



STATE OF NEW JERSEY

In the Matter of Keith Aiello,
 Independence Township, Department
 of Public Safety

CSC DKT. NO. 2020-2434
 OAL DKT. NO. CSV 04810-20

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

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ISSUED: JULY 20, 2022

The appeal of Keith Aiello, Police Chief, Independence Township, Department of Public Safety, 45 working day suspension, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni (ALJ), who rendered his initial decision on June 14, 2022. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 20, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision. However, the Commission did not agree with the ALJ's recommendation that the 45 working day suspension should be modified to a 30 working day suspension. Rather, the Commission upheld the 45 working day suspension.

Along with its review of the charges, in determining the proper penalty, the Commission's review is *de novo*. Upon its review, the Commission agrees that the upheld charges against the appellant merit a significantly penalty. The ALJ's modification of the penalty was based on the appellant's long history of previously unblemished service as well as the dismissal of one of the charges. However, the appellant is the Police Chief and as such is held to the highest standards. See *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). See also, *In re Phillips*, 117 N.J. 567 (1990) (Law enforcement officers are held to a higher standard than a civilian public employee). His misconduct in this matter was extensive and, as stated by the ALJ, "demonstrated disregard for the safety of his fellow officers and the public, and without advancing even a plausible reason for such conduct." Moreover, such infractions, committed by the highest-

ranking officer, clearly has an adverse effect on the public's perception of law enforcement. A Police Chief should be a paragon of competence and serve as an example to all officers under his charges as well as to the public. The appellant's misconduct in this matter fell far short of those standards. As such, the Commission finds that, notwithstanding the mitigating factors relied on by the ALJ, the 45 working day suspension was neither disproportionate to the offenses nor shocking to the conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore affirms the 45 working day suspension and dismisses the appeal of Keith Aiello.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JULY, 2022



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSV 04810-20¹

AGENCY REF. NO. CSC 2020-2434

**IN THE MATTER OF KEITH AIELLO,
TOWNSHIP OF INDEPENDENCE
DEPARTMENT OF ROADS AND
PUBLIC SAFETY.**

Stuart J. Alterman, Esq., for appellant, Keith Aiello (Alterman & Associates
LLC)

Leslie A. Parikh, Esq., for respondent, Township of Independence
Department of Roads and Public Safety (Gebhardt & Kiefer, P.C.)

Record Closed: April 23, 2022

Decided: June 14, 2022

BEFORE ERNEST M. BONGIOVANNI, ALJ:

STATEMENT OF THE CASE

¹ While this matter was ordered consolidated with IMO Aiello, Independence Township, Dept. of Roads and Pub. Safety, OAL Docket, CSR 07415-20, the parties requested and agreed that this instant matter be based on the record established before a Hearing Officer with the other based on the record established at a hearing before an ALJ. Therefore, this Initial Decision is filed separately from the other disciplinary case against Aiello, notwithstanding the consolidation.

Appellant, Keith Aiello (appellant/Aiello) challenges the Final Notice of Disciplinary Action (FNDA) of March 16, 2020, which sustained the charges of 1) incompetency, inefficiency, and failure to perform duties; 2) Conduct unbecoming an employee; 3) misuse of public property, including motor vehicles; 4) Neglect of Duty and 5) Other Sufficient Cause, resulting in his suspension as Police Chief for forty-five (45) working days. The charges and suspension resulted from a high-speed multi-jurisdictional pursuit Police Chief Aiello engaged in on the public roadways in the Township of Independence on November 8, 2017. The parties asked for, agreed, and stipulated to rely on the record from the disciplinary proceedings with a hearing officer, consisting of the videorecorded witnesses, and transcripts of same, and exhibits including video of the pursuit. After my review of the record and arguments of counsel, for the reasons which follow, I find that Aiello did engage in conduct unbecoming an employee, neglect of duty and other sufficient cause, and I impose a suspension term as reasonable and proportionate to the offenses, notwithstanding Aiello's prior good conduct record.

PROCEDURAL HISTORY

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13 to the Office of Administrative Law, where it was filed on May 20, 2020. Respondent filed a motion to consolidate this case with another disciplinary matter, this time removal by the Township of Independence against their Chief of police Aiello which motion was challenged by Aiello. (Keith Aiello v. Township of Independence, OAL Docket No. 07415-2020), After reviewing briefs, and exhibits and hearing extensive oral argument, the motion to consolidate was granted by decision issued and Order granted July 12, 2021. The parties requested, however, that the hearings be presented in sequence with the chronologically earlier suspension case being heard first, and that the record in that matter be confined to the previously videorecorded disciplinary hearing before a hearing officer, (presented in both videodisc format and court reported transcripts, and exhibits

also submitted to the hearing officer, with only written and oral argument on said evidence provided by counsel.) Accordingly, I reviewed the video recorded hearing by the hearing officer (both the videos and transcripts of those proceedings, the exhibits presented to and admitted by the hearing officer, and briefs and arguments presented to me of counsel all via Zoom). Those proceedings were conducted on April 11 and April 18, 2022. The last brief permitted for consideration on that matter was received on April 23, 2022, at which time the record closed.

APPELLANT'S MOTION TO DISMISS

Two issues, which remain unresolved at least by a written decision are 1) whether Mayor Paul Giordano and Administrator Deborah Hrebenak of the Township of Independence should be compelled to testify to supplement the Departmental Record, as it is alleged by respondent that they had critical testimony to prove that 2) the Township could have, but failed, to bring the charges against Aiello within forty five days of learning of them, and that the Township's failure to do so warrants dismissal of the charges. While these issues were first raised during a spate of motions filed in and around March, 2021, a written decision on this motion was delayed for various reasons, one being that the motion to dismiss via the 45-day rule was never properly made as a motion by respondent, but rather was argued as part of his counter argument to the Township's motion to bar its Mayor and Administrator from having to testify.

Appellant argues that, as stated in the Warren County Prosecutor's Office (WCPO) Internal Affairs (IA) Summary Report, the charges stem from his alleged participation during a vehicular pursuit allegedly on November 9, 2017. As shown in the Preliminary Notice of Disciplinary Action (PNDA), (J-1), he was not charged until 15 months later on March 13, 2019. Appellant argues N.J.S.A. 40A:14-47 requires that these charges be brought within 45 days of when they were supposedly committed, or in the alternative, within 45 days of when the WCPO IA completed its investigation, on March 29, 2018. Appellant argues that testimony of Township of Independence Mayor Paul Giordano and/or that of its Administrator Deborah Hrebenak would establish that

the Township had sufficient knowledge to charge Aiello far sooner than the date he was charged.

However, the only evidence on this issue produced at the hearings before the Hearing Officer, upon which the parties agreed to solely rely upon, came from Lt. Young who conducted the IA investigation. He testified that the only persons from the Township of Independence he had any contact with were Aiello and another Independence Police Officer, Gerrit Kinney who witnessed the beginning of Aiello's participation in the pursuit. He never discussed Aiello's involvement or the pursuit with anyone else from the Township, and certainly did not, according to his testimony notify the Township of the result of his investigation until he served Administrator Hrebenack with a copy of his IA report on February 27, 2019. No other evidence has heretofore been brought to contradict Lt. Young's testimony.

Young further testified that while he stopped work on his report in March 2018, he simply failed to notify the Township about the results of the investigation. Rather, the report simply was buried along with other business at his office. In fact, it was only when Aiello was found to be involved in another case which was being investigated by that he realized he had simply forgotten to notify the Township of his report. Accordingly, there is no contrary evidence to the PNDA which states that the Township was notified of the findings of the IA report on February 27, 2019. The Township did not initiate the investigation, but rather it was initiated by Internal Affairs of the WCPO. The Township received a report of that investigation by Internal Affairs of the Warren County Prosecutor's Office on February 27, 2019. Chief Aiello was served with the Preliminary Notice of Disciplinary Action on March 13, 2019. This was well within the 45-day period imposed by the cited regulations. This was the background and basis for a decision issued from the bench in March 2021 which granted the Township's motion to bar appellant from seeking the testimony of Hrebenak and Giordano. There has been no evidence other than pure speculation by Aiello that the Township could have legally brought these charges against him earlier. Lt. Young's testimony that he had no communication with any Township Official or employee other than Aiello and Patrolman

Kinney, (or in fact anyone except the WCPO chief Prosecutor) concerning his findings of his investigation until he served the report on Ms. Hrebenak on February 27, 2019, has been unchallenged by any competent evidence. It is also clear from his testimony that no one from the Township inquired about the investigated prior to his issuing his report and that no-one from the Township delayed his report, which simply languished from being overlooked by his own office until Aiello's disciplinary issue with the township resurfaced after another investigation by IA commenced, again involving Aiello and again involving the use of his police vehicle (now the subject matter of the consolidated case OAL Docket No. CSR 07415-20).

Technically, there is no motion before me to compel the testimony of the Mayor and the Administrator, as petitioner never made that motion. Further, if they were to testify, based on the parallel motion by respondent to bar their testimony, they are clearly unwilling to testify and as conceded to me in oral argument, they have never been subpoenaed to testify. Finally, Aiello agreed to have this hearing conducted based solely on the record below. It would be unfair to permit one side to reopen the record just for the limited purpose of probing these two apparently unwilling witnesses. Furthermore, there is no competent foundation to do so.

Nevertheless, Aiello now asks I reconsider my bench decision to bar the testimony of Giordano and Hrebenak because, he alleges, he has new evidence, consisting of his own April 21, 2022, Certification² which proves, he claims, that Giordano's and Hrebenak's testimony is germane to the argument there is a violation of the 45-day rule.

His certification states that on the date of the pursuit "I was having a meeting of some sort" in "Debbie's office." He "believe(s) Mayor Giordano was there as well." During the meeting "we could hear radio chatter" from the police scanner about the

² Actually, the certification's only evidence is details Aiello has apparently not shared in the nearly five years since the events, concerning what he told the Township officials a few days after the pursuit incident in November 2017. Since these facts were known to him five years ago, they can hardly be considered new evidence.

pursuit. Aiello then left, he says, to find Patrolman Kenney. When he returned, he told "Debbie" what "had happened," that no one had been hurt and that the WCPO may investigate. Within a few days, Aiello says, he had been advised that he and Patrolman Kenny would have to give statements to the WCPO and there would be an investigation. Further, since that time, (exactly when is not clear) Debbie acknowledged to Aiello that he told her the WCPO was investigating, and she indicated "we would see" what the outcome of that was. He concludes that that based on his certification, Hrebernak and Giordano and the Township were aware as early as a few days after the pursuit incident that the WCPO was "initiating an investigation."

The weakness of this argument is obvious from the weakness of the certification. I note with concern the skirting of certain details, the vagueness and the failure to be direct in the Certification. For example, Aiello says he was having a meeting in "Debbie's office," but doesn't directly state that "Debbie" was there. It says the mayor "may have" been there. When Aiello states "we heard" radio chatter he doesn't say "Debbie heard it" or the Mayor (who according to Aiello "may" have been there which of course means he may have not been there) heard the chatter. He says "we," which can mean he and other people in the room, not he Hrebenack and/or Giordano. More critical to this self-serving certification is that it skirts the essential issue -Aiello's alleged involvement in the incident. In the certification, Aiello says he left the meeting to tell Patrolman Kenney about someone trying to reach him on the radio. While he recalled everything he said to Kenney, he conveniently skipped over his involvement in the pursuit. His only reference to it is "after the pursuit ended," he went to Debbie's office, where he explained "what had taken place."

Now, either Aiello was being disingenuous with Administrator Hrebernak or is being disingenuous to the Court. On the one hand he wants us to believe that because of the information he imparted to Hrebernak, they (township officials) knew about the WCPO pending investigation and therefore respondent misrepresented their lack of knowledge. On the other hand, he leaves out the critical details as to why the WCPO investigation would lead to any kind of charges against Aiello, which could possibly

implicate the 45-day rule. Put another way, by omitting his own involvement in the pursuit, he disproves, rather than proves that the Township Officials had any notice of possible disciplinary charges against Aiello. Small wonder that, if Aiello told the story to her the way he portrays it in the certification, Administrator Hrebernak was so blasé in her response to him, i.e., “we would see what the outcome” was. It is logical to believe from the certification, by its omissions, that Aiello failed to discuss his involvement in the pursuit with the Administrator and/ or the Mayor possibly due to his own concern that his conduct would be investigated, and for that reason Aiello, contrary to his new assertions, most likely did not put Township officials on notice of possible concerns of charges against him. The lack of credibility in this certification is exceeded only by the lack of logic in its alleged probative value. Why should the Administrator or Mayor start asking questions of the Prosecutor’s office, seeking out the results of any investigation or contemplating that Aiello might be facing charges, as respondent would have had them doing, if they weren’t told by their Police Chief of his involvement, including all relevant details, in the pursuit?

Furthermore, as stated accurately by respondent in their moving papers, (April 22, 2022, brief, page 3) even if Aiello had admitted his own involvement that might lead to charges against him, the Mayor and Administrator were not permitted to investigate the Chief’s conduct. Respondent accurately states the law that regarding timeliness in bringing disciplinary charges, it is not the time of the event which counts but “the receipt of ‘sufficient information’ by the one who is authorized to file the charge that is significant.” Roberts v. Div. of State Police, 191 N.J. 516, 524 (2007). Therefore, until the WCPO advised the Township of the result of their investigation whatever “knowledge” the Mayor and Administrator had when Aiello says they had it, is irrelevant.

It has been stated that time delays in issuing a PNDA does not warrant dismissal simply because the amount of the time the Prosecutor’s office spent on the case or the amount of time it took the Prosecutor to advise the local authority that they had completed their investigation. See e.g. Kale v. City of Trenton, 13 N.J.A.R. 598, 604 (1988), aff’d App. Div. No. A-4974-87 (Nov. 28, 1988), holding that the complete failure

at any time to serve a preliminary notice of termination was determined not be fatal to a removal where the appellant had “**full knowledge of or was willfully blind to the facts and circumstances attendant to his removal.**” Kale, Initial Decision, 13 N.J.A.R. at 604 (emphasis added). In that case, a police sergeant’s removal was upheld where he was deemed unfit for duty despite his not receiving a notice of preliminary action. Central to this determination was the fact that the appellant was fully aware of the facts surrounding his removal, despite the “lapse of some magnitude” by the department in not serving him with formal notice. Id. at 603-4. The Administrative Law Judge (ALJ) explained that “although a notice of removal might well have set forth specifics supporting the general charges, any irregularity of notice does not prejudice an officer or public employee who has full knowledge of the situation.” Id. at 604 (citing Campbell v. Department of Civil Service, 39 N.J. 556 (1963)). Therefore, although N.J.A.C. 4A:2-2.5 requires specific notice of the charges be given to the employee by way of a PNDA, strict compliance with this section isn’t necessary where the employee has full knowledge of the circumstances leading to his or her removal prior to the administrative hearing. Here, the appellant complains about the amount of time the investigation report languished in the Prosecutor’s office but concedes at least that even without that delay, the report was completed nearly a year before it was delivered to the Township of Independence. However, appellant has not cited any actual prejudicial circumstances caused by the delay.

Finally, the 45-day rule while applicable to charges not involving criminal conduct, is not implicated when the conduct complained of is or charges brought under N.J.A.C. 4A2-2.3, Rather the 45-day rule is implicated in cases where the authority seeks to discipline only for the officer’s failure to comply with “internal rules and regulations of the township.” While the specific N.J.A.C. citations were left off the PNDA form, all of the charges, e.g., conduct unbecoming, insubordination and other enumerated offenses fall under N.J.A.C. 4A:2-2.3. See McElwee v. Borough of Fieldsboro, 400 N.J. Super 388 (App. Div. 2008); See also In Re Messina, 2012 WL 1123526 (App. Div. 2012). See also Jones v City of Millville Police Dept., 2011 N.J. Super, Unpub, LEXIS 2012 (App. Div. 2011) where it is held the 45-day rule does not

apply "when a police department seeks to sanction an officer for misconduct" as opposed to a violation of a specific internal rule or regulation. Here, while Aiello allegedly violated the rules and regulations of the Police Department, the same conduct applies to the enumerated charges of N.J.A.C. 4A:2-2.3

Consistent with my decision in March 2021, and also placed on the record on April 18, 2022, I deny the motion to reconsider my Order granting the request by respondent to bar the testimony of Mayor Giordano and Administrator Hrebenak, and for the same reasons deny appellant's request to compel their testimony owing to alleged new evidence by appellant. The motion is also denied because the appellant agreed to rely solely on the record established before the Hearing Officer in hearings in 2019. Finally, the motion is denied because the two alleged witnesses were never subpoenaed to testify. As their testimony was only sought, as conceded by appellant to prove a violation under the 45-day rule, and is the only hypothetically factual basis for that motion, then for the number of reasons cited above, I deny appellant's motion to dismiss the charges against Aiello based on appellant's theory that the charges had to be brought within 45 days, either from the date the conduct causing the charges occurred or alternatively 45 days from the time that the WCPO completed their Internal Affairs investigation,

DISCUSSION OF THE VEHICULAR PURSUIT AND CHARGES

As previously noted, the record consists of the certified transcripts and video recorded evidence established at hearings before Hearing Officer Thomas F. Portelli, on April 26, 2019, May 22, 2019, September 27, 2019, when the sole witness for the Township Retired Police Lieutenant Timothy Young, (Lt. Young) then of the Warren County Prosecutor's Office (WCPO) testified, and November 26, 2019, when Aiello's expert witness, Police Chief Raymond J. Hayducka (Chief Hayducka) testified.

Lieutenant Young testified as follows:

He was assigned to investigate Chief Aiello's role in a multijurisdictional pursuit of a felon which occurred November 9, 2017. Lieutenant Young had 27 years law enforcement experience. He teaches municipal police officers pursuit practices, as part of their MATS (Mandatory Agency Training). At the time of the incident, Lt. Young had completed approximately 12 Internal Affairs (IA) Investigations for the WCPO. The pursuit started after suspect Erik Johnson failed to stop for Patrolman Chris Laver in Hackettstown. The pursuit involved several municipalities in Morris, Hunterdon, and Warren Counties. While the pursuit went on for over two hours, during which police units from Hackettstown, Mansfield Township., Washington Township., Independence, Washington Township NJ State Police Cars, and helicopters were employed before the culprit was finally apprehended, the portion of the pursuit relevant to Aiello's conduct took place as shown, in an approximately 13-minute video played during the hearing in which Aiello was involved for under two minutes.

Lt. Scott testified that while on duty at the Prosecutor's that day, he learned of the pursuit and that there was video of it, and that he wanted to see it. He listened to all the relevant radio transmissions including every transmission that Aiello had access to before Aiello decided to join in the pursuit. He was soon tasked with formally investigating Aiello's involvement in the pursuit. He watched all the MVR recordings from a State Police vehicle involved in the pursuit and the one-hour long MVR taken from Patrolman Laver's Hackettstown's police vehicle. He interviewed Chief Aiello and Independence Patrolman Kinney.

Lt. Young testified that after his investigation, he drafted a WCPO Summary Report dated March 19, 2018. Therein and in his testimony, he stated that Aiello had violated the police policies, procedures, and Attorney General Pursuit mandates.

According to Young, Aiello's conduct violated the Police Vehicular Pursuit Policy and the Independence Township Police Manual in many ways. Young saw multiple violations of the pursuit policy and three violations of the Police Manual.

As recorded on the dashcam to Trooper Cruz's car, which at that time was the lead vehicle in the pursuit, Young observed Chief Aiello, in an unmarked car with no overhead lights, enter into what was a "defacto roadblock" on Route 46 westbound while a tractor trailer was stopped in the travel lane of 46 eastbound. This happened as the pursuit was rapidly approaching the area at rates of up to 90 MPH (on a 40 MPH regulated road). At this point, where civilians were near and in the direct path of the pursuing vehicles, Aiello chose, with and from his car, to flag down Officer Kinney stopping his own vehicle turning it around to line up next Kinney and told Kinney to stay put. The positioning of the vehicles left only one route of escape, which to the pursuers and the pursued was the oncoming passenger lane with the vehicles heading in the opposite direction to the suspect, leaving civilians and officers in the path of great danger.

Young noted that pursuant to the AG's Pursuit policy a roadblock is only to be employed as a last resort where deadly force is necessary owing to the circumstances. Even when done in such cases (here the suspect's vehicle was approaching a blind bend in the road as he was reaching the roadblock), the vehicles or implements constituting the roadblock are supposed to be lined up perpendicular to each other without anyone in the vehicles and are to leave a safe avenue of escape.

Lt Young noted that while Aiello was in pursuit of the subject and in fact while taking the unauthorized primary position, he never radioed anyone including Warren County Communications to advise he was in the pursuit. There were no communications by Aiello to Independence Police radio dispatch. He also testified that after the pursuit, Aiello failed to file a report of the pursuit. He described in great detail how Aiello's involvement of and conduct during the pursuit violated a number of Guidelines established by the Attorney General regarding vehicular pursuits, as well as how the same violated certain rules and regulations authorized by Township of Independence municipal ordinance governing police officer's conduct.

Chief Raymond Hayducka, Jr., then a 15-year veteran as Police Chief for South Brunswick Township, and past President of the Association of New Jersey State Police Chiefs, and whose expert credentials were unchallenged, testified as an expert witness for Aiello. He argued that rather than creating a roadblock, Aiello simply placed himself in as created was not a “roadblock” but rather simply placed Aiello in a “tactical position” to take advantage of an opportunity to assist in the suspect’s apprehension.

Hayducka also testified that he could find no evidence that Aiello failed to communicate with Warren County Communications (WCC). Yet he later was compelled to admit that indeed the Chief failed to communicate his involvement in the pursuit to WCC and that this was a violation of policy. Hayducka however speculated that Aiello didn’t radio his position because he wanted to keep the airwaves clear as the pursuit was ongoing.

Hayducka also opined that standards for pursuit policies (or practices) are “flexible.” For example, he said that regardless of the wording of the applicable regulation, a police officer once the pursuit enters into his own jurisdiction does not have to be invited to engage in the pursuit.

FINDINGS OF FACTS

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, and my review of the video and audio recording of the portion of the pursuit involving Aiello I **FIND** the following **FACTS**:

1. Aiello voluntarily created an extremely dangerous and unnecessary condition when he flagged a junior officer down who was stopped in the path of the oncoming pursuit and telling him to stay there in the Route 46 westbound lane, as the pursuit vehicles approached and while civilian traffic was stopped in the eastbound lane.

2. Aiello, said that in the few seconds after he aligned himself with Officer Kinney's car, he believed Patrolman Kinney's car had been grazed by the suspect car. However, the video shows the suspect's car didn't come close to hitting Kinney's car. Rather, it shows the suspect driving around 50 MPH crossing the double yellow line heading toward multiple civilian vehicles to get around Aiello and Kinney, and show's Aiello's vehicle accelerating immediately to engage in the chase even before Johnson's vehicle reached Kinney's and Aiello's position.
3. Immediately Aiello began a high-speed pursuit of the suspect. In doing so he came between the lead vehicle at that time being driven by Trooper Cruz. He almost immediately had a near collision as the suspect accelerates to 70 MPH.
4. Aiello maneuvered his vehicle across the double yellow in the opposite land in order to make several attempts to box in the suspect's vehicle.
5. Aiello attempted to overtake the suspect's car. In doing so he got into the lead position ahead of the pursuing vehicle of Trooper Cruz and continued to attempt to "box in" the suspect's vehicle at high rates off speed notwithstanding oncoming and somewhat busy highway traffic.
6. In attempting to overtake the suspect vehicle, Aiello used vehicle paralleling. Such paralleling, like boxing in or heading off a violator's vehicle are only permitted under extraordinary circumstances, and only are permitted "at low speeds, with the approval of a supervisor or in response to an imminent threat to the safety of the public or a public officer."
7. Neither Aiello in his interview with WCPO Internal Affairs nor his expert witness identified any extraordinary circumstances that justified any intervention whatsoever by Aiello, or identified circumstances which warranted the paralleling, the boxing in, the attempting to overtake the suspect and driving at high rates of speed.

8. Guidelines clearly provide that the original pursuing jurisdiction must give timely notification of a pursuit in progress into which the pursuit enters, and such timely notices were given here; however, the pursuing agency is to advise if any assistance is necessary. Advising others of a pursuit in progress is not an invitation to join in the pursuit.
9. There is no evidence that that Aiello was asked to join in the pursuit, and Aiello does not claim that he was asked. Further, Aiello's expert witness conceded there was no evidence that Aiello was asked to join the pursuit.
10. The lead or primary pursuing vehicle is in a pursuit must have overhead lights, and Aiello's car did not have them.
11. In his interview with Lt Young, Aiello admitted he was driving an unmarked vehicle; further the vehicle had no writing on the vehicle to indicate it was a police vehicle. While it had lights and a siren, there was nothing to distinguish Aiello's vehicle from say, an EMT car.
12. The governing policy Section III (D) of the AG's Pursuit Policy states that an unmarked car "shall relinquish primary unit status immediately upon the participation of a marked vehicle."
13. The video from Trooper Cruz's marked vehicle clearly shows that Aiello's vehicle came between Cruz and the subject and that for a time of under a minute and the distance of about a mile, Aiello's car became the lead vehicle in the pursuit.
14. As the primary vehicle in pursuit, Aiello failed to notify communications of his reasons for pursuit, the direction of travel designation and location of the roadway, identification of the vehicle being pursued, and its speed.
15. After the pursuit, Aiello failed to memorialize his involvement in the pursuit by not filing a pursuit incident report.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. 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. Consistent with public policy and civil service law, a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(a). As noted, the Board had adopted, for its non-instructional staff, the Rules and Regulations of the Civil Service Commission and Office of Administrative Law with respect to disciplinary procedures. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. Hearings at the Office of Administrative Law are conducted de novo and determine the appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). Ennslin v. Twp. Of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) cert. den., 142 N.J. 446 (1995).

In an appeal from a disciplinary action, 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); Polk, 90 N.J. 550. 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). Therefore, 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. Del Lackawanna and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence needed to satisfy the standard must be decided on a case-by-case basis.

On such appeals, the penalty for imposed after a finding of conduct warranting disciplinary action, may be affirmed, increased or decreased. N.J.S.A. 11A:2-19. The concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee’s prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness,” Id. at 484 (quoting in re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

Here I **FIND** the weight of the evidence clearly preponderates with the respondent “according to the reasonable probability of truth.” I am unpersuaded and unconvinced by the expert opinion of Chief Hayducka, which to overcome the weight of the evidence against Aiello indicates, without much foundation that Police Chiefs have implied powers even when the exercise of same seems to directly contradict the mandates of the law.

Notwithstanding Hayducka’s opinion, specifically I **FIND** that Aiello violated New Jersey Attorney General’s Police Vehicular Pursuit Policies,”1) Section III “Vehicular Pursuit Restrictions K” by employing a roadblock when it was unnecessary and created a dangerous condition to civilians and other police officers 2) Section VIII, “Interjurisdictional Pursuits” by joining a pursuit without being requested to do so 3) Section II, “Role of the Pursuing Officer C” by failing to radio Warren County

Communications to advise he was involved in the pursuit and to give necessary details of the pursuit 4) Section II, "Vehicular Pursuit Restrictions, D" by becoming the lead vehicle in pursuit while in an unmarked car with no overhead lights, and by not immediately relinquishing primary status upon the participation of a marked vehicle, to wit Trooper Cruz's vehicle 5) Section III "Vehicular Pursuit Restrictions H," by engaging in vehicle paralleling, and by attempting to overtake the pursued vehicle, by boxing in or heading off the pursued vehicle in the absence of extraordinary circumstances and at a high rate of speed 6) Section IX "Pursuit Reporting," by failing to file a pursuit incident report.

In violating the aforesaid Attorney General Guidelines, Aiello also violated Independence Township General Rules and Regulations, Section D, part 7 which requires "Obedience to Laws and Regulations," and Section E, Part 9, "Reporting" which required a pursuit report

As noted, Aiello is charged with conduct unbecoming, in violation of N.J.A.C. 4a:2-2.3(a)(1). There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), <http://njlaw.rutgers.edu/collections/oal/>. In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys. Bd. (June 26, 2001), <http://njlaw.rutgers.edu/collections/oal/>, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services." Id. at 554. In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), the court stated that a finding of misconduct 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.”

“Neglect of duty”, governed by N.J.A.C. 4a:2-2.3 (a)(7) has been interpreted to mean that an employee “neglected to perform an act required by his or her job title or was negligent in its discharge.” In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), njlaw.rutgers.edu/collections/oal/. The term “neglect” means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). “Duty” means conformance to “the legal standard of reasonable conduct in the light of the apparent risk.” Wytypeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. 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.

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct 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.”

The clear preponderance of the credible, relevant, and competent evidence establishes, and I **CONCLUDE** that Aiello is guilty of the charges of neglect of duty, conduct unbecoming, and other sufficient cause. The neglect of duty offense was clearly shown Aiello's complete disregard for the rules of engaging in an unauthorized pursuit. Aiello's conduct in this regard was made even worse of failing to make report of his activities that day. Whether Aiello was motivated by a desire not to create a record

of what he knew to be wrongful conduct that could result in disciplinary action, or simple wanton disregard of his duties, is not clear but need not be proven.

The conduct unbecoming is clearly demonstrated by his disregard for the safety of his fellow officers and the public, and without advancing even a plausible reason for such conduct. Such careless, and borderline reckless behavior by a Police Chief would certainly tend to demoralize any well-informed resident of the Town or adjoining municipalities and would particularly demoralize and embarrass the department. Other sufficient cause in this case is found in that Aiello put his own ambitions, by an apparent desire to bring a fleeing felon to justice in "his" own town, rather than let the other professionals who from all available evidence were doing a good job in keeping the public and other officers safe eventually capture the culprit, as in fact they did. There is certainly no other plausible reason for why an experienced officer would engage in what might be termed "juvenile" conduct if it wasn't so serious a subject, other than Aiello must have expected he could be the hero in this drama.

There is no definition in the New Jersey Administrative Code for Other Sufficient Cause, N.J.A.C. 4A:2-2.3(a)(12). Other sufficient cause has been found with conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Aiello's conduct, whatever his ultimate motivation, fell far short of upholding that implicit standard of good behavior.

As for the charges I do not sustain, while Aiello's failure to follow proper and well-established pursuit guidelines may have been incompetent, I find the same behavior justifies the more serious charge of neglect of duty. While the way Aiello handled public property in this case was not commendable, he did not use the vehicle strictly speaking for his own purposes, but was engaged in police activity, while on duty in a police car. I find this does not amount to "misuse" of his police car.

I **CONCLUDE** that Aiello committed the offenses of conduct unbecoming a public employee, neglect of duty and other sufficient cause, and dismiss all the other charges.

PENALTY

An employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, In Re Carter, 191 N.J. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting in re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

This case is unusual in that the conduct was egregious in part because of the volume of incorrect police practices employed by Aiello, who as Police Chief should be held to a higher standard. Thus, notwithstanding a prior unblemished record, a minimal suspension would be inappropriate. Still, I am not unmindful that except for the charge involving failure to make reports, the events for which he is not being held responsible took just one minute and 20 seconds of his long career as a law enforcement professional.

However, Township of Independence was correct in initially seeking a 60-day suspension which was reduced in the administrative hearing to 45 days, because a minimal suspension would be inappropriate given the sheer number of violations which occurred. Accordingly, I **CONCLUDE** and impose a penalty of 30-day suspension as the appropriate penalty for the Neglect of Duties, Conduct Unbecoming, and Other Sufficient Cause offenses.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, neglect of duty and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(6) are sustained and all other charges dismissed, and that the municipality's suspension on the appellant is hereby **MODIFIED** to a thirty-day suspension.

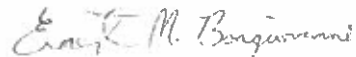
I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

June 14, 2022



DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

06/14/22

Date Mailed to Parties:

06/14/22

id

APPENDIX

LIST OF WITNESSES

For Appellant

Chief Raymond J. Hayducka Jr.

For Respondent

Lt. Timothy Young

LIST OF EXHIBITS IN EVIDENCE³

For Appellant

- A-1 C.V. of expert witness Chief Raymond Hayducka Jr.
- A-2 Hayducka expert report, dated May 6, 2019
- A-3 Hayducka additions to expert report dated June 14, 2019
- A-4 Employment Agreement of Aiello and Township of Independence, dated August 8, 2017

For Respondent

- T-1 Internal Affairs Report
- T-2 Chair of Custody of DVR
- T-3 Transcripts of Aiello's statement to Internal Affairs.
"Exhibit 9" Internal Affairs Policies and Procedures

Joint Exhibits

- J-1 Preliminary Notice of Disciplinary Action dated March 13, 2019

³ Exhibits used at the Departmental Hearing. In addition, the record before me consisted of Certified Transcripts and CD video recordings of the aforesaid hearing and a CD of the Dashcam of the portion of the pursuit involving Aiello