about the police aides' use of the time stamp machine. He testified that the police aide was required to punch the time stamp machine at the far end of the long hallway adjacent to the cells because this was supposed to be the way to keep police aides honest, i.e., to ensure that they were actually doing the required inspections every thirty minutes. He stated that police aides were not to simply punch the time stamp machine without doing the actual detainee inspections. Tyler testified that he concluded from the evidence before him that Ali had stamped the jail logs several times, but she had not performed any face-to-face detainee checks between 7:09 a.m. (her last check of Matthews) and 12:15 p.m. (the end of her second shift).

During his direct testimony, Tyler, using the above-listed sources of information, testified about what Simonne Ali did and did not do during her double shift; about the circumstances of Douglas Matthews's (D.M.'s) death on April 14, 2017; and about the preparation of his report to Director Riley.

Tyler testified that he made a recommendation to Police Director Carl Riley that Simonne Ali be terminated for failing to perform the face-to-face checks of prisoners every thirty minutes as required by the Police Department's regulations and General Order as well as her overall performance. Tyler testified that the decision to terminate rests, not with him, but with the Police Director, Carl Riley.

In regard to the searches of Matthews, Tyler testified that he was searched twice by the South Plainfield Police and twice by the Plainfield Police. Tyler testified that during a search incident to an arrest an officer performing a pat-down search may reach into a detainee's pockets or pull the pockets inside-out; the officer may ask the detainee to remove his shoes and socks in order to search them; and the officer may search the waistband of a detainee's pants; but the officer cannot go onto the detainee's undergarments. Tyler testified that there was a standing order providing that before a detainee was placed into a jail cell, that cell had to be searched by the police officers for any contraband.

On cross-examination, Attorney Mintz asked Tyler whether the police aides were ever trained that they could skip the face-to-face prisoner checks if they were busy with other duties as long as they wrote in the jail logs what they were actually doing at the time of the scheduled check. Tyler responded that such an instruction would violate the Regulations and the General Order and that he never heard about any such instructions being given to police aides.

Attorney Mintz also asked Tyler if it ever came to his attention that police aides were not doing the required prisoner checks and were instead writing-in what they were doing at the time that they were scheduled to perform the prisoner checks. Tyler

responded that during his investigation, he learned that police aides had sometimes skipped the required checks and instead they were writing-in what they had been doing. Tyler stated that this practice came to his attention after Attorney Mintz sought discovery of jail logs and after he (Tyler) was tasked with the job of pulling and reviewing approximately 365 reports (i.e., jail logs). Tyler stated that when he reviewed the jail logs in August, 2017, he learned that Ali and several other police aides, on occasion, were writing-in on the jail logs what other duties they were performing (e.g., booking, fingerprinting, photographing, doing paperwork or otherwise performing work associated with the processing of detainees, and handling phone calls or radio calls) during times when prisoner checks were scheduled and perhaps were not actually doing the face-to-face prisoner checks every thirty minutes. He added that videos were taped-over every thirty days and that without the videos, he could not prove that the inspections/checks were being skipped.

Tyler testified that he viewed the practice of writing-in rather than doing the checks as a violation of the regulations governing the handling of prisoners, specifically the rule requiring that prisoners be checked face-to-face every thirty minutes. He therefore reported what he learned up the chain of command to his superiors (particularly mentioning Captain Guarino) and left it to his superiors to take the appropriate action in light thereof. During cross-examination, Tyler admitted that he did not investigate any of the police aides (other than his investigation of Ali's actions during the April 13-14, 2017 double shift) whose records showed that they had written-in other duties they were performing and had perhaps skipped the required thirty-minute prisoner checks. When he was cross-examined about why he did not investigate apparent violations of the thirty-minute prisoner checks by police aides other than Simonne Ali, he responded that he was not ordered to do so and that even if he did so, there was no evidence to prove that the police aides had skipped the inspections since the video of the hallway, time stamp machine and cell area would have been taped-over. He explained that the video camera is on a "thirty-day loop", meaning that every thirty days the videos are erased/taped-over and the media is re-used and that any content older than thirty days is lost. When asked if he ever questioned any police aides about the jail logs showing that they had written-in

what they were doing over the course of several hours when they should have been doing the prisoner checks, he responded that the police aides would never admit that they had violated the prisoner check regulation and would instead lie to cover their violations. He added that he would have no evidence (videos showing what the aides were actually doing) with which to overcome their expected untruthful responses.

During cross-examination, Attorney Mintz questioned Tyler about a memo entitled "Police Aide Mandatory Responsibilities" (Exhibit-24) (hereinafter the "Plum Memo") written by Plainfield Police Lieutenant Jeffrey T. Plum, who had trained police aides. Tyler confirmed that Plum had supervised Ali. The memo stated that "These inspections [face-to-face prisoner checks every thirty minutes] are mandatory." However, it also contained language stating the following:

"If an inspection is missed, then the police aide will write in the comment lines whatever immediate / emergent work that was being done during the time that the stamp was mandatory that prevented the inspection from being conducted."

Mintz's aim, in this portion of his cross-examination of Tyler, was to inquire into what instructions Plum was giving to the police aides. That is, whether Plum, in the quoted section of the memo (Exhibit-24, Paragraph 1, Line 4), was instructing police aides that the regulation requiring face-to-face inspections every thirty minutes was not to be applied literally and that the aides had discretion to skip the thirty-minute checks as circumstances warranted as long as they noted it in the jail log's comment section. When asked if he found this language confusing, Tyler responded that it was confusing. He agreed that it was confusing because in one place the memo states that half-hourly face-to-face checks are mandatory (i.e., that they cannot be missed), but in another place it contradicts the mandate by directing the police aides, after they have already missed the check, to write in the comments section of the jail log whatever immediate / emergent work they were doing which prevented them from performing the check. However, Tyler ultimately maintained that the regulation requiring face-to-face prisoner checks every thirty minutes originated with the State Department of Corrections, is mandatory, and must be adhered to literally.

Tyler criticized the Plum Memo stating that it not only contradicted the literal meaning of the regulation but that it was “not official”, was “not authorized”, was “not signed”. When asked if the Plum Memo carried any weight or was binding in any way on the [police] personnel, he responded “No.”

Attorney Mintz referred to several jail logs that showed that several police aides on several occasions had skipped face-to-face detained checks and had instead written in the jail logs their reasons for skipping the face-to-face detainee checks. Mintz asked Tyler if he would have recommended that they be terminated for doing so. Tyler responded in the affirmative. Mintz also asked Tyler if he would have recommended termination if police aides had not had their jail logs stamped every half hour. Tyler responded in the affirmative. Knowing that there are jail logs showing that police aides skipped face-to-face checks and that they instead wrote-in what they were doing in the comments section of the jail logs, Attorney Mintz asked Tyler if he conducted any investigations about the skipping of the face-to-face checks. Tyler responded that he did not investigate, but he made the chain-of-command aware of the problem. When asked if he ever became aware of the superior officers disciplining any police aides for skipping the face-to-face checks noted on the above-mentioned jail logs, Tyler responded that, to his knowledge, the superior officers had not investigated and that no police aides were disciplined. Attorney Mintz, noting that signatures of watch commanders appeared on certain jail logs where the police aides had skipped face-to-face detainee checks, asked Tyler if any watch commanders were disciplined for approving jail logs containing information from their police aides about the skipping of face-to-face detainee checks. Tyler responded by saying, in so many words, that he noted the watch commanders' signatures, but did not know if the signatures indicated approval of the practice of skipping by the police aides. Mintz asked Tyler if any watch commander had been disciplined for not signing a jail log at the end of a shift. He was unaware of any such discipline. Pointing out that there were jail logs containing “gaps” (i.e., time wherein police aides other than Ali had not made time stamps), Mintz asked Tyler if he viewed videos showing what other aides were doing in

order to compare their actions or inactions with Ali. Tyler responded that he did not deem viewing those videos necessary to his investigation of Ali.

In regard to the searching of detainees for contraband, including drugs, Tyler testified during his direct testimony (Tyler's Transcript of 10/31/18 at p.166) that PPD did not perform a body cavity search or a strip search of Matthews. In answer to the Tribunal's questions about the nature and extent of searches, Tyler stated that in D.M.'s case PPD would not perform a body cavity search or a strip search (a search that would go into D.M.'s undergarments). When asked if the search was simply a "pat down" search, Tyler responded that a search incident to an arrest would extend into searching the detainee's pockets, socks and shoes (as part of a "pat-down" search), but to go into his undergarments would make it a strip search. In answer to the Tribunal's questions, Tyler stated that there is a standing order that before a detainee is placed into a jail cell, the police officers must check the cell for contraband.

On cross-examination, Attorney Mintz asked further questions about what measures Plainfield took to prevent arrestees from carrying drugs into the Plainfield jail. Tyler responded that Matthews was searched twice when the South Plainfield policemen arrested him and searched twice again when the two Plainfield policemen (Officer Johnson and Officer Falligan) took custody of him. Mintz asked if a strip search or body cavity search was performed on Matthews. Tyler responded, "Prisoners have rights."

Mintz asked if Matthews could have been placed on a higher level of supervision since he had drugs in his possession when he was arrested. Tyler responded that even though Matthews had a drug container in his possession when he was arrested, most drug users do have such items in their possession and Matthews was not showing signs of drug overdose. Tyler was unaware if Plainfield had warned Ali that Matthews had been in possession of drugs when he was arrested. He also stated that Plainfield did not put detainees who had drugs in their possession when they were arrested on a special watch protocol.

Attorney Rau conducted the re-direct examination of Tyler on November 9, 2018. Tyler reiterated that he did not start to investigate the April 14, 2017 incident involving the death of Douglas Matthews until after the Union County Prosecutor's Office was finished with its criminal investigation. In August, 2017 Tyler was assigned to start his administrative investigation. In response to Attorney Rau's questions, Tyler stated that he did not review any video camera footage corresponding to the nine jail logs on which he was cross-examined. This is because the hallway videos were only kept for 30 days, had been taped-over and thus were no longer available in August, 2017. Tyler re-iterated that, having not personally reviewed the videos, he relied on information given to him by Detective Green and Detective Romeo, both of whom had reviewed the hallway and cell block videos. Tyler also relied on the information contained in UCPO Detective Oliver Kalebota's June 13, 2017 report. Detective Green told Tyler about his viewing of Ms. Ali watching a device in the booking area. Green also watched the video of Matthews in Cell Number 4 up to the time when Matthews stopped moving. Tyler stated his opinion that Ms. Ali is a nice person, but based on the information given to him by Green, Romeo and Kalebota, he formed the opinion that Ali was "in over her head" and "she wasn't doing all of the things that we expected." Amplifying his statements, Tyler stated that Ali did not do the face-to-face inspections and she seemed more interested in her cell phone. He summed-up his opinion by saying, "It was the totality of her work product that led us to the determination - at least my recommendation for termination."

On re-direct examination, Tyler stated that the time stamp machine procedure was replaced by a Record of Confinement form prescribed by a new General Order (Exhibit A-10) dated August 3, 2017, but he emphasized that the 30-minute face-to-face checks were still required.

On re-direct, Tyler was questioned about Lieutenant Plum's memo (Exhibit-24). Tyler stated that the Plum Memo was "non-binding" and was contrary to the provisions of the Regulations and the General Order requiring face-to-face checks of detainees every thirty minutes. He noted that Plum's memo was not printed on the proper letterhead and was not authorized by the Chief Executive Officer (the Police Director).

Having been questioned about the Plum Memo and about what tasks were to be considered as "immediate" or "emergent", Tyler stated that, in his opinion, tasks like booking, fingerprinting or photocopying would not be "emergent" and would not be considered more important than the performance of the required face-to-face checks.

On re-direct, Tyler testified that he was unaware of any complaints or of any video evidence to substantiate that Police Aides Sutton, Bowe and Warren failed to do face-to-face checks or that they falsely time stamped, that they did so on March 3, 2017 and that Police Aides had not done face-to-face checks on March 5, March 9, March 16, March 22, and March 24, 2017. He also testified that he was unaware of any complaints and unaware of any video evidence that Ms. Ali and Officer Fusco did not do face-to-face checks on April 1, 2017 and falsely stamped that they had done so. He also testified that he is unaware of any video evidence that on April 3 and 20, 2017 police aides had not performed the face-to-face checks.

Having earlier referenced Exhibits 9 and 10, Tyler testified that Matthews was searched by Plainfield Officers. He said that there was no justification for an invasive strip search or body cavity search. He saw nothing that indicated that the search of Matthews either was not done or was improperly done by Plainfield's transporting officers.

Tyler re-iterated that using the television monitors in the booking area was never a substitute for the requirement that the detainees be checked face-to-face. Testifying about the videos taken in the six hours before Matthews's death, Tyler noted that the only video he viewed of Douglas Matthews was from some time after 9:00 a.m. to approximately 9:45 a.m. Any other knowledge he acquired about the content of videos came not as much from his own viewing of videos, but from his discussions with Detective Green about what Green saw in the videos. With that clarification established, Attorney Rau asked Tyler if Ali had done a face-to-face check at 9:02 a.m. and whether Ali would have seen Matthews alive in his cell. Tyler responded, according to what Green told him, that if Ali had performed a face-to-face check at 9:02 a.m. she would have seen Matthews

safe and alive. Asked the same question about a face-to-face check performed at around 9:30 a.m., Tyler responded that around 9:30 a.m. Ali would have seen Matthews, as he characterized it, "in distress" and "slumped over". [Note: The Tribunal viewed the video of Cell Four for the period 8:40 a.m. to 9:42:03 a.m. on the record on November 5, 2018 during the testimony of Sergeant Wayne Slaughter.]

In regard to Ali performing other tasks during the times when she was supposed to do face-to-face checks, Tyler noted that Ali did no face-to-face checks between 2:03 a.m. and 5:31 a.m. He also stated that it would take only one hour, not three hours to perform the booking of three arrestees.

Tyler concluded his re-direct testimony by agreeing that Ali had not done an essential function of her job (face-to-face checks of the detainees every thirty minutes) and that the other tasks she performed were not emergent and did not supersede or take priority over the face-to-face checks of the detainees.

On Attorney Mintz's Re-Cross-Examination, Tyler confirmed that Ali worked alone on a double shift on April 13 – 14, 2017, but that the policy has been changed so that aides will no longer work alone. Police aides no longer use the time stamp machine, but instead must conduct physical checks at the detainee's cell and fill-out a Confinement Form stating their actual observations of the detainee. The purpose of the Confinement Form is to rectify the problem of aides simply stamping without doing the actual face-to-face checks. In regard to the investigation, Tyler testified that Ali was questioned about and certainly did know about the rule requiring face-to-face checks of detainees every thirty minutes, but he did not know if anyone questioned Ali about Lieutenant Plum's memo or about any training she received allowing her to skip face-to-face checks if she was busy with other tasks as long as she wrote-in what she was doing.

On re-cross examination, Mintz asked Tyler if Police Aide Ali or any other aide was authorized to ignore Lieutenant Plum's memo. At first Tyler responded that he did not know the answer to that question, but then stated that the memo was unauthorized and

that he believed that an aide would be authorized to ignore the Plum memo. When Mintz asked Tyler how an aide would know that the Plum memo was unauthorized, Tyler responded, "I don't know."

Finally, the last question Tyler answered was whether Ali was ever disciplined for taking too long for booking a detainee. Tyler testified that, to his knowledge, Ali was never disciplined for taking too long when booking a detainee.

Testimony of Sgt. Wayne Slaughter, Plainfield Police Dept. – November 5, 2018

Sergeant Slaughter has twenty years of experience with the Plainfield Police Department including the policies and procedures of the booking area. On his direct testimony, Slaughter testified that he personally trained Police Aides Debra Barlow and Shante Warren. Slaughter instructed both Barlow and Warren that they were required to conduct face-to-face checks of the detainees every thirty minutes and every fifteen minutes if a detainee was suicidal. As part of her direct examination of Sergeant Slaughter, Attorney Rau asked him what he instructed Barlow and Warren to do about face-to-face checks of detainees if they had other tasks such as fingerprinting, photographing, booking and those tasks were being done at the same time that they were supposed to do the face-to-face checks. Slaughter responded:

" I instructed them if they couldn't do their physical check [i.e., face-to-face check] within thirty minutes, document the reason why you couldn't do it on the jail log."

On direct examination, Slaughter was questioned about his viewing of the camera footage. He responded that he watched all the footage of Douglas Matthews in Cell Four and made notes, marked at the Hearing as Exhibit 19. He testified that Ali brought breakfast to Matthews at 7:07 a.m. and at 7:09 a.m. Ali brought a bottle of water to Matthews. He testified that Ali did not appear again on the Cell Four video until 12:36 p.m., which was a few minutes after Police Aide Barlow found Matthews unresponsive. He made it clear that Ali did not appear on the Cell Four video footage at any of the times

corresponding to time stamps she made at 6:31 a.m.; at 7:03 a.m.; at 7:38 a.m.; at 8:07 a.m.; at 8:38 a.m.; at 9:02 a.m.; or at 11:38 a.m. Although there were no corresponding time stamps for the following times, Attorney Rau asked Slaughter if he saw Ali on the Cell Four footage at 12:00 (Noon), 12:10 p.m. and 12:15 p.m.. He responded "No" to all three questions. When asked who was visible on the Cell Four footage at 12:33 p.m., Slaughter identified Barlow doing a face-to-face check and standing in front of Cell Four. Rau asked the question regarding whether Matthews was moving when Barlow arrived, but the answer was delayed until after the Tribunal viewed the video.

It was at this point in the testimony of Sergeant Slaughter that, at Attorney Rau's suggestion, the Tribunal viewed the Cell Number Four video footage. The Tribunal viewed the video for the time period from 8:40 a.m. to 9:42:03 a.m. (the times noted on the video) taken on April 14, 2017. I thought it prudent for me, as the judge, to provide a minute-by-minute narration for the record of what the video showed. (See, Transcript dated November 5, 2018, pages 39 through 67.) Throughout the video, Matthews and the entire cell (cell door, bars, walls, light, bed and commode area) are in view except for an electronically blacked-out rectangle to provide privacy for a detainee's use of the commode itself. Throughout the video, Matthews stands up, lays down, repositions himself facing the wall or the bars, sits, takes small squats, moves his hands and arms to and from his mouth, sips his water, eats his food, rocks back and forth, plays with his shirt, scratches his lower back and his head, reaches under his shirt near the waistline (at 9:10 a.m.), sits at 90 degrees and at other angles while on the bed. Leaning into the blacked-out area, he seems to use his hands to do something with his sock at 9:14 a.m. He leans or rocks forwards and backwards at irregular intervals. For much of the latter part of the video (from 9:33 a.m. onwards) Matthews is mostly within the electronically blacked-out rectangle and can only be partially seen. His moving shadow is seen from 9:35:30 to 9:37:09. From 9:37:40 onwards Matthews's foot and part of his body can be seen on the floor underneath the blacked-out area. From 9:38:27 a.m. onward, there is no movement from Matthews.

Returning to the testimony of Sergeant Slaughter, in answer to Attorney Rau's several questions about when Matthews was seen moving, Slaughter responded that at 9:02 a.m. Matthews was sitting on the bed; that at approximately 9:40 a.m. Matthews was in the blacked-out area near the commode and not moving; that at 11:38 a.m. Matthews was in the blacked-out area near the commode and not moving. Slaughter testified that the view from Cell Four's camera was displayed on a monitor at the Police Aides' work station.

Using Exhibit-11, Attorney Rau inquired of Slaughter and established that at 9:02 a.m. Ali wrote "visual check" on the jail log. Slaughter said that a visual check denotes when a police aide checks the television monitor, but he also said that it is not necessary to write down "visual check" every time an aide looks at a monitor. He distinguished a "visual check" (the aide's use of the monitor) from a "physical check", which entails an aide doing a face-to-face check of a detainee.

At the end of his direct testimony, Slaughter testified that he had no interactions with Barlow or Ali on April 14, 2017 except that he drove them to and back from the Union County Prosecutor's Office.

On Attorney Mintz's cross-examination, Slaughter testified that he instructed Barlow that she was to always initial the jail log when making an entry such as "booking" or "printing". He agreed that on Exhibit A-2b there were some time stamps without initials. He testified that this was problematic because it was inconsistent with his training to the aides that any entry must be initialed. The same was true for Exhibit A-5a and A-5b.

On cross, Mintz inquired whether Slaughter trained the Police Aides that they were required to turn in their jail logs to their watch commanders. Slaughter responded that it was not part of his training and that it was something to be determined by someone in management who was higher than himself.

Mintz cross-examined Slaughter as to whether there were any special procedures for police aides to follow when a detainee had been arrested for drug possession. He responded that there were no general Orders in place requiring such special procedures, but that all arrestees were routinely asked if they had been using drugs or were "high".

On Re-direct, Rau asked Slaughter if police aides were allowed to stamp the jail logs without doing the face-to-face checks. He responded in the negative.

On Re-cross, Mintz asked Slaughter if he trained police aides that they could skip a face-to-face check in its entirety if they were doing other things and write it in the jail log. Slaughter responded, "Yes."

This judge then asked Slaughter if he was saying that he trained the aides that they were not allowed to simply stamp without doing a face-to-face check, but he did train them that they could skip face-to-face checks, as long as they made an entry saying they skipped. Slaughter responded, "Yes, if they documented the reason why they skipped."

Testimony of Captain Anthony Bonito (Retired, Union County Department of Corrections) – November 9, 2018

Captain Bonito retired from the UCDOC after 27 years of service. He testified that among his duties was the training of law enforcement personnel in Cell Block Management and Prisoner Processing. He recalled being the sole instructor at a four-hour training class in March, 2015 at the Stamler Police Academy in Scotch Plains wherein he made a PowerPoint presentation for participants and awarded certificates to them after completion of the training class. He testified that the materials (including Exhibit 25) and discussion included the requirement that authorized personnel check the detainees face-to-face once during a period not to exceed every thirty minutes, as provided by N.J.A.C. 10A:34-4.1(b). He testified that the purpose of the checks was for wellness and security, including that the detainees were alive and well and to detect any problems.

As part of her direct examination, Attorney Rau asked Bonito if he instructed the attendees of the March, 2015 training class that they could use booking or printing or warrant checking or photographing as a reason for not conducting the 30 minute face-to-face checks of the detainees. Bonito replied; "A 30 minute check requires a 30 minute check, it must be done absent any other - absent anything else as indicated by the State statute and standards." He identified Exhibit 27 as the standard that municipal detention facilities must follow. He stated that this material was provided to all attendees in the class. He identified Exhibit 26, a copy of the certificate awarded to Ali Simonne for attending the March 11, 2015 training class which he conducted.

On Attorney Mintz's cross-examination, Captain Bonito testified that he was not aware of the procedures that were in place on April 14, 2017 at the Plainfield City Jail. When asked about whether there were any special procedures at the Plainfield City Jail for detainees arrested with opioids in their possession, he responded that he did not know and that such procedures would be determined by the individual municipality.

Focusing on Bonito's PowerPoint materials (Exhibit 25), under the entry "Log Book Entries", Mintz asked whether it states "Checks should not follow a specific time pattern." Bonito agreed that that is what it says, but he explained that the half-hourly inspections were a guideline, that it further states that the intervals of half-hourly checks should "not exceed" 30 minutes, and that it was advisable for officers and aides to vary the times of the checks so as not to allow detainees to know exactly when the checks would take place.

Mintz next focused on Exhibits A-9a and A-9b, pointing out to Bonito that between the time stamps of 9:32 a.m. and 1:03 p.m. there appear various entries of "Booking", "Prints", "Photos", "Warrant checks", "Booking" and so on. Mintz posed the question that if the policy or procedure of Plainfield was for the Police Aides to skip doing the cell block inspections while they were performing those other duties, would that be consistent with

the training he provided to police personnel. Bonito responded that it would not be consistent with the training he provided.

Upon the Tribunal's questioning, Captain Bonito re-iterated that booking, finger printing, or taking photos were not reasons for not performing the half-hourly face-to-face checks. The Tribunal then asked whether there were other things that would be considered enough of an emergency or something that needed immediate attention that could justify skipping the requirement for half-hourly face-to-face checks. Bonito's answer was "Yes", and he qualified his answer by saying that anything that would be life threatening would supplant the requirement for a face-to-face check. The Tribunal inquired with Bonito whether there was anything besides a life-threatening emergency that would justify skipping the face-to-face checks. He responded that the purpose of the face-to-face checks was to ensure safety and security and that would take precedence.

After the conclusion of the Tribunal's questions, it invited further questioning from both attorneys. Mr. Mintz posed the question to Bonito that if Plainfield trained its Police Aides that they could skip face-to-face checks while they were performing booking, printing, photographing as long as they recorded what duties they were performing, would that be consistent with the regulations as he taught it during training classes. Bonito responded that such a policy and procedure would contradict the requirements of the law as he taught it.

Testimony of Detective Adam Green, Plainfield P.D., June 3, 2019

Prior to the start of Detective Adam Green's testimony, the attorneys confirmed that there were ten relevant time stamps or "punches" made by Simonne Ali using the time stamp machine shown at its location on Exhibit R-36. The relevant time stamps were all made during the course of Simonne Ali's double shift on April 14, 2017 at the following times: 1:33 a.m.; 2:03 a.m.; 5:34 a.m.; 6:31 a.m.; 7:03 a.m.; 7:36 a.m.; 8:07 a.m.; 8:38 a.m.; 9:02 a.m.; and 11:38 a.m. (See R-11).

Adam Green is currently serving as a detective with the Plainfield Police Department, where he administrates and manages the department's technology. Green started his law enforcement career in approximately 2006 in Plainfield. In approximately 2015, he left Plainfield for two years and worked with the Union County Prosecutor's Office before returning to the Plainfield Police Department in approximately 2017.

In April, 2017 Green's supervisors were Captain Kevin O'Brien and Director Carl Reilly. He recalled receiving a telephone call from Captain Brian Newman regarding the in-custody death of Douglas Matthews and was tasked with extracting (downloading) recorded video footage from the Department's video systems. He was also tasked with reviewing said footage in order to determine what had happened to Douglas Matthews and to determine what Simonne Ali was doing and not doing during her double shift. Green watched the video of Cell #4 showing Douglas Matthews. Green watched the entirety of video footage of Simonne Ali from 600 hours (6:00 a.m.) to 1300 hours (1:00 p.m.) for the date in question, April 14, 2017. The videos of Ali were recorded by cameras in two locations. One location was the long hallway described below; and the other location was the area where the police aides worked (the Police Aide Area / Booking Area). These locations are noted on R-36. The video of Ali walking in the main hallway was marked as R-38 and segments of it were played during Green's testimony. The video of the Police Aide Area/ Booking Area was marked as R-39 for Identification, but it was not played during the hearing.

R-36 is a diagram showing the relevant portions of Plainfield Police Headquarters. R-36 contains markings written by Judge Scollo to depict the locations of several objects or areas. Both attorneys agreed with the accuracy of the judge's markings. For purposes of orientation, the marking "R-36" is at the lower left of the diagram. The markings are "Police Aide"; "Main Hallway"; "Booking"; "Prints and Photos"; "3 female cells"; an "X" marking the location of the "time stamp machine" using an arrow to point to its location; and "Cell # 4". "Police Aide" is the area where the police aides sit in chairs at a console on which are computers with keyboards, radio equipment, telephones, video monitors, etcetera. This location faces and adjoins the "booking" area and the room wherein

"fingerprinting and photographing" were done. "Main Hallway" is a long hallway running from the area of the "cells for female" detainees (on the left side of the diagram) to the area where the time stamp machine and the "side corridor" to "Cell #4" were located (on the right side of the diagram).

During Green's testimony, he testified about R-38, the "Hallway" video and R-39, the Police Aide Area video (neither of which contain any audio). In seven segments of R-38 he observed what Simonne Ali was doing and he matched the segments to the corresponding time stamps (R-11). All seven segments showed Ali walking from the Police Aide Area (where she sat to perform most of her duties), entering the hallway that leads past the adjacent side hallways (a/k/a side corridors) that go to the male prisoners' cells, to the time stamp machine, briefly disappearing from view and then re-appearing within seconds and returning via the same hallway either directly to her workstation or disappearing into the area where the female prisoners' cells were located. After each viewing of the video segments, Attorney Rau asked Green if he saw Ali go into the side hallways that lead to the cells of the male prisoners. His answer to each of these questions was "no". After the viewing of each video segment Attorney Rau asked Green if he saw Ali look in the direction of the cells of the male prisoners. His answer to each of these questions was "no". After the viewing of each video segment Attorney Rau asked Green if he saw anything in the videos that indicated that Ali was attempting to listen to or speak with any of the male prisoners. His answer to each of these questions was "no". He added that since there was no audio available his testimony was based solely on what he could ascertain from viewing the video segments. He said there was no visible indication that he could discern that Ali attempted to listen to or speak with the male prisoners. He also added that, from his own familiarity with the location, a person in the hallway would be able to hear prisoners speaking.

Without playing the video marked R-39 (the Police Aide Area video), Green was asked about the types of things he saw Simonne Ali doing at her work station in the Police Aide Area / Booking Area during the time period from 0600 hours (6:00 a.m.) to 1300 hours (1:00 p.m.). Green testified,

"I observed obviously a various – a variety of things which to pinpoint exactly, I would obviously have to refer to my working notes, but of these things I observed Ms. Ali several times exit the area and then return to the area. I observed her on the computer terminals as would be expected with work. I did observe her several times on a personal or non-divisional, let me say that, non-divisional cellular phone. I observed a small electronic media device that was being watched for a periods of time and outside of that you as well would have the entry and exit for – for the punches that you note."

The video of what Ali was doing at her work station in the Police Aide Area was marked for identification as R-39. R-39 was not played during the hearing. Detective Green testified about his observations of Ali from 6:00 a.m. to 1:00 p.m. by reading his computerized notes. Green testified that he had made these while he was viewing R-39. These notes (five pages) were printed-out during the hearing and marked as R-40. Page one is marked "Cell 4 Camera"; Pages two and three are marked "Camera Covering Booking Aid Area"; Pages four and five are marked "Camera Covering Hallway Area". Green observed Ali in both the Police Aide Area and Hallway Area starting at 8:53:17 a.m. and ending at 12:35:20 p.m. Green observed Douglas Matthews (R-40, page 1) in Cell #4 from 6:26:23 a.m. to 12:34:40 p.m. Green states that Matthews' last recorded movement is that of his leg at 9:39:15 a.m.

The following are some of the entries from Green's R-40 notes, which the Tribunal and the attorneys read along with him in court and which show the following:

At 8:53:17 a.m. Ali was at her work station on a phone call.

At 9:00:36 Ali went from her work station to the Booking and Cell area, from which she returned at 9:01:47 (about a minute later).

At 9:02:37 Ali went from her work station towards the booking and cell area, from which she returned at 9:04:41 (four minutes later).

At 9:05:11 (about a minute later) Ali went from her work station to the booking and cell area, from which she returned at 9:06:23 (a minute later).

At 9:06:23 (about a minute later) Ali went from her work station towards the front desk area from which she returns a minute later (at 9:07:15).

At 9:07:35 (twenty seconds later) Green reports that Ali turned on some type of "non-Divisional media equipment", for which he gives no further description.

T 9:13:32 (six minutes later) Ali went from her work station to the office area, from which she returns a minute later at 9:14:20.

During his testimony, Green recited many additional entries of the types of work that he observed Ali doing. The pattern of Ali going from her work station to adjoining areas of the police station and returning from those areas to her work station repeats about fifteen times between 8:53:17 a.m. and 10:18:07 indicating that she was quite busy with work tasks. At 10:18:07 a.m. a police officer came into the Police Aide Area with an arrestee, with whom Ali starts the process of booking at 10:18:07 a.m. and which she finishes (completed fingerprinting) at 11:06:22 a.m. at which time she returns to her console.

On cross-examination, Green testified about Ali's use of a cell phone. He stated that the cell phone was not a divisional (i.e., department-issued) cell phone, but he had no knowledge as to whether Ali was talking to police personnel or non-police personnel. Green admitted that he could not know whether she was conducting police business or making personal calls. He admitted that he did not note the specific number of cell phone calls made or received by Ali. He did not note the duration of each specific cell phone call. In some of his notes he wrote down the time that he saw her on the phone, but he could not say when each cell phone call had commenced. He had some notes that indicated that she was still on the phone a few minutes later, but he did not state the duration of these calls. He did not note the total duration of time that Ali was on the phone. Green never stated or indicated that it appeared to him that Ali was "preoccupied" on the phone.

Green also testified that Ali turned on a small media device and that she was "viewing" it. However, he did not state the length of time that he observed her listening

to or viewing the device, whether the viewing was constant or interrupted. Moreover, Green did not state whether the content of the video was related to police business or for personal entertainment such as watching a movie or listening to music.

On cross-examination, Green admitted that he was not asked to coordinate video footage of what Ali was doing at 9:39:15 a.m. (the time he reported as D.M.'s last movement) with the Cell Four video footage of D.M. (It should be noted that by use of Green's R-40 notes, pages 2 through 5, it can be shown what Ali had been doing and what she was doing at a given point in time.) In answer to a further question, Green admitted that he did not know what Ali was doing at 9:39:15 a.m., which, according to him is the time of D.M.'s leg's last movement. However, Green offered to check his notes so that he could answer the question. That was the point in the hearing when it was discovered that Green's notes had not been turned over to the City's counsel (and therefore not produced in response to Mintz's discovery requests). At that point, the Tribunal instructed Green to download said notes and email them to both attorneys and to the Tribunal. Subsequently, despite the availability of his notes, Green's testimony did not establish what Ali was doing at 9:39:15 a.m. (However, his notes show that at 9:30:24, Ali left the Booking Area, a/k/a Police Aide Area, and walked towards the Front Desk area. At 9:38:05, Ali returns from the Front Desk area. Ali is on the phone at 9:44:22 and eight seconds later, at 9:44:30, she gets up and goes to the Office area.)

On Re-Direct, Green reiterated that he had reviewed all the hallway footage and all the footage from the Booking / Police Aide Area pertaining to April 14, 2017 and that he never saw Ali make a face-to-face inspection of any of the prisoners in the cell block area in the side hallways.

On Re-Cross, Green clarified his testimony by stating that Ali did have face-to-face interactions with prisoners at the time of her 7:03 a.m. time stamp when she, on two occasions (7:07 a.m. and 7:09 a.m.) brought Matthews food and water. Green also stated that from viewing the hallway camera footage, he saw Ali walk towards and turn into the area of the Women's Cell Area / Kitchen Area, where he would see the female prisoners.

A further question established that there were no cameras in the area of the female prisoners' cells.

Upon further re-cross by Attorney Mintz, Green acknowledged that he reviewed the jail log for April 14, 2017. In answer to a follow-up question, Green admitted that he did not attempt to correlate the hallway video with the Police Aide Area / Booking Area video to ascertain what work duties Ali had been performing at her workstation whenever she left to go to the time stamp machine. He explained that his task was to view and make notes of what he saw on the video and that although he had the jail log, the log did not have any bearing on what he was asked to do.

Testimony of Detective Oliver Kalebota, UCPO, June 6, 2019

Oliver Kalebota has been a detective with the Union County Prosecutor's Office, and at the time of his testimony was assigned to work with the Federal Bureau of Investigation. Kalebota was involved with the investigation of the in-custody death of Douglas Matthews at the Plainfield Police Department's jail. He described his duties as fact-gathering, i.e., the gathering of facts about what took place in the Plainfield jail on April 14, 2017, who was involved, the postmortem examination of D.M. and, using said facts, attempt to make a determination of whether the municipality (its police personnel and employees) did anything that contributed to D.M.'s death. Kalebota interviewed an associate of D.M. named Ushma Desai, Simonne Ali and Deborah Barlow on Monday, April 17, 2017. He stated that these interviews were recorded. He also reviewed videos from various police station / jail cameras (notably the processing area where Police Aides work) and reviewed documents (notably the Jail Logs).

Kalebota wrote a report dated June 13, 2017 (Respondent-City's Exhibit 5) consisting of three pages. In his report, Kalebota outlined the methodology of his investigation. In his report, he discussed the autopsy and toxicology reports, his review of the videos, and he summarized his interviews of Ali and Barlow.

Kalebota's direct testimony generally followed the outline of his report. He noted that the autopsy and toxicology report determined that D.M. died from the toxic effects of cocaine and fentanyl. He stated that from his review of the videos and the jail logs and from his interview of Simonne Ali, there was a two-and-a-half-hour gap (between 9:02 a.m. and 11:38 a.m.) in which Ali did not make a punch and did not enter the cell area. He stated that Ali did not make the required physical cell checks. He implies that D.M.'s death appears to have occurred in the time period between 9:02 a.m. and 11:38 a.m. He noted that there were four occasions when one or more prisoners (a total of seven) were brought into the jail for processing between the start of Ali's shift at 11:30 p.m. on April 13, 2017 and the time (about 12:25 p.m.) when Deborah Barlow found D.M.'s dead body.

Kalebota testified on direct examination about his interview of Ali on Monday, April 17, 2017. R-13 is the Transcript of Kalebota's Interview of Simonne Ali. The following information was obtained from said transcript, notably ps. 17 – 24. Ali worked a double shift starting at 11:30 p.m. on Thursday, April 13, 2017 and ending at 12:15 p.m. on Friday, April 14, 2017. Kalebota learned that there were no prisoners in the jail cells when Ali started her shift. Ali was the only Police Aide on duty. Her duties included receiving radio calls from police officers on the road, running license plates, feeding and checking prisoners, answering telephone calls, doing missing persons procedures, and processing prisoners. Processing prisoners included running identification checks, criminal history checks and warrant checks of the prisoners. It also included fingerprinting, photographing and booking the detainees. In answer to one of Kalebota's questions, Ali told him that it took about an hour to process a prisoner. At approximately 1:00 a.m. (actually 12:53 a.m.) on April 14, 2017 one arrestee was brought in by police officers to be processed and housed in a cell. Some time later, between 2:30 and 3:00 a.m., four more arrestees arrived and underwent processing.

At 5:53 a.m. the Plainfield police officers brought Douglas Matthews in for processing. After Matthews was processed and placed into Cell Number 4, Ali still had not yet completed the paperwork on the previous four prisoners. (See ps. 18 to 24, notably p. 19, of Ali's statement to Kalebota, Exhibit R-13.) The transcript indicates that Ali was

booking (Matthews) around 6:00 a.m. At 6:31 a.m. and 7:02 a.m. she punched. (It has been established elsewhere that Ali brought Matthews breakfast and water at 7:07 a.m. and 7:09 a.m.) At "7:30-something" she punched. Ali also punched at 8:07a.m.; punched again at 8:36 or 8:38 a.m.; and punched again at 9:02 a.m. at which time she was also doing a "visual check". A "visual check" is a check of the prisoners using the TV monitor; an "18 check" is defined on p.18 of the Transcript as a radio call from a police officer on the road requesting a warrant check on a person. The transcript indicates that through further questioning, Kalebota established that at 9:30 Ali was doing an "18 check", which is a warrant check. Ali continued doing paperwork, but at 10:18 a.m. another prisoner was brought in to be processed (booked, fingerprinted, photographed, etcetera). From 10:18 a.m. onwards Ali was booking; at 10:30 she was doing fingerprinting. Around 11:00 a.m., Ali said she was doing paperwork. Ali's last punch/stamp was at 11:39 a.m. In answer to further questioning, Ali stated that generally the prisoners were quiet; there was no commotion; and nothing out of the ordinary was happening. Ali continued doing paperwork up until Debra Barlow arrived. (R-13, at p. 24.)

All of the above is chronicled in Kalebota's interview of Ali. It is noteworthy that on the first page of R-5, Kalebota states that Ali made no prisoner checks between 9:02 a.m. and 11:38 a.m., which, according to Kalebota's belief, was the time period in which D.M. died. It is true that she made no face-to-face checks, but Kalebota himself confirms that she made one, perhaps two, visual checks. The important clarifying information comes from R-13, where Kalebota established through his questioning of Ali what Ali was doing between 1:33 a.m. and 11:39 a.m. on April 14, 2017. Ali punched/stamped (These terms are used interchangeably to denote Ali's use of the time clock stamp machine) or wrote in the jail log (see R-11) the tasks she was doing until 9:02 a.m. At 9:02 a.m. she received a warrant check on the radio and did a visual check of the cells. Then she says she did another warrant check, another visual check, was doing booking and printing and, during the time when she was supposed to do the 11:30 punch, she says she was getting caught up on paperwork from the earlier detainees' bookings. (See p. 18 of the Transcript in R-13.)

According to Kalebota's report, he questioned Ali about whose responsibility it was to search prisoners and place them into the jail cells. She responded that these were duties of the police officers, not the Police Aides.

In answer to Kalebota's questions regarding the checking of the prisoners, Ali stated that she was responsible to make a physical check of the prisoners every half hour. Ali also stated that she was not required to make such checks if she was booking, fingerprinting, answering the phones or answering radio calls [i.e. performing other duties]. Upon further questioning later in the Transcript about whether police aides were required to walk down the side halls leading to the individual cells, Ali stated that she was never told that she had to walk down to each cell. She added that when she checked prisoners, she would walk down the (long / main) hallway, "looked in" (apparently into the side hallways) and listened, but did not walk down each individual row (side hallway). Ali stated that the person who trained her was Sergeant Frances Bennett.

Kalebota's report stated that Ali received training in temporary detention policy and procedure, which explained how physical checks of prisoners in their cells were to be conducted and he noted that Ali's records indicated that she acknowledged that training.

Kalebota's report contained summaries of his interviews of Police Aide Deborah Barlow, Ushma Desai (D.M.'s associate) and D.M.'s former employer, Jimmy Aiello.

The final paragraph of Kalebota's June 13, 2017 report states:

"After reviewing all of the above facts and conferring with Assistant Prosecutor [John] Esmeraldo, it has been determined there are no elements of criminality and that this matter should be referred to the Plainfield Police Division for administrative review."

In addition to testifying about his investigation and his report, Detective Kalebota was questioned on direct examination about his review of the videos taken during the time period of approximately 3:00 a.m. on Friday, April 14, 2017 to 1:00 p.m. on Friday,

April 14, 2017. The video footage covers the time period from when PPD officers arrived with Matthews at the Plainfield Police Department through the periods of time when video was recorded in the Police Aide's work area (the processing area), video camera footage of the hallway and video camera footage of the cells.

Kalebota testified that several officers, including Officer Fusco, Lieutenant Tyler and Lieutenant Sylvester told him that Plainfield P.D.'s General Orders set forth the rules governing temporary detention and required that Police Aides were to make a documented face-to-face check of the prisoners every thirty minutes and to punch a time card to document that the check had been done.

When questioned on direct examination about the television monitors in the Police Aides' work area, Kalebota stated that his understanding was that use of the television monitors could not be in lieu of a police aide's or an officer's actual face-to-face prisoner check, and that the purpose of the monitors was that "if for some reason they couldn't make the check they could look up at the monitor and see if there was an issue that they didn't see in between the checks or whatever." On the subject of using the television monitors in place of doing face-to-face checks of the prisoners, Kalebota stated that he did not recall Ali giving him any specific times that she used the television monitor to check on Matthews (p.44) and he stated that he could not recall if he directly asked Ali about using the television monitors (p.45). The Transcript of his interview of Ali (Exhibit 13) shows that Kalebota questioned Ali about the set-up of the cameras and the television monitors. When he asked Ali about whether there was a protocol in place requiring that prisoner checks must be done physically or whether they could be done by camera, Ali responded by saying that Police Aides are required to physically walk back and are required to punch. She also said that her training did not require her to walk to each cell. She also said that her training included writing-in what she was doing and stamping the jail log when she was performing other tasks at the time of scheduled detainee checks. Ali said nothing about using the television monitors in lieu of doing a physical prisoner check. Kalebota's only other question about the television cameras and monitors (p.15)

was about the clarity of the images of the cells on the monitors. Ali responded that the images were "pretty clear".

On cross-examination by Attorney Mintz, Detective Kalebota stated that D.M. died while Ali was on duty. He also said that from his viewing of the video footage, D.M.'s last movement was at 9:38 a.m. Kalebota did not know when D.M. ingested the drug that led to his death. While affirming that it would be important to his investigation to determine when D.M. ingested the drugs, Kalebota conceded that he found no facts that established when D.M. ingested them. He stated that while he read the reports of the South Plainfield Police and of the Plainfield Police, he did not interview any policemen from South Plainfield or Plainfield.

Mr. Mintz cross-examined Kalebota about his questioning of Ali about whether as part of her training, she was ever trained that she could skip the half-hour prisoner checks if she was performing other duties such as booking or fingerprinting. At first, Kalebota could not recall, but after referring to his report he stated that he had questioned Ali and she told him that her training allowed her to skip prisoner inspections if she was busy with other duties. Attorney Mintz asked Kalebota if he ever inquired with Ali to find out if such skipping of checks while busy with other duties was a practice condoned or permitted by the City. His answer was that he did not inquire about this with Ali. Upon questioning into Assistant Prosecutor John Esmeraldo's characterization of Ali's conduct (not making half-hourly prisoner checks) as "extremely problematic", Kalebota stated that those words were stated by Esmeraldo and that all he (Kalebota) did was to gather facts and that he did not render opinions.

Kalebota testified that in his review of the videos he noted between 9:00 a.m. and 11:00 a.m. (the time period in which D.M. died) that Ali was "was doing various things". He added that he recalled that "she was on her cell phone a lot". After further cross-examination, Kalebota stated that he did not know what kind of electronic device Ali was using; did not know who Ali was talking to (police personnel or others); could not provide a reasonable estimate of how many minutes he observed Ali using such a device. In

answer to a question from the judge, Kalebota answered that he could not quantify his use of the words "a lot", that is, he could not give an estimate quantifying the amount of time that Ali spent on the phone. Moreover, in answer to the judge's question asking for a breakdown of the time Ali spent doing "various things" during the time period from 9:00 a.m. to 11:30 a.m., Kalebota responded that he did not have an answer. He stated that he could not quantify how much time Ali spent on the phone, answering radio calls, or performing other duties or doing anything else.

Mr. Mintz cross-examined Detective Kalebota about his interview of Deborah Barlow. Kalebota re-iterated that Barlow stated that the half-hourly checks were mandatory, but she was also ambiguous about whether such checks could be skipped if a police aide was busy with other duties. Kalebota admitted that he did not attempt to get a clarification from Barlow on this point. Moreover, Kalebota did not check the jail logs to see if Barlow or any other police aide ever skipped the half-hourly prisoner checks. He only checked Ali's jail logs. In answer to another question, Kalebota stated that he did not question any Plainfield Police officials about whether the City permitted police aides to skip detainee checks while police aides were busy performing other duties. He also did not question any police officials about police aides working alone.

In other cross-examination, Kalebota stated that he did not know and did not ask if Ali was ever told that Matthews was arrested with drugs in his possession.

On further cross-examination, Attorney Mintz noted that D.M. died during Ali's shift and Ali's jail log showed that Ali had not done prisoner checks. Yet the watch commander signed-off on Ali's jail logs. Mintz asked Kalebota why he did not question the watch commander (1) to ascertain why he signed-off on Ali's Jail Log and (2) whether the watch commander's signing-off meant that the City condoned the skipping of prisoner checks when police aides were busy with other duties. In response, Kalebota stated that he did not question the watch commander and he did not ask anybody in the City's management whether they condoned the skipping of prisoner checks.

There was no re-direct testimony of Detective Kalebota.

Testimony of Police Aide Debra Barlow, June 7, 2019 and June 7, 2021

Debra Barlow, a police aide, testified generally about her training, her duties, her usual daily approach to her tasks when coming on duty (her "routine"), and her understanding that it was a priority for police aides to do face-to-face checks of the prisoners every thirty minutes. Barlow testified about her familiarity with Simonne Ali. She testified that, as she understood the workplace rules, police aides were not permitted to use personal electronic devices while on duty. However, she observed Ali use them while on duty on various occasions. She also testified that she complained to Ali that Ali took more time than allowed for lunch breaks on several occasions.

In regard to the events of Friday, April 14, 2017, Barlow testified that she arrived at work at 12:15 p.m., saw and spoke with Ali, put her personal belongings away, logged into the computer, heated the prisoners' lunches, and then went to distribute water to the prisoners and perform face-to-face checks. She distributed water to the prisoners in the various cells. When she reached the last tier (containing Cells One, Two, Three, and Four), she said "hello" to D.M. in Cell Number Four and offered him water. She said "hello" several times, but D.M. did not respond to her greeting and did not respond when she asked, "Are you okay in there?" When Barlow spoke to D.M., she was outside Cell Number Four looking at him through the bars. Barlow said that D.M. was kneeling in front of the commode in Cell Number Four. She suspected that something was wrong with D.M. Barlow asked the prisoner in Cell Number Three, which was next to Cell Number Four, if he had heard anything from D.M., and the prisoner in Cell Number Three stated to her that he had heard nothing. Barlow testified that she ran out of the cell area, saw Sergeant Graham, reported to him that there was something wrong with a prisoner, and asked him to get the cell keys. Graham and Barlow immediately went to Cell Number Four. Barlow testified that she was behind Graham when he unlocked the cell door and entered Cell Number Four, but she remained in the hallway outside the cell. She described D.M. as kneeling in front of the commode as if he were vomiting. She testified

that D.M. appeared to be stiff as Graham pulled his body away from the commode, but she did not see details.

Barlow stated that she then went out to the police-aide area, saw Sergeant Austin, and told him, "Something happened to one of the prisoners. We need you back here." At that time Ali asked Barlow, "What happened?" and Barlow replied, "I think there's something wrong with one of the prisoners." Barlow then said "everybody" ran to the cell block, and she added that through a window in the police-aide area she could see "all the police officers" coming down the steps from upstairs into the hallway that led to the cell area. The names of the officers she recalled proceeding to Cell Number Four were Sergeant Collina, Sergeant Fusco, Detective Stanley, and Detective Mohammad. Barlow recalled that someone came out of the cell area to ask for "the paddles." Barlow offered a fire extinguisher, but was told that paddles were needed, not a fire extinguisher. Barlow recalled that Ali was crying hysterically. Barlow and Ali remained in the police-aide area, but then Sergeant Collina told them to leave the area. Barlow testified that Sergeant Collina took her upstairs, and also testified that Collina took both her and Ali upstairs, to the cafeteria, but that Sergeant Collina subsequently separated them. After being brought upstairs to the cafeteria, Barlow did not see or hear anything more pertaining to what was going on downstairs in Cell Number Four.

Barlow testified that later, Sergeant Fusco approached Barlow and Ali in the cafeteria and he told them that they were being placed on administrative leave, specifying that Ali's administrative leave was "required" and that Barlow's administrative leave was "optional." Barlow testified that she spoke with someone from the Union County Prosecutor's Office on Monday, April 17, 2017, and that she and Ali were interviewed by the Prosecutor's Office with their union representative present on April 17, 2017. Barlow testified that she drove Ali to the police station on April 17, 2017, before they went to the Prosecutor's Office. Afterwards, they had lunch together, but did not discuss the incident or the visit to the Prosecutor's Office.

Barlow's direct testimony ended after attorney Rau asked Barlow if Ali adequately performed her job duties on April 14, 2017. Attorney Mintz objected on the basis that the question called for opinion evidence. The Tribunal sustained the objection.

Shortly after Attorney Mintz started his cross-examination of Debra Barlow, he asked questions about pre-trial preparations. There were objections to Mintz's questions which resulted in the filing of motions. The Respondent-City's motion sought reversal of the Judge's ruling that Barlow should answer questions about preparation of Barlow by Attorney Rau for testifying at trial. The Appellant's motion sought to compel an answer to Attorney Mintz' "third" question about trial preparation and to impose sanctions for refusal to answer the question. I decided that Barlow was not Attorney Rau's client and ordered that she answer the Attorney Mintz's "third" question. When the hearing resumed on June 7, 2021, Barlow answered in the affirmative, that she and Attorney Rau did discuss, to some degree, Barlow's answers to certain questions in the course of trial preparation. Barlow was not asked about the content or substance of the questions and answers, nor did she state anything about the content or substance of her discussion with Attorney Rau. Upon being asked if she discussed her testimony with anyone between June 7, 2019 and June 7, 2021, Barlow responded that she did not discuss it with anyone.

During cross-examination by Attorney Mintz, Barlow testified that she was trained by Sergeant Slaughter. Barlow denied that Sergeant Slaughter, during the course of his training of her as a police aide, stated that she could skip cell block checks (face-to face checks of the prisoners) if she was busy performing other duties as long as she wrote down what she was doing on the jail log. When asked if Sergeant Slaughter ever told her that she could skip cell block checks under certain circumstances, Barlow explained that Sergeant Slaughter stated to her during training that because things could become hectic in the booking area, she could ask a police officer to punch (stamp) the jail log for her, but she added that she would be the one who initialed the stamp, not the officer. Barlow admitted that she had skipped cell block observations of detainees and that she did not have an officer punch the jail log when she was busy performing other duties.

During cross-examination Attorney Mintz used various documents among which were Exhibits A-2a and A-2b dated March 5, 2017; Exhibits A-5a, A5b, A-5aJL and A-5bJL dated March 22, 2017; Exhibits A-6a and A-6b dated March 24, 2017. Barlow testified that she was required to do "cell block" (i.e., face-to-face) checks, not just "visual inspections" relying on the cameras. Using the aforesaid documents, Attorney Mintz secured answers from Barlow in which she acknowledged (1) that on March 5, 2017, she skipped cell block observations for six half-hour long periods during which she was performing other duties; (2) that she was not disciplined for skipping the cell block inspections on March 5, 2017; (3) that on March 22, 2017 she skipped cell block inspections while performing other duties and did not initial her hand-written entries on the jail log; (4) that she was not disciplined for skipping the cell block checks or for not initialing in accordance with her training on March 22, 2017; (5) that no one told her that she was violating Police Department policy by failing to initial the jail log entries; (6) on March 24, 2017, she skipped cell block checks while performing other duties between 4:30 and 8:33; and (7) that she was not disciplined for skipping the cell block checks on March 24, 2017.

On Re-Direct examination, Barlow testified that during her training, no one told her that she could skip physical face-to-face checks of the prisoners. Neither Sergeant Slaughter nor Lieutenant Plum ever told her that she could skip the 30-minute face-to-face checks. On Re-Direct, Barlow initially could not recall if she asked police officers to do the face-to-face checks during the booking process, but later testified that she asked them to do so. She added that when that happened, she would later write in the jail log whatever she had been doing, but did not punch. She agreed that if the officer did not punch the clock, there would be no time stamp associated with the cell block check.

On Re-Cross, Barlow agreed that on March 5, 2017, March 22, 2017 and March 24, 2017 she had skipped cell block checks, that she later wrote in the duties that she had been performing, but that she did not initial her entries. She also confirmed that in addition to herself and Simonne Ali, she knew that other police aides had also skipped cell block checks while performing other duties.

Testimony of Lieutenant Christopher Sylvester – October 27, 2021

Lieutenant Sylvester testified that he was in the nineteenth year of employment with the Plainfield Police Department and that he was currently working in the narcotics vice section of the Department. He was formerly the patrol lieutenant watch commander for the day shift.

During his direct testimony, Sylvester stated that he was not working on April 14, 2017 and therefore had no interactions with Ali on that date. The questions posed to Sylvester inquired mainly about his interactions with Ali during the three-week period prior to the April 14, 2017 in-custody death of Douglas Matthews. Sylvester testified that Captain Guarino was Ali's direct commander, but that he, as watch commander, was often Ali's supervisor for a given shift. He stated that on several occasions he had to counsel Ali about her work performance, but he never documented these occasions and never sought to discipline her. When asked about the nature of the things he had to counsel Ali about, he responded that he had seen Ali talking on her cell phone, listening to music or watching movies while on duty, or being away from her post. He recalled only one occasion in detail. He testified that during the three-week period leading up to the 4/14/17 incident he recalls one occasion where he noticed that radio calls were coming in from patrol officers and that Ali was not at her post to handle these calls. He noted that she was missing from her post for somewhere between 20 to 40 minutes, went looking for her, and then saw her walking down to her post from the second floor. He questioned Ali about her absence and she told him she had been taking a bathroom break. He counselled her that when she needed to leave her post she was required to report to a superior so that someone could be assigned to cover her post. In addition, he told Ali that if a detainee should die in the booking section while she was away from her post, it would cause a lot of trouble. He did not write a contemporaneous report about this incident and but did report it to Ali's supervisor, Captain Guarino, who subsequently assured Sylvester that he had spoken to Ali about leaving her post in the future. Sylvester testified that he eventually did write a report (dated September 24, 2017) about this

occasion when Ali was away from her post. He testified that he had a casual conversation with Lieutenant Tyler during Tyler's investigation of Ali arising out of the April 14, 2017 in-custody death of Matthews. Sylvester explained that during that casual conversation with Tyler, Sylvester mentioned that he had to counsel Ali on several occasions about her work (e.g., use of her phone, watching movies, listening to music and being away from her post without telling her superiors). Upon hearing this, Tyler asked Sylvester to write up a report, as detailed as possible from his recollection, about the counselling. This resulted in Sylvester's September 24, 2017 report (Exhibit-28).

On direct examination, Attorney Rau asked Sylvester about how many times he counselled Ali. He could not give a specific number of times, but he did say that it was "a lot of times" and that he counselled her about once per week. He had no notes or reports regarding the nature of the counselling or the number of times he spoke to Ali about her job performance. He did not have any video footage demonstrating the duration of Ali being away from her post or the number of times that this occurred. He stated that there were no specific rules about cell phone use or even about personnel watching movies or listening to music. Sylvester testified that with regard to the April 14, 2017 death of Matthews, since he was not present that day, he had no way of knowing whether Ali was away from her post or whether she was not performing things that he had previously counselled her about.

On Attorney Mintz's cross-examination, Sylvester admitted that he testified solely from his memory of events that occurred four and a half years prior, that he did not document the number of time that Ali was on her phone, that he never disciplined her for skipping detainee checks while she performed other tasks, and that he never disciplined Police Aide Barlow for skipping detainee checks while she was performing other tasks.

Mintz also cross-examined Sylvester regarding jail logs. Sylvester testified that the main purpose of jail logs was to keep track of the confining and release of prisoners. When questioned about the time stamps and handwritten entries on jail logs, Sylvester testified that the logs indicated that police aides other than Ali skipped the thirty-minute

face-to-face checks and wrote-in what duties they were performing at the time of the scheduled checks. He never questioned any police aides about why there was no time stamp next to their entries for booking and other tasks. He also agreed with Mintz that the watch commanders were responsible to sign the jail log, but they did not always do so. He knew of no disciplinary actions brought against any watch commanders for not signing a jail log.

Sylvester testified that he did not counsel or discipline Ali, Barlow or any other police aides for skipping face-to-face checks while performing booking, finger printing or other duties and he was unaware of any disciplinary action brought by others against Barlow or any other police aides for skipping face-to-face checks and writing-in the tasks they were performing. When asked if there would have been disciplinary charges filed against a police aide if a detainee died while the aide was doing a task like booking an arrestee and who did not perform a scheduled face-to-face check, he responded that he assumed that charges would be brought. However, he also testified that if no one died, then no charges would be brought.

The cross-examination concluded with Sylvester testifying that he did not know when Police aides started working alone. He testified that police aides were not given any special notice of an arrestee's involvement with drugs, but, he said, if the arrest had been for drug possession, then that would put the aide on notice of the detainee's involvement with drugs. Finally, Sylvester re-iterated that because he was not on duty on April 14, 2017, he made no observations of Ali's work performance that day, and that he would have no knowledge about whether she was or was not performing her job in accordance with his previous counselling.

On re-direct examination, Sylvester explained that when he counselled Ali, he told Captain Guarino about it because Guarino oversaw the Bureau. Sylvester added that during his eighteen months as a watch commander he never did a performance evaluation of Ali and never counselled Barlow or any other police aide.

On re-cross examination, Sylvester agreed that he served as watch commander for eighteen months over Ali, Barlow and other police aides. He agreed that he reviewed Barlow's jail logs. He re-iterated that he never counselled nor disciplined Barlow for skipping face-to-face checks when she wrote-in that she was performing other tasks.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The parties agreed to thirty-nine stipulations of fact, which are attached to the Appendix of this Initial Decision.

Having had the opportunity to review the testimony of the various witnesses and having had the opportunity to assess their credibility, and having had the opportunity to review the stipulations and the documents in evidence, I herein make my analysis of the pertinent facts and make the following findings of fact.

- (1) Ali worked two consecutive shifts at the time of the subject incident. Her first shift began at 11:30 p.m. on Thursday, April 13, 2017 and lasted until 6:15 a.m. on Friday, April 14, 2017. Her second shift began at 6:15 a.m. on Friday, April 14, 2017 and ended at 12:15 p.m. on April 14, 2017.
- (2) Ali was the only police aide on duty during the aforementioned times.
- (3) Seven people were processed and placed into cells in the Plainfield Police Department's jail facility during Ali's double shift: a male at 12:53 a.m.; two females and a male between 2:30 a.m. and 3:00 a.m.; male at 5:03 a.m.; Douglas Matthews at 5:53 a.m.; and a male at 10:18 a.m.
- (4) Early on the morning of April 14, 2017 Douglas Matthews (D.M.) was arrested in South Plainfield on warrants and later found to be in possession of CDS (Heroin). The South Plainfield Police Department Plainfield found that there were outstanding warrants from Plainfield. They contacted the Plainfield Police Department and arrangements were made for Matthews's transfer to Plainfield. Plainfield P.D. took custody of Matthews from South

Plainfield P.D. and transported him to Plainfield. Plainfield P.D. searched Matthews and handcuffed him. Douglas Matthews was processed (i.e., booked) and placed in Cell Number Four at 6:26 a.m. and was its sole occupant.

- (5) The video camera covering Cell Four shows that at 7:07 a.m. Ali brought breakfast to Matthews and she brought him a bottle of water at 7:09 a.m. According to the video camera the next time Ali went to Cell Number Four was at 12:36 p.m., which was after Police Aide Debra Barlow found Matthews unresponsive.
- (6) The subsequent Autopsy Report (Exhibit-16) and Toxicology Report (Exhibit-17) determined that Matthews's cause of death was his use of a combination of cocaine and fentanyl.

FINDINGS OF FACT

Facts Derived from the Testimony of Lieutenant Tyler

The following is an analysis of pertinent facts based on the testimony of Lieutenant Tyler. Lieutenant Tyler testified that the Plainfield Police Division General Order, Volume 5, Chapter 7, Effective date October 21, 2016 (Exhibit-22) requires that documented face-to-face checks of detainees must be done every thirty minutes and that there are no exceptions to this order. During his direct testimony, a question was asked about a police aide who was in the middle of booking a detainee. The question asked whether the police aide, when the time came for a face-to-face check, should stop doing the booking and do the face-to-face check, or should the police aide finish the booking and then perform the face-to-face check. Lieutenant Tyler testified, "[T]he face-to-face [checks] take priority over everything." Tyler made it clear that the police aide's performance of face-to-face checks of the detainees every thirty minutes was more important than the performance of any other of the police aide's duties. Another question was asked about a police aide who was receiving a call from a police officer on the road who had just stopped a motorist

and was seeking information about the motorist (e.g., whether the motorist had outstanding traffic or criminal warrants). The question asked whether the police aide, when the time came for a face-to-face check, should prioritize the look-up and provide the information to the officer on the road, or have the officer wait for the information until she completes the face-to-face checks of the detainees. Tyler's response was that the check of the prisoner was the priority, not the providing of information to the police officer on the road. In other words, Tyler said that the performance of face-to-face checks of detainees takes precedence over calls to headquarters from officers engaged in their duties on the road. This Tribunal is cognizant that officers engaged in their duties on the road with members of the public perform a variety of duties for which essential information is only available from headquarters, i.e., from the police aides who look up information on outstanding traffic and criminal warrants. This information is vital to the performance of the officer's job and, more importantly, to his safety. By contacting the police aides, the officer on the road can learn whether the motorist he has stopped is a felon or a dangerous fugitive. Yet, if Tyler's statement is to be believed, the officer on the road who is engaged with a motorist must wait until the police aide leaves the police aide area, walks to each cell to check each detainee and then returns to her post before she proceeds to look up the information he needs. Nonetheless, Tyler stated that this is the procedure and he recounted times when he was working the road, soaking wet, and he had to wait.

I **FIND** that Tyler's statement about the priority given to detainee checks was an opinion. I **FIND** that He did not cite any authority whatsoever to verify the validity of his opinion. I **FIND** that the content of the opinion, when viewed against the policeman-on-the-road scenario just illustrated, to be inherently incredible. I **FIND** that Tyler's stated interpretation of N.J.A.C. 10A:34-4.1(b) (that the requirement for physical cell checks every thirty minutes is paramount to any other duty of the police aides) is not in conformity with common experience because he attempts to apply the regulation without consideration of the various exigencies that might and which do arise in the course of police activities. To state it another way, I **FIND** that Tyler's interpretation (his opinion of

how the regulations should be applied) is overly restrictive and is too inflexible to meet varying circumstances in a commonsense manner.

Tyler testified on cross-examination that he learned for the first time, in August, 2017, during his investigation of Simonne Ali, while he was performing a review of 365 jail logs subpoenaed by Ali's attorney, that the jail logs showed that several police aides skipped the required face-to-face checks, sometimes failed to time-stamp the jail logs, and wrote-in on the jail logs the other things that they were doing at the time of the scheduled half-hourly checks. Applying N.J.A.C. 10A:34-4.1 and the Police Department's General Order (Exhibit-22), Tyler concluded that this type of conduct by the police aides was violative of the requirement for face-to-face checks set forth in the General Order. I **FIND** that the "skipping" of the mandatory thirty-minute face-to-face checks of detainees was a common occurrence in the Plainfield Police Department.

Tyler testified that he reported to his superiors "up the chain of command" that the face-to-face checks were often not being done as required. Tyler testified that he did not investigate the violations which his review of the jail logs uncovered and, to his knowledge, neither did his superiors. He knew of no investigations or of discipline meted-out to any police aides or police personnel as a result of his revelations. This includes watch commanders (discussed below) who signed jail logs containing content demonstrating skipped face-to-face checks, missing time stamps, and reports of other duties being written-in in lieu of face-to-face checks. Tyler testified that the only person investigated and disciplined for violating the half-hourly face-to-face check of detainees' rule was Simonne Ali. Tyler claimed during his testimony that he did not attempt to investigate the above-noted violations because he was not ordered to do so; because there would be no videotaped evidence (because said videos were recorded-over every thirty days) with which to prove said violations; and because he expected that the police aides would not admit to violating the General Order. However, during the hearing, Police Aide Debra Barlow admitted that she had, at times, failed to time stamp the jail logs and that she skipped half-hourly face-to-face checks when performing other duties. I **FIND** that Tyler, a lieutenant in the Plainfield Police Department's Internal Affairs Unit, was

remiss in his duty to investigate the violations of the General Order (the skipping of face-to-face checks) that he discovered. I **FIND** that the members of the upper echelons of the Plainfield Police Department were remiss for failing to act on Tyler's report of said violations. I **FIND** that the Plainfield Police Department was rightfully concerned with investigating Ali for her alleged violations of the General Order and N.J.A.C. 10A:34-4.1, but I also **FIND** that the Police Department failed to investigate whether there were others whose conduct, along with Ali's conduct, may have contributed to the creation of circumstances that are dangerous to the welfare of detainees.

I **FIND** that "Police Aide Mandatory Responsibilities" (Exhibit-24), in the Section "Jail Logs", requires Police Aides to conduct time stamped inspections (face-to-face checks) of detainees every thirty minutes. In the Subsection "Signatures" it states:

It is the responsibility of each booking aide to bring the jail logs to the watch commander at the end of each shift for review and signature. This will ensure that all prisoners are accounted for and the logs are properly completed.

I **FIND** that the above-cited regulation means that when a watch commander signs a jail log, he /she thereby vouches for the accuracy of the information contained therein. I **FIND** that certain jail logs were produced at the hearing which were not signed by the watch commanders. I **FIND** that Tyler failed to investigate and I **FIND** that the upper echelons of the Police Department failed to investigate the inconsistent signing of the jail logs by watch commanders (i.e., they sometimes signed the jail logs and sometimes did not sign the jail logs).

I also **FIND** that the Plainfield Police Department's failure to investigate the possible violations of the rules by people other than Ali demonstrates that the Plainfield Police Department's motivation was to deflect blame for D.M.'s demise from certain members of the Police Department and to place all the blame on Ali.

On cross-examination, Attorney Mintz showed Exhibit R-24, entitled "Police Aide Mandatory Responsibilities" written by Plainfield Police Lieutenant Jeffrey T. Plum (called the "Plum memo") to Lieutenant Tyler. The memo was addressed to all police personnel (including police aides) and it reiterated the requirement that face-to-face detainee checks be performed every half hour. However, the memo also stated in part,

"If an inspection is missed, then the police aide will write in the comment lines whatever immediate/emergent work that was being done during the time that the stamp was mandatory that prevented the inspection from being conducted."

When asked if the memo was confusing, Tyler responded in the affirmative because in one place the memo stated that face-to-face checks every half hour are mandatory, but in another place it allows the police aide to skip a face-to-face check as long as he / she is busy with other immediate/emergent duties and he / she writes in the jail log explaining what he / she was doing at the time that the check was supposed to be performed. Tyler stated that the above-quoted section of the Plum Memo contradicted the General Order. I **FIND** that Tyler admitted that the Plum Memo was in contradiction to the Regulations (N.J.A.C. 10A:34-4.1(b)) and the PPD's General Order, and I **FIND** that this contradiction was confusing to him.

Tyler asserted that the Plum memo was "not official"; was not authorized by anybody"; and was not signed by the Police Director. Tyler offered his opinion that the Plum memo was "not binding" on anyone. Based upon Tyler's assertion that the memo was not binding to the police personnel it was addressed to, including police aides, Attorney Mintz asked Tyler if a police aide would be authorized to ignore Lieutenant Plum's memo. Tyler at first responded that he did not know the answer to that question, but then stated that because the memo was unauthorized, he believed that (i.e., was of the opinion that) a police aide would be authorized to ignore it. This led to Mintz's question asking Tyler how a police aide would know that the Plum memo was unauthorized, to which Tyler responded, "I don't know."

I **FIND** that N.J.A.C. 10A:34-4.1 (b) states "Physical cell checks of detainees shall be conducted at least every thirty minutes" and the General Order, Volume 5, Chapter 7, Roman Numeral Eight, Section 'C' states "The officer supervising the detainee shall make a documented face-to-face observation of a detainee, who is secured in a temporary detention room, at least every thirty minutes or less, if required, in accordance with this policy." I **FIND** that the text of the Regulation and the text of the General Order do not state whether there are any exceptions to the face-to-face half-hourly rule for detainee checks. I **FIND** that the above-quoted Regulation and the above-quoted General Order contain no provisions (i.e., they are silent) regarding what should be done in circumstances when the face-to-face checks cannot be performed or, despite the officer's best efforts to comply with the Regulation / General Order, the face-to-face checks are not performed. I **FIND** that the above-quoted portion of Plum memo authorizes police aides to skip half-hourly face-to-face checks under the limited circumstances set forth therein. I **FIND** that the Plum memo, since it was written and circulated by a Lieutenant of the Plainfield Police Department to all police personnel, and was not countermanded by those ranking higher than Lieutenant Plum, constitutes a valid order to anyone subordinate to him. I **FIND** that all police personnel subject to the orders of a lieutenant, including all police aides, would have no authority to disregard the contents of the Plum memo. I **FIND** that the Plum memo was an attempt to address, in a commonsense way, the real-life circumstances faced by officers and police aides who were subject to the mandate of N.J.A.C. 10A:34-4.1 (b) and the General Order, but who found themselves in circumstances where they have been unable, but not unwilling, to follow the half-hourly face-to-face detainee check requirement. I **FIND** that Lieutenant Tyler's statements that the Plum memo was "not official", "not authorized by anybody" and "not binding" are merely his own opinions and that he did not cite any authority or criteria to verify the validity of his opinions.

In regard to the searching of detainees, Lieutenant Tyler testified that D.M. was searched a total of four times, twice by the South Plainfield policemen and twice by the Plainfield policemen. Tyler stated that D.M. was not subjected to a body cavity search or to a strip search. I **FIND** that, allowing for the fact that the camera would not be able to

record D.M. while he was in the blacked-out area of the cell containing the commode, the Cell Four video did not show that D.M. removed the drugs that he used from one of his body cavities. I **FIND** that the Cell Number Four videos show at least two occasions where D.M. could have been using his hands to access something, possibly a packet containing drugs: from the rear portion of his waistband (at 9:10 a.m. when he appeared to be placing his hand into that portion of his pants) or from his right sock (at 9:14 a.m. when he appeared to raise his right leg and appeared to reach for his sock with his hands in the blacked-out area).

Logic dictates that since D.M. died of a drug overdose, D.M. either had to consume the drugs which killed him before he entered Cell Number Four, or he had to have carried said drugs with him into Cell Number Four and consumed them therein.

During Tyler's testimony, he described the searches performed on D.M. From what he described, I **FIND** that the searches were pat-down searches. Although Tyler's opinion about the efficacy of the searches of D.M. was based only upon written reports, he expressed his opinion that there was nothing done improperly by the Plainfield policemen regarding the searches or the transporting of D.M. However, Tyler's testimony did not include any information about whether the officers actually reached into D.M.'s pockets; whether D.M.'s pockets were actually turned-out, whether his waistband was actually folded-over or otherwise checked for any contents, or whether the insides of his socks were actually checked for any contents. I therefore, **FIND** that Tyler's opinion that the Plainfield Police officers performed a thorough or proper search of D.M. is unsound. The Plainfield Police Department's property records (Exhibit-9) show that D.M.'s shoelaces and belt were taken from him. Presuming that no police personnel gave drugs to D.M. and presuming that there were no drugs in Cell Number Four when D.M. was placed therein at 6:26 a.m., I **FIND** that D.M., despite being searched, still had drugs in his possession when he entered Cell number Four.

From the autopsy report (Exhibit R-16) and the toxicology report (Exhibit R-17), it is certain that D.M. consumed a combination of cocaine and fentanyl, which resulted in

his own death. From the fast-acting nature of the drug Fentanyl, I **FIND** (1) that it is not likely that D.M. consumed the Fentanyl before his apprehension by the South Plainfield Police Department at 3:51 a.m.; (2) that he did not consume the Fentanyl while in the custody of the South Plainfield Police Department; (3) that he did not consume the Fentanyl while in the custody of the Plainfield Police Department before being placed into Cell Number Four at 6:26 a.m.; and (4) that he most likely possessed and consumed the Fentanyl while he was in Cell Number Four. I **FIND** that the officers who performed the pat-down searches of D.M. failed to discover the drugs which killed D.M. I **FIND** that Tyler's opinion that the Plainfield Police Officers properly performed their search of D.M. was an incorrect opinion. I **FIND** that a properly-performed search of D.M. by the Plainfield Police Department police officers would have discovered the drugs that D.M. obviously had in his possession and which were obviously hidden somewhere in his clothing. While it is obvious that D.M.'s use of a combination of cocaine and Fentanyl directly caused his death, I **FIND** that the failure of the Plainfield policemen to discover the drugs on D.M.'s person made D.M.'s use of said drugs possible.

During his re-direct testimony Lieutenant Tyler reiterated that he did not view any "hallway" videos of Simonne Ali using the time stamp machine and he did not view any videos of Ali working in the Police Aide area. Instead, he relied on the report of Detective Kalebota and the information communicated to him by Detective Green and Detective Romeo. From these sources of information and not his own personal observations, Tyler decided as a matter of fact that Ali stamped the jail logs, but she did not perform any face-to-face checks of detainees. Moreover, from these sources of information and not his own personal observations, Tyler formed his opinion that Ali was "in over her head" and that she seemed "more interested in her cell phone" than in performing her duties correctly. I **FIND** that Tyler could summarize factual observations made by others regarding what they observed, but I **FIND** that Tyler could not know what Ali was thinking, and so he could not formulate his own valid conclusions (e.g., that she seemed to be more interested in her cell phone) without seeing firsthand what Ali was doing or not doing. I **FIND** that when he stated the opinion that Ali "seemed more interested in her cell phone" Tyler was speculating or was expressing a false assumption, or was revealing

a pre-conceived prejudice against Ali, rather than collecting, summarizing and presenting facts to his superior, Police Director Carl Riley. I **FIND** that Tyler's opinion that Ali was "more interested in her cell phone" is unfounded.

During Tyler's re-direct testimony he stated that the only video he saw of D.M. was the Cell Number Four video from some time after 9:00 a.m. to approximately 9:45 a.m. Attorney Rau posed a question to Tyler asking (paraphrasing the question): Assuming Ali had performed a check of D.M. at 9:02 a.m., would she have seen D.M. safe and alive? He responded that based upon what Lieutenant Green told him, Ali would have found D.M. safe and alive. Asked the same question, but substituting the time of 9:30 a.m. instead of 9:02 a.m., Tyler responded that from his own viewing of the video, Ali would have found D.M. "in distress". Tyler also adopted Attorney Rau's description (incorporated in several leading questions) of D.M. being "slumped over". "To slump" is a verb meaning "to fall over or collapse, often suddenly". The phrase "slumped over" denotes a bent-at-the-waist position of a person's body. Tyler was not merely describing D.M.'s bodily position. As used by Attorney Rau in her leading questions and adopted by Tyler, "slumped over" connotes a condition of infirmity or helplessness approaching a person's fall or collapse. I **FIND** that this connotation is not necessarily accurate in this case, especially because the phrase "slumped over" did not originate with the witness, Lieutenant Tyler.

As noted above, Tyler viewed about forty-five minutes of the Cell Number Four video. i.e., from 9:00 a.m. to approximately 9:45 a.m. Attorney Rau asked Tyler a question as to what Ali would have noticed about D.M., if she had done a face-to-face check at approximately 9:30 a.m. Tyler's answer is based only on what he saw in the video. Tyler's answer did not elaborate about particular observations he made of D.M.'s physical condition. Tyler's testimony was that he observed D.M. shortly before D.M. walked toward the commode and that he observed the position of D.M.'s foot (the rest of D.M.'s body being in the blacked-out area of the video) when D.M. was at the commode. Tyler's answer to the question was that Ali would have found D.M. "in distress". The word "distress" is a noun. It is a collection of circumstances wherein a person is undergoing

pain or undergoing suffering affecting his body or mind. The phrase "in distress" generally denotes a state of danger or desperate need. In medical parlance, the term "under distress" (which is likely what Tyler was referring to when he answered the question) denotes physical pain or suffering. I **FIND** that Tyler's answer is actually his lay assessment (i.e., an opinion rendered by one who is not a medical expert) of D.M.'s physical condition. I **FIND** that since it was not demonstrated that Tyler was a medical expert qualified to render a medical assessment of a person's physical condition, his assessment of D.M.'s condition has some value, but only limited value to this Tribunal.

The Cell Number Four Video

I will now present the Tribunal's Findings of Fact regarding the Cell Number Four Video. There was no audio recording accompanying the Cell Number Four video. My own viewing and simultaneous narration of the Cell Number Four video, in the presence of Attorney Rau and Attorney Mintz, at the time of the testimony of Sergeant Wayne Slaughter, was done on November 5, 2018. There were no objections from the attorneys regarding the accuracy of my narration of the content of the video.

I **FIND** that my own account (which was recorded in the record on November 5, 2018) is accurate. A short summary of what I noted on the record is as follows. From 8:40 a.m. to 9:42:03 a.m. D.M. is seen alternately and at various times sitting, rocking, leaning, standing, walking (sometimes into the blacked-out area), sitting, rocking, reclining, sitting, leaning forwards against the cell door and against the cell wall, and walking into the blacked-out area. At 9:10 a.m. D.M., while seated on the bed, reached toward the bottom rear portion of his shirt close to the waistband of his pants. At 9:11 a.m. D.M. turned towards the back wall of the cell and then adjusted his pants and shirt. Between 9:12 and 9:14 a.m. he brought one or both hands to his face. At 9:14 a.m. D.M., while seated on his bed, leaned into the blacked-out area and appeared to reach with his hands toward his sock. Thereafter, D.M. remained seated on the bed rocking back and forth. At 9:27:44, D.M. appears to hold his stomach or his chest with his right hand. At 9:28:09 a.m. D.M. stands up. At 9:30 a.m., D.M. remains standing but is somewhat bent

over and he leans against the cell wall. At 9:33:50 a.m. D.M. walks toward the commode in the blacked-out area. From 9:34:08 a.m. onwards D.M. is in the blacked-out rectangle near the commode. From 9:35:30 a.m. to 9:37:09 a.m. only D.M.'s shadow can be seen. From 9:37:40 onwards only D.M.'s lower extremities (feet) can be seen. At 9:38:27 there is some movement. From 9:39:00 a.m. onwards there is no further discernable movement of D.M.'s shadow or foot. I **FIND** that R-16 and R-17 prove that D.M. ingested a toxic dose of cocaine and fentanyl. I **FIND** that D.M. likely ingested the toxic dose of cocaine and fentanyl sometime between approximately 6:26 a.m., when D.M. was placed into Cell Number 4, and 9:39 a.m., when no further movement is seen from D.M.

Facts Derived from the Testimony of Captain Bonito, Union County Dept. of Corrections

Captain Bonito maintained that according to the training he imparted to police aides, the checks were to be performed at intervals not exceeding every thirty minutes. He stated that the checks could only be skipped if there was an emergency, an example of which would be anything that was life-threatening. I **FIND** that Bonito enunciated a commonsense exception to the regulation, but otherwise stated that there were no other exceptions to the 30-minute face-to-face requirement.

Facts Derived from the Testimony of Sergeant Slaughter

The following is an analysis of pertinent facts based on the testimony of Sergeant Slaughter. On direct examination, Attorney Rau asked Slaughter what he instructed Police Aides Barlow and Warren to do about face-to-face checks of detainees if they had other tasks such as fingerprinting, photographing, booking, and those tasks were being done at the same time that they were supposed to be doing the face-to-face checks. Slaughter responded:

“ I instructed them if they couldn't do their physical check [i.e., face-to-face check] within thirty minutes, document the reason why you couldn't do it on the jail log.”

From the aforementioned testimony of Sergeant Slaughter, I **FIND** that the Plainfield Police Department anticipated that there would be times when police aides would not be able to perform the half-hourly face-to-face checks of detainees mandated by the Regulation and the General Order. I **FIND** that in anticipation of the times when police aides would not be able to perform the half-hourly checks, the Plainfield Police Department, as demonstrated by Slaughter's instructions to Barlow and Warren, changed from a literal interpretation or application of N.J.A.C. 10A:34-4.1(b) and the General Order to a more elastic interpretation or application of those regulations and it made an "alternate plan". The alternate plan was Sergeant Slaughter's instructions to the police aides: that if they were busy with other duties, they could skip the half-hourly check, as long as they wrote in the jail log what other tasks they were performing when the checks were scheduled to be performed.

I **FIND** that Slaughter was Barlow's and Warren's superior and their trainer. During her testimony, Barlow admitted that there were times when she and other police aides skipped face-to-face half-hourly checks of detainees. Although Barlow denied that Slaughter instructed her that she could skip detainee checks if she were busy with other duties as long as she wrote it in the jail log, I **FIND** that Barlow's actions were identical to the procedure (which I have termed his "alternate plan") set forth by Slaughter during his testimony. I **FIND** that Barlow's testimony confirms that the Plainfield Police Department was aware that there would be times when circumstances would arise wherein police aides would not be able to literally follow that half-hourly mandate of N.J.A.C. 10A:34-4.1(b) as adopted in the Department's General Order Volume 5, Chapter 7, Roman Numeral 8, Section 'C' and that they would of necessity follow the alternate plan imparted by the Department's police aide trainer, Sergeant Slaughter. I **FIND** that the alternate plan imparted by Slaughter to the police aides is in accord with the plan contained in the Plum memo, which was explored at length during the testimony of Lieutenant Tyler.

On re-cross examination, Attorney Mintz asked Slaughter if he trained police aides that they could skip a face-to-face check in its entirety if they were doing other things and write it in the jail log. Slaughter responded, "Yes." I then asked Slaughter if he was saying

that he trained the aides that they were not allowed to simply stamp without doing a face-to-face check, but he did train them that they could skip face-to-face checks, as long as they made an entry saying they skipped. Slaughter responded, "Yes, if they documented the reason why they skipped." I **FIND** that Sergeant Slaughter's testimony confirms that, despite the literal requirement for half-hourly face-to-face checks of detainees set forth in N.J.A.C. 10A:34-4.1(b) and Plainfield's General Order Volume 5, Chapter 7, Roman Numeral 8, Section C, Plainfield nonetheless trained its police aides that said mandatory half-hourly checks could be skipped, if the aides were busy with other tasks and if they wrote what they were doing in the jail log.

I **FIND** that Plainfield Police Department's training of its police aides was not in strict conformity with the regulations set forth in N.J.A.C. 10A:34-4.1(b), and indeed the training and the practice of skipping checks was contrary to a literal application of said regulations. I **FIND** that Sergeant Slaughter's testimony that he trained police aides that they could skip checks if they were busy with other tasks is contrary to Lieutenant Tyler's testimony that the checks "take priority over everything". I **FIND** that Sergeant Slaughter's training of the police aides could and did leave them with the understanding that they were authorized to use their own discretion to skip checks when they had "reasons" for not performing the checks, which they should simply report to their superiors in the jail log.

During Lieutenant Tyler's direct testimony, Attorney Rau asked him what the Police Department's requirements were regarding the importance of and the timing of the half-hourly face-to-face checks. Tyler testified that Plainfield Police Division General Order dated October 26, 2016 (Exhibit 22) requires that face-to face checks of detainees be done every thirty minutes and that there are no exceptions to this Order.

I **FIND** that the instructions set forth in N.J.A.C.10A:34-4.1(b) and General Order Volume 5, Chapter 7, Roman Numeral 8, Section C and the interpretation of same by Lieutenant Tyler on the one hand, is in contradiction to the text of the Plum memo and to the training imparted by Sergeant Slaughter on the other hand.

After both attorney's questioning of Sergeant Slaughter was ended, I asked him if he was saying that his training of the aides was that they were not allowed to simply stamp without doing a face-to-face check, but he did train them that they could skip, as long as they made an entry saying they skipped. Slaughter responded, "Yes, if they documented the reason why they skipped." After considering the testimony of Lieutenant Tyler on the one hand and the testimony of Sergeant Slaughter and Police Aide Barlow on the other hand, I **FIND** that the Plainfield Police Department's training of its police aides was equivocal and even contradictory. I **FIND** that the Plainfield Police Department's lack of clarity in its instructions to its police aides has caused confusion in the ranks.

Finally, during his testimony, Slaughter also testified about what the Cell Number Four camera recorded regarding Ali. Ali brought breakfast to Matthews at 7:07 a.m. and at 7:09 a.m. she brought him a bottle of water. Slaughter testified that Ali did not appear again on the Cell Four video until 12:36 p.m. I **FIND** that Slaughter's testimony in this regard is consistent to the parties' Stipulations Numbers 12, 13, and 21.

Facts Derived from the Testimony of Detective Adam Green

From the testimony of Detective Adam Green, I **FIND** that he reviewed all the videos of Simonne Ali and Cell Number Four. I **FIND** that Green confirmed that Ali only went to Detainees' cells at 7:07 a.m. and 7:09 a.m. I **FIND** that Ali next went to Cell Number 4 at 12:36 p.m., which was after Barlow found Matthews unresponsive. Green stated that there was no audio accompanying any of the videos he reviewed.

Green was asked what Ali was doing while she was in the Police Aide Area during the time 0600 to 1300 hours on April 14, 2017. Green testified on direct examination, using his memory and his written notes (R-40), about various types of observations he made of Ali's activities. Green reported that he saw Ali use her computer keyboard in the course of her work. He did not mention if he saw her use the landline telephone or the police radio. He mentioned that Ali carried paperwork. He mentioned that Ali made

several trips to and from other areas of the police station. He does not specifically report whether or not Ali is "doing paperwork" at her work station, but he clearly testified that she was using her computer terminal. He does not specifically report whether or not Ali was seen reading any police-related materials. He did not report or could not report that Ali looked at the monitors to make any visual checks of the detainees. (NOTE: Sgt. Slaughter reported that Ali did make a "visual check" using the monitor at 9:02 a.m. and also reported that Ali made a warrant check at some point in time thereafter.

Green testified that Ali appeared to be "viewing" a small media device, but he did not say that she was actually "watching a movie". At no time did Green testify or write in his notes indicating that Ali was "not busy". Indeed, his testimony and his notes indicate that Ali was continuously ambulating to and from her workstation, using the computer's keyboard, and was doing various types of work, including, as mentioned above, the booking of an arrestee.

I **FIND** that Green's testimony attests to the fact that Ali was performing a variety of work duties from 0600 through 1300. I **FIND** that the testimony of Green, based on his memory, his viewing of R-38 and R-39 and his notes (R-40), demonstrates that Ali was using her computer console and otherwise was constantly working as she sat at her console; that she frequently stood up to walk to other areas and returned from such areas to her work station in order to resume her work duties there. I also **FIND** that the allegation that Ali was watching movies on a small media device is unfounded because Ali was on the move every few minutes, making it impossible to watch a movie. I **FIND** that at no time did Green testify or write in his notes indicating that Ali was "not busy" or that she was "preoccupied on her cell phone". Indeed, his testimony and his notes indicate that Ali was continuously working, including, as mentioned above, the booking of an arrestee.

In addition to Detective Green's testimony, I **FIND** that although there were witnesses who testified that Ali used a cell phone while on duty, there were no witnesses who testified that Ali was "preoccupied on her cell phone" during her double shift spanning

April 13 -14, 2017. Indeed, I **FIND** that no witness ever confirmed that Ali engaged in any telephone calls of a personal nature or of non-police matters during her double shift.

Facts Derived from the Testimony of Detective Oliver Kalebota, Union Cty. Prosecutor's Office

Detective Oliver Kalebota testified relying on his memory, his report, and his recollection of the videos of the police station and on his review of the transcript of the videos of his interviews of Ali and Barlow, and his review of the Medical Examiner's report and the Toxicology report. Kalebota's testimony helped the Tribunal to make several factual findings. From Kalebota's testimony, a review of his report (which is in part based on his review of R-16 and R-17), I **FIND** that D.M. died from ingesting a toxic combination of cocaine and fentanyl on April 14, 2017.

In regard to the time period between 9:00 a.m. and 11:00 a.m. on April 14, 2017, Kalebota testified that Ali "was doing various things". I **FIND** that Kalebota was stating that Ali was busy with her job duties. Although Kalebota testified that Ali was on her phone "a lot", additional questioning revealed that he was not able to give an exact response or a reasonably reliable estimate in answer to the request to quantify the amounts of time that Ali spent on the phone. I **FIND** that Kalebota's statement that Ali was on her phone "a lot" is vague, unreliable, and unfounded. I also **FIND** that Kalebota, after further questioning, was not able to confirm that Ali was using a phone or that she was using some other type of device.

I **FIND** that there was no testimony offered setting forth a standard for how often a police aide was required to check the T.V. monitors. I **FIND** that there was no testimony offered stating that Ali did not check the T.V. monitors as often as she should have done so. I **FIND** that Ali made a "visual check" at 9:02 a.m. and made an "18 check" (a warrant check) at 9:30 a.m. I **FIND** that there was testimony, notably from Kalebota, that Ali checked the T.V. monitors during the course of performing her duties. I **FIND** that Sergeant Slaughter testified that it was not necessary for a police aide to make a note

about each time she viewed the T.V. monitor. I **FIND** that there is no evidence to support the accusation that Ali failed to use the TV monitor to check the detainees or to support the accusation that she failed to use the TV monitor to particularly check D.M.

I **FIND** that Kalebota did not interview any police officers from South Plainfield or from Plainfield. I **FIND** that Kalebota admitted that he never questioned any Plainfield Police officials about whether they permitted police aides to skip detainee checks when they were busy performing other duties or whether they condoned the skipping of the detainee checks. I also **FIND** that Ali was the only police aide on duty during her double shift. I also **FIND** that Sergeant Frances Bennett trained Ali.

Facts Derived from the Testimony of Police Aide Debra Barlow

I **FIND** that Barlow found Matthews unresponsive at approximately 12:25 p.m. and that she thereupon alerted her superiors. I **FIND** that Barlow accompanied Sergeant Graham to Cell Number Four. I **FIND** that upon arriving with Sergeant Graham at Cell Number Four, any matters pertaining to the non-responsive D.M. were handled not by Barlow, but by Sergeant Graham and other superior officers. I **FIND** that other than identifying D.M. as non-responsive and alerting her superiors, Barlow had no further role in any matters pertaining to D.M. I **FIND** nothing in Barlow's testimony that indicated that she was expressly or impliedly cloaked with the authority to make decisions for, or to speak for, or to otherwise bind the City. I **FIND** nothing in Barlow's testimony that indicated that she was involved in determining or formulating the City's legal position or legal strategy.

I **FIND** that Barlow, by her own admission, skipped cell block observations (i.e., "checks") on several specific occasions when she was busy performing other duties. I **FIND** that Barlow was not disciplined for skipping said checks. I **FIND** that Barlow testified that other police aides besides Ali and herself skipped detainee checks.

Facts Derived from the Testimony of Lieutenant Christopher Sylvester

Lieutenant Sylvester testified that he was not on duty on April 14, 2017, the day when D.M. died in police custody. Sylvester testified that Captain Guarino was Simonne Ali's superior; however, on several occasions he served as watch commander over Simonne Ali. Sylvester testified that he counselled Ali about her work performance, including during the three-week period leading up to April 14, 2017. He wrote his report (Exhibit R-28) at the urging of Lieutenant Tyler. During the cross-examination of Sylvester, Attorney Mintz utilized several jail logs covering dates within the period of January, 2017 through April, 2017. I **FIND** that the subject jail logs contained information demonstrating that police aides had skipped detainee checks, but they had written into the jail logs that they were performing other duties such as booking, printing and photographing. I **FIND** that after reading the jail logs carefully, Lieutenant Sylvester testified that watch commanders were required to sign the jail logs at the end of each shift, but they did not always do so. I **FIND** that Sylvester confirmed that at least one police aide (Debra Barlow) had skipped detainee cell checks, but she had written in the jail logs that she had been busy with other duties such as Booking, Printing and Photographing. I **FIND** that Sylvester testified that concerning the period from January, 2017 through April, 2017 he had no knowledge of any watch commanders who were disciplined for not signing the jail logs. I **FIND** that Sylvester had no knowledge of any police aides, other than Ali, who were disciplined for skipping detainee checks. I **FIND** that both Sylvester and Tyler learned that watch commanders had not always signed the jail logs as they were required to do and that both Sylvester and Tyler learned that police aides had been writing in the jail logs that they were performing other duties and were skipping the face-to-face checks of the detainees, yet they did not investigate these as possible breaches of duty except in the case of Ali.

Facts Derived from the Testimony in General

There Were Two Sets of Instructions.

Taking into account all of the testimony, I **FIND** that the police aides were given two sets of instructions in regard to how they were to carry-out the provisions of N.J.A.C. 10A:34-4.1(b) as adopted by the PPD's General Order.

One set of instructions, embodied the text of the Regulation and the text of the General Order, literally called for half-hourly face-to-face checks of the detainees (i.e., the literal interpretation). I **FIND** that the literal interpretation of the regulations is that the half-hourly face-to-face checks must be performed without exception at all times. I **FIND** that the only flexibility allowed under the literal interpretation entails the police aide soliciting someone else, a police officer, to perform the check instead of the police aide.

The other set of instructions is the one subsequently taught by the trainers of the police aides and the Plum Memo (the elastic interpretation). I **FIND** that the elastic interpretation of the regulations allows the police aides to skip the half-hourly checks if the police aide is busy with other duties, as long as the police aide writes his / her reasons for skipping the check in the jail log. I **FIND** that this latter interpretation was imparted to the police aides by Sergeant Slaughter and I **FIND** that it is in accord with the Plum Memo.

I **FIND** that the two sets of instructions are equivocal. I **FIND** that the two sets of instructions contradict each other. I **FIND** that the contradictory nature of these two sets of instructions can cause, and in this matter, did cause confusion among the ranks of police personnel, including the police aides, and including Simonne Ali. I **FIND** that even Lieutenant Tyler, one of the City's main witnesses, admitted he was confused by the contradictory nature of the instructions. I **FIND** that the equivocal and contradictory nature of the PPD's two sets of instructions, failed to adequately and fairly inform the police aides of their duties regarding the simultaneous need to check detainees and the performance of their other duties. I **FIND** that the equivocal and contradictory nature of the PPD's two

sets of instructions made it impossible for the police aides to discern with finality what they were to do when confronted with the simultaneous need to perform the detainee checks and their other assigned work duties. I **FIND** that, when presented with contradictory instructions, it was not unreasonable for police aides to follow the directives of their trainers and the content of the Plum Memo under the circumstances presented.

Ali was Working Alone and was Busy Throughout Her Double Shift.

I **FIND** that there was abundant evidence, mainly from Detective Green and Detective Kalebota, that Ali was working alone, was doing various work duties, and was busy. Although there was some mention by Detective Green that Ali turned on some sort of electronic device, his R-40 notes demonstrate that Ali was continuously working and moving from her work station to other areas of the police headquarters and back again and again. I **FIND** that there was no witness who credibly testified that Ali was idle, loafing, or otherwise “not busy”.

In addition to Detective Green’s testimony, I **FIND** that although there were witnesses who testified that Ali used a cell phone while on duty, there were no witnesses who testified that Ali was “preoccupied on her cell phone” during her double shift spanning April 13 -14, 2017. Indeed, I **FIND** that no witness ever confirmed that Ali engaged in any telephone calls of a personal nature or of non-police matters during her double shift.

I **FIND** that there was no evidence demonstrating that Ali was incompetent, unqualified or unable to perform her job duties under N.J.A.C. 4A:2-2.3(a)(1) (Incompetency in the Performance of Duties). I **FIND** that there was no evidence demonstrating that Ali was inefficient in the performance of her duties under N.J.A.C. 4A:2-2.3(a)(1) (Inefficiency in the Performance of Duties).

I **FIND** that there was little, if any, testimony that could be reasonably interpreted as supporting the proposition that Ali’s non-performance of the half-hourly detainee checks after 7:09 a.m. tended to destroy the public’s confidence in or respect for the

Plainfield Police Department or how the performance of her duties adversely affected the morale or efficiency of the Police Department, as set forth under N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming). Rather, the focus was entirely on whether or not Ali failed to perform, neglected, or disobeyed the Police Department's Rules, Regulations, or Orders pertaining to the safe operation of the jail, that is, the performance of the half-hourly checking of detainees.

In regard to Failure of an employee to perform her duties (which arises under N.J.A.C. 4A:2-2.3(a)(1) and an employee's Neglect of her duties (which arises under N.J.A.C. 4A:2-2.3(a)(7), the two charges are similar, but not the same. Complete failure to perform a duty clearly falls within the concept of Neglecting of Duty. But neglecting one's duty can be a matter of degree. That is to say, partial performance is not a complete failure to perform, yet it can be neglectful in the sense of failing to complete the assigned task. I will discuss that part of N.J.A.C. 4A:2-2.3(a)(1) that covers Failure to perform and I will discuss N.J.A.C. 4A:2-2.3(a)(7) together. Ali was charged with failing to perform the detainee checks and neglecting to perform the detainee checks. I found that the equivocal and contradictory nature of the two sets of instructions made it impossible for the police aides to discern with finality what they were to do when confronted with the simultaneous need to perform the detainee checks and their other assigned work duties. I **FIND** that despite the contradictory nature of the two sets of instructions, Ali did not fail to perform her duties under N.J.A.C. 4A:2-2.3(a)(1) (Failure to Perform Duties) and did not neglect her duties under N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duties).

I **FIND** that there was no evidence that Ali violated any of the PPD's regulations, rules, general orders or policies during her double shift spanning on April 13-14, 2017.

APPLICABLE LAW

Employee Discipline

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No.1 N.J. Civil Serv. Ass'n. v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; and N.J.A.C. 4A:2-2.3. Major discipline involves removal, suspension, or fine for more than five working days.

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." West New York v. Bock, 38 N.J. 500, 519 (1962); In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987); Ennslin v. Twsp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) certif. den., 142 N.J. 446 (1995).

Burden of Proof in Disciplinary Matters

In a civil-service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 4A:2-1.4. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Put another way, in an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Greater weight of credible evidence in the case - a preponderance - depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950). The judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna and Western Railroad, 111 N.J.L. 487, 490 (E.&A. 1933). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

A trier of fact "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted ... when it contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997) citing In re Perrone's Estate, 5 N.J. 514, 521-522 (1950). A trier of fact may reject testimony as 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). The choice of accepting or rejecting the testimony of witnesses rests with the trier of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960).

The Necessity for Maintaining Discipline

Maintenance of strict discipline is important in quasi-military settings such as police departments and correctional facilities. Rivell v. Civil Serv. Comm'n., 115 N.J. Super. 64, 72 (App. Div. 1995), certif. den. 142 N.J. 446 (1995). City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). In such settings, the primary duty of the officers and supervisors is the safety and security of the facility. Police (and correction) officers are held to a higher standard of conduct than ordinary public employees. In Re Phillips, 117 N.J. 567, 576-577 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Applicable Regulations, Rules and Orders

The list of General Causes of action for Civil Service employee discipline are set forth in N.J.A.C. 4A:2-2.3 (a), which provides:

- (a) An employee may be subject to discipline for:
 1. Incompetency, inefficiency or failure to perform duties;
 2. Insubordination;
 3. Inability to perform duties;
 4. Chronic or excessive absenteeism or lateness;
 5. Conviction of a crime;
 6. Conduct unbecoming a public employee;
 7. Neglect of duty;
 8. Misuse of public property, including motor vehicles;

9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder;
11. Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and
12. Other sufficient cause.

Conduct Unbecoming a Public Employee, Incompetency/Inefficiency, Neglect of Duty, and Other Sufficient Cause are four of the above-listed types of charges that are frequently litigated. A brief analysis of each of these four types of charges follows.

N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "conduct unbecoming" has been described as that conduct "which affects the morale or efficiency of the [governmental unit] [or] which adversely affects the morale or efficiency" of the public entity or tends "to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); see Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't. of Civil Serv., 17 N.J. 419, 429 (1955)). Unbecoming conduct may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous, or improper under the circumstances. Conduct unbecoming a public employee may be less serious than a violation of the law, but it is inappropriate to on the part of the public employee. Ferrogine v. State Dep't. of Human Servs., Trenton

Psychiatric Hosp., CSV 2441-98, Initial Decision (April 17, 1998), modified MSB (July 6, 1998), <http://njlaw.rutgers.edu/collections/oal/>. It is a fact-sensitive determination rather than one based on a legal formula.

N.J.A.C. 4A:2-2.3(a)(1), Incompetence, Inefficiency or Failure to Perform Duties

Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. John Steinel v. City of Jersey City, 7 N.J.A.R. 91, modified at 193 N.J. Super.629 (App. Div. 1984), aff'd. at 99 N.J. 2 (1985). This section also covers an employee's breach of duty by simple non-performance of assigned duties.

This section also covers instances where an employee attempts to perform his or her duties, but in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is sub-standard. See, Lynda Clark v. New Jersey Dept. of Agriculture, 1 N.J.A.R. 315.

N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty

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 light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). 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 (March 27, 2009), <<http://njlaw.rutgers.edu/collections/oal/>>. 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.

N.J.A.C. 4A:2-2.3 (a) (12), Other Sufficient Cause

Charges of Other Sufficient Cause pertain to violations of the appointing authority's regulations, rules, general orders or policies.

Penalties and Progressive Discipline

In determining the appropriateness of a penalty, several factors must be considered including, but not limited to: the nature of the offense, the previous use of progressive discipline, the employee's prior record, and the seriousness or severity of the offense under consideration.

The theory of progressive discipline is based on the following principles:

(1) that discipline should be designed to be corrective and to further the development of the employee; (2) that the penalty should be proportionate to the severity of the offense; and (3) that where there is a pattern of violations, progressively more severe penalties should be imposed for each occurrence. The disciplinary process in New Jersey's Civil Service incorporates the concept of progressive discipline. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what an appropriate penalty should be in a given case. See West New York v. Bock, 38 N.J. 523 (1962). However, the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Some disciplinary infractions are so serious that removal is appropriate notwithstanding an unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007).

Theft is considered a serious offense. A police officer who commits a theft is subject to removal. In re Cohen, 56 N.J. Super. 502 (App. Div. 1959) (upholding the

removal of a police officer in the theft of parking meter funds; In re Hall, 335 N.J. Super. 45, 51 (App. Div. 2000) (sustaining the removal of a police officer for attempted theft).

The Provisions of The New Jersey Administrative Code Regarding Municipal Detention Facilities, Particularly Supervision and Care of Detainees

N.J.A.C. 10A:34-3.10 regulates the use of monitoring systems. It provides as follows:

- (a) The Commissioner or designee shall determine the need for an audio and/or video system to monitor detainees based upon the design of the detention area.
- (b) The monitoring system shall remain activated at all times that detainees are present due to the added measure of safety and security the system provides. The monitoring system shall not be used as a substitute for physical cell checks of detainees.

N.J.A.C. 10A:34-4.1 governs the Supervision and Care of Detainees. It provides as follows:

- (a) Staff assigned to supervise detainees shall receive training in the supervision and care of detainees. Special training shall be provided for supervision and care of detainees of the opposite sex.
- (b) Physical cell checks of detainees shall be conducted at least every 30 minutes. [Highlighting supplied.]**
- (c) Closer surveillance, which includes cell checks at least every 15 minutes, shall be conducted for detainees who are:
 - 1. A security risk;
 - 2. A suicide risk;
 - 3. Demonstrating unusual or bizarre behavior behavior; and/or
 - 4. Exhibiting signs of mental illness.

(d) A record of the physical cell checks shall be maintained in a log that shall contain, at a minimum, the following information on the detainee:

1. Full name;
2. Sex;
3. Date and time initially placed in cell;
4. Date and time of release;
5. Date and time of each physical cell check; and
6. Signature and/or badge number of staff member conducting physical cell checks.

N.J.A.C. 10A:34-3.2 regulates searches of detainees. It provides as follows:

(a) Each person detained, arrested or lawfully confined to a municipal detention facility shall be thoroughly searched prior to placement in a cell in accordance with the applicable provisions of N.J.S.A. 2A:161A-1 et seq., and this subchapter.

(b) Searches shall be conducted in a professional and dignified manner, with maximum courtesy and respect for the person.

(c) No detainee shall be search as punishment or discipline.

(d) All objects or property in the possession of the person detained, arrested or lawfully confined in a municipal detention facility, whether the objects are opened or closed, shall be thoroughly searched and an inventory of the contents prepared. A copy of the inventory shall be provided to the person confined in the municipal detention facility.

N.J.A.C. 10:34-3.3 regulates pat searches of detainees. It provides as follows:

(a) A pat search shall be conducted while the detainee is fully clothed. A pat search includes both the touching of the detainee's body through clothing, including hair, dentures, etc., and a thorough examination into pockets, cuffs, seams, etc., and all personal property in the detainee's possession.

(b) Pat searches of detainees may be conducted at any time where conditions indicate a need for such searches.

(c) In addition to the foregoing routine searches, a pat search may be conducted at any time when there is a reasonably clear indication that the detainee is carrying contraband.

(d) Pat searches may be conducted either by male or female custody staff members upon male inmates. Except in emergent circumstances, pat searches shall only be conducted by female custody staff members upon female inmates.

N.J.A.C. 10A:34-3.4 governs strip searches of a person(s) who has been detained or arrested for commission of an offense other than a crime. It provides as follows:

(a) A person who has been detained or arrested for commission of an offense other than a crime and who is confined in a municipal detention facility shall not be subject to a strip search unless:

(1) The search is authorized by warrant or valid documented consent;

(2) A recognized exception to the warrant exists and the search is based on probable cause that a weapon, controlled dangerous substance, contraband or evidence of a crime will be found and the custody staff member authorized to conduct the strip search has obtained the a authorization of the custody staff supervisor in charge;

(3) The person is lawfully confined and the search is based on a reasonable suspicion that a weapon, controlled dangerous substance, contraband or evidence of a crime will be found, and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge; or

(4) Exigent circumstances prevent obtaining a search warrant or authorization of the custody staff supervisor in charge and such exigent circumstances require custody staff to conduct a strip search in order to take immediate action for purposes of preventing bodily harm to the officer, person or others.

(b) As authorized at (a) above, a strip search of a person

shall be conducted:

- (1) At a location where the search cannot be observed by unauthorized persons;
- (2) By a custody staff member of the same gender, who has been authorized to conduct the search;
- (3) By the number of custody staff members deemed necessary to provide security;
- (4) Under sanitary conditions; and
- (5) In a professional and dignified manner.

(c) The custody staff member authorized to conduct a strip search shall file a written report to be made a part of the record of the detained or arrested person in accordance with this section. The report shall be reviewed by the supervisor who authorized the search and filed in accordance with internal management procedures. The report shall include, but not be limited to, the following information:

1. A statement of facts indicating any reasonable suspicion or probable cause for the search;
2. A statement of the exigent circumstances requiring immediate action to prevent bodily harm to the custody staff member(s), person or others when such conditions existed;
3. The name of the custody staff supervisor in charge who authorized the search;
4. The name(s) of the custody staff member(s) conducting the search;
5. The name(s) of the custody staff member(s) present during the search and the reason for custody staff presence;
6. An inventory of any item(s) found during the search; and
7. Any supporting documentation consisting of the warrant or consent when such documentation is the basis for the search.

(d) Reports required pursuant to this section shall not be deemed public records; however, upon request, such reports shall be made available to:

1. The New Jersey Department of Corrections Commissioner, or designee;

2. The municipal detention facility custody staff supervisor in charge;
3. The Attorney General;
4. The county prosecutor; and/or
5. The person searched.

Plainfield Police Department's Temporary Detention Policies

Plainfield Police Division General Order, Volume 5, Chapter 7 sets forth the Plainfield Police Department's procedural guidelines regarding the temporary detention and processing of detainees. In Section VIII (Roman Numeral 8) entitled "Temporary Detention Room and Cell Block Security Concerns", Section "C" entitled "Visual Observation", it provides:

Visual Observation - The officer supervising the detainees shall make a documented face-to-face observation of a detainee, who is secured in a detention room, at least every thirty minutes or less, if required, in accordance with this policy.

1. Face-to-face checks of detainees placed in a temporary detention room shall be made at least every thirty minutes unless more restrictive face-to-face checks are outlined below.
2. Closer surveillance and more frequent face-to-face checks or constant contact shall be made for detainees who are:
 - a) A security risk (Constant face-to-face supervision);
 - b) A suicide risk (Constant face-to-face supervision);
 - c) Demonstrating unusual or bizarre behavior (Constant face-to-face supervision); and/or
 - d) Exhibiting signs of mental illness (Constant face-to-face supervision);
 - e) Juveniles (face-to-face supervision every fifteen minutes).
3. A record of the physical face-to-face checks shall be

maintained in a log that shall contain at the minimum, the following information on the detainee:

- a. Full name;
 - b. Gender;
 - c. Date and time initially placed in a temporary detention room;
 - d. Date and time of release;
 - e. Date and actual time of each face-to-face check; and
 - f. Signature of staff member conducting face-to-face checks.
4. If a detainee is confined during regular meal periods, the detainee shall be provided a meal.

Section "D" of the General Order is entitled "Monitoring System" and provides as follows:

Monitoring System: The monitoring system shall remain activated at all times that detainees are present in headquarters processing or temporary detention rooms due to the added measure of safety and security the system provides. The monitoring system shall not be used as a substitute for face-to-face checks of detainees (N.J.A.C. 10A:34-3.10).

1. The monitoring system will be used to monitor Detainees between the face-to-face visual observations.
2. Care shall be taken that there is no intrusion of privacy in the area around the sanitary unit by use of the monitoring system.
3. If the monitoring system is not functioning as designed, face-to-face monitoring of the detainees shall be required.
4. Remote monitoring of detainees shall not substitute for the physical face-to-face monitoring of detainees by sworn personnel.

LEGAL ANALYSIS

Generally, the two sides' arguments are set forth as follows.

The City's Argument

The City, by its counsel Attorney Rau, argues that this matter is simple. N.J.A.C. 10A:34-4.1(b, c and d) and General Order Volume 5, Chapter 7, Section VIII (Roman Numeral Eight), Subsection "C" (Entitled "Visual Observation" Effective October 21, 2016) both require that physical, face-to-face checks of detainees shall be conducted at least every thirty minutes and that those checks be documented. The evidence convincingly establishes, and Ali admits, that Ali was at Cell Four with Matthews at 7:07 a.m. and 7:09 a.m. on April 14, 2017, giving him breakfast and a bottle of water and did not go to Cell Four again until after Barlow found Matthews unresponsive at 12:24 p.m. The face-to-face checks are mandatory because they promote safety and security. Ali's performance in accordance with the rules requiring half-hourly face-to-face checks could and should have been accomplished without difficulty; and failure to do the checks was inexcusable. Ali did not perform the mandatory checks and detainee D.M. died of a drug overdose while in Plainfield's custody. The failure to perform her job duties (the half-hourly face-to-face detainee checks) resulted in very serious consequences for which she should be disciplined. The City's argument is that since the consequences of Ali's failure to perform her duties were very serious and contributed to the death of a detainee, it follows that the discipline should be severe, up to and including removal.

The Appellant's Argument

Ali's counsel, Mr. Mintz, argues that Ali was trained in accordance with all the rules which a Police aide must follow, including the rule requiring the half-hourly face-to-face check of detainees. However, Mintz argues that the matter is not as simple and straightforward as the City would have the Tribunal believe. Mintz argues that although Ali's superiors cited the above-mentioned Regulation and the General Order, they also

trained the police aides that there were circumstances (e.g., when the police aide was busy with tasks such as booking, fingerprinting and/or photographing an arrestee, or handling calls or radio calls from police officers on the road, or checking warrants, DMV look-ups for police officers on the road, and other such tasks) where the face-to-face checks could be skipped as long as the aide wrote onto the jail log what he / she was doing at the time of the scheduled check and initialed the entry. Mintz points out that the City's own witnesses gave testimony about how the training of police aides was inconsistent with the Regulation and the General Order. So, on the one hand the police aide was trained to literally do half-hourly face-to face checks and on the other hand the police aide was trained that he / she could more elastically defer face-to-face checks if busy with other important tasks. Thus, it is argued, the training given to police aides was equivocal. Therefore, Ali should not be held responsible for the City's deficient training of its police aides and should not have been removed from her position. Mintz also argues that the City did not prove that Ali was "preoccupied" on her cell phone.

Analysis of the Charges

We now turn to an analysis of the charges (Exhibit R-4) that were brought against Ali. The charges were that Ali violated Plainfield Police Division Rule 3:1.1 (Substandard Performance of Duty or Failure to Perform Duty);

Police Division Rule 3:1.3 (Disobedience of Laws, Rules and General Orders); and Police Division Rule 7.14 (Engaging in Prohibited Activity While on Duty). Violations of said Laws, Rules and General Orders formed the basis of the charges brought under the New Jersey Administrative Code. The applicable provisions of the Administrative Code, as set forth in the Preliminary Notice of Disciplinary Action (PNDA) (Exhibit R-3) dated August 8, 2017, and which were sustained in the Final Notice of Disciplinary Action (FNDA) dated September 28, 2017 (Exhibit R-2) are:

N.J.A.C. 4A:2-2.3 (a)(1) Incompetency, Inefficiency, or failure to Perform Duties;

N.J.A.C. 4A:2-2.3 (a)(6) Conduct Unbecoming a Public Employee;

N.J.A.C. 4A:2-2.3 (a)(7) Neglect of Duty; and

N.J.A.C. 4A:2-2.3 (a)(12) Other Sufficient Cause.

In the matter at bar, the Police Department's charges are all predicated on the allegations:

(1) that Ali "while being preoccupied on her cellular phone" failed to carry out her duty to perform half-hourly face-to-face checks of the detainees;

(2) that Ali failed to perform face-to-face checks of the detainees every half hour and that she failed to use the closed circuit television system to monitor detainees "during which time, a prisoner (Matthews) was in medical distress resulting in an in-custody death"; and

(3) that Ali engaged in a prohibited activity, "[s]pecifically, by using her personal cellular telephone as a personal entertainment device and watching a video on same, which distracted her from properly monitoring her assigned area; during which time, a prisoner died in the cell block."

Analysis of the Evidence and Factual Determinations

The evidence in this matter is that the Plainfield Police Department adopted the provisions of the New Jersey Administrative Code (N.J.A.C. 10A:34-4.1(b)) regarding the operation of municipal detention facilities, when it formulated the subject General Order. The above-mentioned regulation deals with the subject of the timing and manner of inspections (or "checks") of detainees by police personnel. The Plainfield Police Department's training of police aides included the above-cited Administrative Code's requirement for half-hourly, face-to-face checks of detainees. However, there is evidence in the case elicited from the Plainfield Police Department's own personnel demonstrating that the above-referenced requirement for half-hourly face-to-face checks was not strictly followed, was not strictly enforced, and that the training of police aides was changed from

a strict, literal application of N.J.A.C. 10A:34-4.1(b) to a modified, more elastic, interpretation of same.

I found as a fact that the evidence adduced at trial demonstrated that police aides received training that allowed them to skip the half-hourly face-to-face checks if they were busy with other duties as long as they wrote the reasons for doing so in the jail logs. The evidence came from Sergeant Slaughter and from the Plum Memo.

I found that Sergeant Slaughter's training left the police aides with the understanding that they were authorized to use their own discretion to skip checks when they had reasons (other duties to perform) for skipping the checks.

I found that the Plum Memo was an attempt by Lieutenant Plum to address practical, real-life circumstances faced by those who were subject to the mandate of N.J.A.C. 10A:34-4.1(b) and the Department's General Order and who found themselves unable, but not unwilling, to follow the regulations. I found that the Plum Memo constituted a valid order and that it authorized police aides to skip face-to-face checks under the limited circumstances set forth therein.

I found that the PPD gave two sets of instructions to the police aides and that these two sets of instructions were equivocal and contradictory. I found that the two sets of instructions caused confusion among the ranks of police personnel. There is an inherent tension in this matter between N.J.A.C. 10A:34-4.1(b)'s literal requirement that face-to-face detainee checks must be performed every thirty minutes, and the far less stringent and more elastic training actually imparted to police aides by Sergeant Slaughter and by Lieutenant Plum in his "Plum Memo". The tension is due to the equivocal and contradictory nature of the two sets of instructions given to the police aides. On the one hand, the police aides were told to perform the checks every half hour without exception. On the other hand, the trainers directed the police aides that when they are busy with their other duties they may skip the check and simply explain in the jail log what they were doing at the time when they were supposed to perform a half-hourly detainee check.

There is a sharp contrast between strict, literal compliance with the regulations and the more flexible interpretation of the regulations imparted by the trainers. Therein lies the problem for the police aide. Does he / she follow the written regulation or does he / she follow the instructions of his / her trainer and superior officer?

I found that the equivocal and contradictory nature of the two sets of instructions given to the police aides made it impossible for them to discern with finality what they were to do when confronted with the simultaneous need to perform the detainee checks and other assigned work duties. I found that Sergeant Slaughter's instructions to the police aides was in accord with the Plum Memo. I found that it was not unreasonable for police aides to follow the directives of their trainers and the content of the Plum Memo under these circumstances.

CONCLUSIONS

I **CONCLUDE** that when a police aide follows the instructions of her trainer (in this case her supervisor, Lieutenant Plum), such action demonstrates that she is in compliance with the requirements of her job. If there is a competing and contradictory set of instructions, it does not negate the fact that she is in compliance with the requirements of her job and the wishes of her lawful superior. Police Aide Simonne Ali was not responsible for the fact that there were two sets of instructions which contradicted each other. The preponderance of the credible evidence referenced in the Findings of Fact demonstrates that throughout her double shift spanning April 13-14, 2017, Ali was not idle, not watching movies and not preoccupied on her cell phone, but rather she was working and, I **CONCLUDE**, she was therefore performing her job duties. I **CONCLUDE** that it has not been demonstrated that Ali was deficient to any extent in the performance of her job duties during her double shift spanning April 13-14, 2017. Although Ali did not perform any half-hourly face-to-face checks of the detainees after 7:09 a.m. on April 14, 2017, she was busy with other duties at the times for the half-hourly checks and she noted her reasons for skipping the checks in the jail log in accordance with her training. I therefore **CONCLUDE** that she acted in compliance with her training.

Under the Common Law and extending to our own time, the employer has enjoyed the right to tell the employee what work to perform, and how, when, and where to perform the work. Ordinarily, in the employer-employee relationship, the employer is entitled to set forth the employee's work duties, to set standards of expected performance, and to set forth disciplinary measures for both non-performance or sub-standard performance, including discharge from employment. I **CONCLUDE** that an employer, as the one in control of the workplace, owes a duty to his / its employees to set forth an employee's job duties and to set forth in clear, unequivocal language the rules governing the workplace. An employee is bound to follow the rules of the workplace set by the employer, however, the law provides that the rules and regulations must give fair warning or fair notice of prohibited conduct. See, Silvia Cotriss v. City of Roswell, 2022 U.S. App. LEXIS 17941, quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972).

I have found that the PPD gave two contradictory sets of instructions to its police aides. It is self-evident that under these circumstances the employer did not give "fair warning" or fair notice to the employees of what constitutes prohibited conduct.

I **CONCLUDE** that it would be fundamentally unfair to bring charges against an employee and to impose discipline upon an employee under circumstances where the employer's workplace rules and regulations are vague, unclear, ambiguous, equivocal, or self-contradictory.

As noted in the case of B. Elizabeth Rushin v. Board of Child Welfare, Department of Institutions and Agencies, and Civil Service Commission, 65 N.J. Super. 504, 514-515 (1961):

Civil Service Disciplinary] proceedings are therefore penal, or at least quasi-penal in nature, and deeply embedded constructional principles, supported by fundamental notions of fairness, dictate that in such an action the statute or regulation defining the alleged violation be construed to comport with the fair meaning of the language used. See 82 C.J.S. Statutes

Sect.389, pp. 922-931. The theme of fairness threads its way through the notice, hearing, and right of appeal provisions of our Civil Service Act, N.J.S.A.11:1-1 et seq., and finds particular pertinence in those sections requiring that the causes for removal constituting "just cause" be enumerated with specificity. See R.S. 11:15-2, 11:15-3. The governing consideration, that one be fairly and completely advised of the nature of the charges against him, loses all effectiveness if it is not reinforced by a requirement that the proscribed activities and contingencies warranting disciplinary proceedings be set forth with reasonable particularity and construed accordingly.

[Emphasis supplied.]

In accordance with the above-stated principle, I **CONCLUDE** that it was fundamentally unfair to bring charges against and to impose discipline upon Police Aide Ali under the circumstances in this matter because the employer's workplace rules and regulations are demonstrably equivocal and self-contradictory. I **CONCLUDE** that the sustained charges docketed against Simonne Ali for not performing half-hourly, face-to-face checks of the detainees must be, and hereby are, **REVERSED**.

Rulings on the Individual Charges

Conduct Unbecoming

Specifically, with regard to the Charge of Conduct Unbecoming under N.J.A.C. 4A:34-4.1(6), I make the following analysis and conclusions. As noted above in the Applicable Law section, Conduct Unbecoming is not strictly defined by the Administrative Code, but it has been described as pertaining to the employee's personal or on-duty behavior pertaining to his / her status as a public employee. The regulation obligates all public employees to regulate their behavior so that they present themselves before the public as persons of modesty, good taste or good manners, and to avoid behavior that is unsuitable to a person who holds the public's trust, to avoid indecorous or improper conduct, and to conduct themselves in accordance with high standards of propriety. Thus, the purpose of the regulation against conduct unbecoming is to warn public

employees to avoid conduct that would tend to destroy public respect for the employee or his unit. Likewise, the penalties imposed for unbecoming conduct serve the purpose of deterring conduct that would adversely affect the morale and efficiency of the employee or his governmental unit. I have found that there was little or no evidence supportive of the charge of unbecoming conduct. I therefore **CONCLUDE** that the sustained charge of Unbecoming Conduct docketed against Ali must be and hereby is **REVERSED**.

Incompetency, Inefficiency

I have found that there is no evidence that indicates that Ali was incompetent, unqualified, or unable to perform her job duties, or inefficient in the performance of her job duties. Therefore, I **CONCLUDE** that the sustained charge of Incompetency and Inefficiency docketed against Ali under N.J.A.C. 4A:2-2.3(a)(1) must be, and hereby is, **REVERSED**.

Failure to Perform Duties and Neglect of Duties

In regard to the charge that Ali failed to perform her duties (which arises under part of N.J.A.C. 4A:2-2.3(a)(1) (Failure to Perform Duties) and that she neglected her duties (which arises under N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duties), the two charges are similar, but not the same. Complete failure to perform a duty clearly falls within the concept of the Neglecting of Duty. But neglecting one's duty can be a matter of degree. That is to say, partial performance is not a complete failure to perform, yet it can be neglectful in the sense of failing to complete the assigned task. I will discuss Failure to Perform (N.J.A.C. 4A:2-2.3(a)(1)) and I will discuss Neglect of Duties (N.J.A.C. 4A:2-2.3(a)(7)) together. Ali was charged with failing to perform the detainee checks and with neglecting to perform the detainee checks.

I found that the equivocal and contradictory nature of the two sets of instructions made it impossible for the police aides to discern with finality what they were to do when confronted with the simultaneous need to perform the detainee checks and their other

assigned work duties. Therefore, it follows, and I **CONCLUDE**, that because of the contradictory nature of the two sets of instructions and because Ali performed her other duties and wrote them in the jail log, Ali did not fail to perform her duties under N.J.A.C. 4A:2-2.3(a)(1) (Failure to Perform Duties) and did not neglect her duties under N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duties). It follows, and I **CONCLUDE**, that the sustained charges docketed against Ali under N.J.A.C. 4A:2-2.3(a)(1) and N.J.A.C. 4A:2-2.3(a)(7) must be, and hereby are, **REVERSED**.

Other Sufficient Cause

Now, turning to the charge of Other Sufficient Cause (which arises under N.J.A.C. 4A:2-2.3(a)(12)), this is a catch-all category covering in a general way any violation of the appointing authority's regulations, rules, general orders, or policies. Having found that there were two contradictory sets of instructions given to the police aides, the same analysis as stated above applies to the Charge of Other Sufficient Cause. I have found that the proofs offered in support of the accusations that Ali was preoccupied on her personal cell phone, that Ali was viewing movies on an entertainment device, and that she failed to use the T.V. monitors to detect that D.M. was "in distress" all to be insufficient. I have found that Ali complied with the directions she was given by her trainers. Ali did not violate workplace regulations and she was in compliance with the instructions of her trainer and her supervisor; and so I **CONCLUDE** that Ali was not in violation of the PPD's rules, regulations, general orders and policies. Therefore, the sustained charge docketed against Ali of Other Sufficient Cause must be, and hereby is, **REVERSED**.

ORDER

Based upon the foregoing, it is **ORDERED** that the determination set forth in the FNDA dated September 28, 2017 that Simonne Ali engaged in unbecoming conduct pursuant to N.J.A.C. 4A:2-2.3(a)(6) is hereby Reversed; and it is further

ORDERED that the determination set forth in the FNDA dated September 28, 2017 that Simonne Ali demonstrated incompetence, inefficiency and that she failed to perform her duties pursuant to N.J.A.C. 4A:2-2.3(a)(1) is hereby Reversed; and it is further

ORDERED that the determination set forth in the FNDA dated September 28, 2017 that Simonne Ali neglected her duties pursuant to N.J.A.C. 4A:2-2.3(a)(7) is hereby Reversed; and it is further

ORDERED that the determination set forth in the FNDA dated September 28, 2017 that Simonne Ali violated the appointing authority's regulations, rules, general orders, or policies, categorized as Other Sufficient Cause for discipline pursuant to N.J.A.C. 4A:2-2.3(a)(12) is hereby Reversed; and it is further

ORDERED that the termination of Simonne Ali's employment with the PPD set forth in the FNDA dated September 28, 2017 is hereby Reversed; and it is further

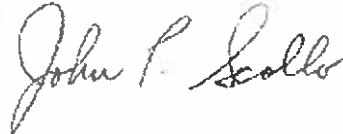
ORDERED that the City of Plainfield Police Department shall restore Simonne Ali to her position of Police Aide and restore to her all back pay from the date of the beginning of her administrative leave (April 14, 2017) forward, together with all seniority and all other benefits that would have accrued since the date of the beginning of her administrative leave forward; the implementation of this Order is subject to the right of the City of Plainfield Police Department to avail itself of any and all rights to seek a stay of this Order within the time limits allowed by the procedural rules governing the Office of Administrative Law and the laws of the State of New Jersey, generally.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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 2, 2022

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

Appellant's Witnesses

None

Respondent's Witnesses

Lieutenant William Tyler, PPD
Sergeant Wayne Slaughter, PPD
Captain Anthony Bonito, Retired, UCDOC
Detective Adam Green, PPD
Detective Oliver Kalebota, UCPO
Police Aide Debra Barlow, PPD
Lieutenant Christopher Sylvester, PPD

Appellant's Exhibits

All the Appellant's exhibits are in evidence.
A-1a: Jail Log dated 3/3/17
A-1b: Jail Log dated 3/3/17 (enhanced)
A-2a: Jail Log dated 3/5/17
A-2b: Jail Log dated 3/5/17 (enhanced)
A-3a: Jail Log dated 3/9/17
A-3b: Jail Log dated 3/9/17 (enhanced)
A-4a: Jail Log dated 3/16/17
A-4b: Jail Log dated 3/16/17 (enhanced)
A-5a: Jail Log dated 3/22/17
A-5b: Jail Log dated 3/22/17 (enhanced)
A-6a: Jail Log dated 3/24/17
A-6b: Jail Log dated 3/24/17 (enhanced)
A-7a: Jail Log dated 4/1/17
A-7b: Jail Log dated 4/1/17 (enhanced)

- A-8a: Jail Log dated 4/3/17
- A-8b: Jail Log dated 4/3/17 (enhanced)
- A-9a: Jail Log dated 4/20/17
- A-9b: Jail Log dated 4/20/17 (enhanced)
- A-10: Detainee Intake Form with Record of Confinement form
- A-11: Memo from David Hancock to J. Esmeraldo

Respondent's Exhibits (40 in number)

All of the Respondent's Exhibits are in evidence except for R-31, R-32, R-33, and R-39.

- R-1: 8/19/14 Appointment Letter
- R-2: FNDA dated 9/28/17
- R-3: PNDA dated 8/8/17
- R-4: Charges and Specifications dated 8/8/17
- R-5: UCPO's Investigation Report dated 6/13/17
- R-6 UCPO's 8/1/17 Letter remitting the matter for administrative handling
- R-7: PPD's Internal Affairs Investigation Report dated 8/8/17
- R-8: South Plainfield Police reports dated 4/14/17
- R-9: PPD's Incident and CAD Reports #17020259
- R-10: PPD's record of Booking Douglas Matthews (D.M.) dated 4/4/17
- R-11: 4/14/17 Jail Log showing Ali's time stamps (enlarged)
- R-12: 4/20/17 Attorney General Notification Report completed by Lt. R. Fusco
- R-13: DVD and Transcript of 31-page Interview of Ali by Kalebota dated 4/17/17
- R-14: DVD and Transcript of Interview of D. Barlow by Kalebota dated 4/17/17
- R-15: 4/25/17 Medical Examiner's Scene Visitation Report
- R-16: 4/25/17 Autopsy Report
- R-17: Toxicology Report
- R-18: Camera footage of Cell #4 from lock-up of D.M. to time of death on 4/14/17
- R-19: Sgt. W. Slaughter's report log dated June 5, 2018 of his viewing of Cell 4 video
- R-20: Temporary Detention Management training materials
- R-21: Ali's acknowledgment of training dated 10/20/16

- R-22: PPD's General Order: Processing and Temporary Detention, Vol.5, Chapt.7, effective date 10/21/16
- R-23: Power DMS records re: General Order, acknowledged by Ali on 10/25/16;
- R-24: PPD Police Aide Mandatory Responsibilities and Directives (Plum Memo)
- R-25: Capt. A. Bonito's "Cell Block Management & Suicide Awareness", March, 2015
- R-26: Ali's Certification of completion of course referenced in R-25
- R-27: Chapter 23 (portions), N.J. Municipal Detention Facilities, Monitoring Facilities
- R-28: Lt. Sylvester's Report dated 9/24/17 to Director and to Internal Affairs
- R-29: Employee Handbook
- R-30: Ali's acknowledgment of receipt of Employee Handbook on 8/5/14
- R-31: Ali's essay (Not in Evidence; marked for I.D. only)
- R-32: Certification of Debra Barlow dated 8/2/18 (Not in Evidence; marked for I.D. only)
- R-33: Certification of James Bowe dated 8/1/18 (not in Evidence; marked for I.D. only)
- R-34: Videotaped 1/25/18 walk-through with counsel of cell block by Lt. Tyler
- R-35: Tyler's 6/28/18 Certification
- R-36: Plan (diagram) of Cell Block with Judge Scollo's handwritten notations
- R-37: PPD's Rules and Regulations (portions appearing in charges)
- R-38: Video of Jail Hallway recorded 4/14/17
- R-39: Video of Police Aide Area recorded 4/14/17 (Not in Evidence; marked for I.D. only)
- R-40: Notes of Detective Adam Green's review of R-39

Stipulations of the Parties (39 in number)

See attached "List of Exhibits and Stipulations of Fact" submitted by Littie Rau, Esq. of Ruderman & Roth, LLC containing the 39 stipulations agreed upon by the parties.