A-004

STATE OF NEW JERSEY

In the Matter of Timothy Snyder
Marlboro, Police Department

CSC DKT. NO. 2016-4306
OAL DKT. NO. CSV 08663-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JANUARY 18, 2023

The appeal of Timothy Snyder, Police Sergeant, Marlboro, Police Department, removal, effective June 3, 2016, on charges, was heard by Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on December 6, 2022 reversing the removal. Exceptions and a reply were filed on behalf of the appellant and exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on January 18, 2023 accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision, as well as the recommendation to reverse the removal.

The Commission makes only the following comments. The ALJ's initial decision was thorough and well-reasoned and most of her findings and conclusions were based on his assessment of the credibility of the witnesses. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or

modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom. Notably, the Commission agrees with the ALJ's assertion that there "was no support provided for the Township's claim of unfitness for duty, violation of rules and/or procedures or a disability which prevented [the appellant] from performing the duties of a police officer."

Further, the Commission wholly rejects the appointing authority's argument presented in its exceptions that the appellant cannot be reinstated as he is over-age pursuant to *N.J.S.A.* 40A:14-127. The appointing authority's contention in that regard is misplaced. That statute **only** applies to a police officer who is ***appointed*** to a position. In other words, no individual can be over the maximum age limit upon initial appointment. In this matter, the appellant is being ***reinstated*** to the position he possessed a vested property right to prior to his improper removal. *See e.g., In the Matter of Robert W. Terebetski,* 338 *N.J. Super.* 564 (App. Div. 2001) and *In the Matter of Robert Terebetski* (MSP, decided July 19, 1999) (for a discussion of the distinction between a reappointment and a reinstatement). To credit the appointing authority's argument would essentially be to disallow any police officer improperly removed from a position who was over the age limit in *N.J.S.A.* 40A:14-127 from being reinstated.

Since the charges have been dismissed, the appellant would normally be entitled to mitigated back pay pursuant to *N.J.A.C.* 4A:2-2.10. However, in the initial decision, the ALJ found that "[d]ue to the waiver of the one-hundred-eighty-day provisions . . . and the multiple adjournments and inactive status sought by the appellant in this matter, there shall be no back pay award." Upon its review, the Commission agrees with the ALJ that, under the circumstances presented, the appellant shall not be awarded back pay. *See generally, N.J.A.C.* 4A:2-2.10(d)8. Nevertheless, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant is entitled to any other benefits as provided for in Civil Service rules[1] as well as seniority[2] from the first date of separation from employment until the actual date of reinstatement. Further, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. However, the Commission notes that the counsel fees award is limited only to counsel fees accrued in pursuit of this matter before the Commission, and not any other related proceedings in any other forum. *See N.J.A.C.* 4A:2-2.12(a).

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[1] In his exceptions, the appellant requests that the Commission provide "pension credit." The Commission has no authority or jurisdiction to determine the appellant's entitlement to pension credit, as such matters are solely under the jurisdiction of the Department of the Treasury's Division of Pensions and Benefits. That Division is the proper venue to determine whether the appellant is entitled to such credit in this matter. As such, the Commission makes no determination on his request.

[2] This seniority is for Civil Services purposes, such as salary step placement and layoff seniority.

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 counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position. In this regard, given the length of time the appellant has been out of work, it is incumbent upon the appointing authority to ensure that the appellant undergo any required and necessary retraining. However, such retraining shall occur only after his reinstatement. Should the appellant fail to successfully complete such training, any disciplinary action taken therefrom by the appointing authority shall be considered new.

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 Timothy Snyder. The Commission further orders that the appellant is not awarded back pay as detailed above, but shall be granted benefits and seniority as indicated above from the first date of separation to the actual date of reinstatement pursuant to *N.J.A.C.* 4A:2-2.10. The Commission further orders that counsel fees, subject to the limitations detailed above, 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:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to 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 18TH DAY OF JANUARY, 2023

Allison Chris Myers

Allison Chris Myers
Acting 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. CSR 08663-16

AGENCY DKT. NO. ~~N/A~~ 2016 - 4306

IN THE MATTER OF TIMOTHY SNYDER,
TOWNSHIP OF MARLBORO.

Charles J. Sciarra, Esq., for appellant (Sciarra & Catrambone, LLC, attorneys)

Matthew R. Tavares, Esq., for respondent (Rainone, Coughlin, Minchello, LLC, attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

Record Closed: November 23, 2022 Decided: December 6, 2022

STATEMENT OF CASE AND PROCEDURAL HISTORY

The appellant, Timothy Snyder (appellant) was employed as a police officer in Marlboro Township in June of 2005. On October 15, 2015, law enforcement officers were called to appellant's home for a safety check after his girlfriend (who was not present) reported that he threatened to harm himself. The appellant was taken to crisis and thereafter entered an alcohol treatment facility. The Marlboro Township doctor deemed him fit to return to full duty on February 3, 2016. He was rearmed in May 2016 by the Monmouth County Prosecutors' Office.

A Preliminary Notice of Disciplinary action (PNDA) was issued on March 2, 2016, and a Final Notice of Disciplinary Action (FNDA) was served on June 6, 2016, seeking

removal of the appellant on the grounds conduct unbecoming, fitness for duty, violation of rules and regulations, and other sufficient cause. An appeal was filed, and the matter was transmitted to the Office of Administrative Law as a contested matter on June 8, 2016. N.J.S.A. 52:14F-1 to -13. The appellant waived the one-hundred-eighty-day provision of the statute in September of 2016 and requested that the matter be placed on the inactive list, where it remained for several years.[1] A hearing was held via zoom on July 11, 2022, and July 12, 2022, and a phone conference with the parties on September 12, 2022. There was a problem with the recording on the final day of the hearing and the parties stipulated to the testimony on that day. The stipulations were submitted to the undersigned on October 27, 2022, and the record was closed on November 23, 2022, after closing submissions by the parties.

TESTIMONY

Jonathan Capp (Mr. Capp) is the business administrator in Marlboro Township. He has held this position for twelve years and is responsible for the day-to-day operations of the Township. He handles discipline and risk management issues for the township, which includes the police department and the issuance of disciplinary notices. He is familiar with Timothy Snyder and was responsible for the issuance of the FNDA which was issued on June 6, 2016. He discussed a minor disciplinary matter related to an incident between the appellant and his then girlfriend which occurred on August 20, 2015. There were no criminal or domestic violence charges brought against the appellant and he received a minor discipline in the form of five days, which were served in the form of forfeited vacation days. The appellant was rearmed shortly thereafter and deemed fit to return to work full duty. There were no other disciplinary matters against the appellant since his hiring in 2005 until the infraction which forms the basis of the current matter.

[1] The appellant was involved in litigation with the Monmouth County Prosecutors' Office regarding his rearming. He was rearmed by the prosecutor's office in March of 2016, but after Marlboro Township got involved, they rescinded the rearming order. It has been stipulated that the within matter is not a removal due to inability to perform duties related to his rearming and the undersigned has no jurisdiction over this issue. The appellant will seek the appropriate approval from Monmouth County following the conclusion of this proceeding.

Mr. Capp discussed the incident which occurred on October 16, 2015. Appellant's girlfriend had requested a safety check as she claimed he had threatened to harm himself via telephone or text message. He did not threaten her or anyone else and she was not in his presence when he made the statement. After the police arrived at his home, appellant voluntarily agreed to go to the Crisis Unit at the Jersey Shore Medical Center without incident. He was disarmed at that time which is routine in connection with any such claim. Mr. Capp described the conduct from the first and second incident as a "pattern of domestic violence." However, he conceded that there were no domestic violence charges brought in either of the incidents. Moreover, no one else was present or threated when the second incident occurred. There was no internal affairs investigation conducted. He made the determination to terminate the appellant because the thought there was a "pattern" of behavior between the two incidents. Mr. Capp sent appellant to the township doctor for a fitness for duty evaluation in March 2016, and he was cleared for full duty. It was unclear to the undersigned as to why he ordered a fitness for duty evaluation of the appellant if he intended to terminate based on the conduct alone.

Mr. Capp testified that the appellant had no other prior disciplinary infractions during his ten years on the police force in Marlboro Township. The appellant was well regarded and had received promotions. He was aware that he went to an alcohol treatment facility in Florida for a month following the incident which led to this disciplinary action. After he returned, the Township sent him for a fitness for duty evaluation in November 2015, and again in February of 2016. Dr. Guller deemed him fit for duty. Notwithstanding the fitness evaluation, Mr. Capp decided to terminate him. Thereafter, the appellant went for a follow up evaluation on May 16, 2016, with the Township's doctor. Mr. Capp testified that he did not order the follow up and the appellant went on his own and paid for it. However, it was the Township's designated doctor, and the report was the property of the Township. The May 16, 2016, fitness for duty evaluation was memorialized in a report to the Township, again deeming the appellant fit to return for full duty.

Mr. Capp decided that there was a pattern of behavior and that notwithstanding the fitness for full duty recommendation by their doctor, he decided to terminate him. The "pattern" which he referred to was the within matter and one prior incident which resulted

in minor disciplinary infraction. He repeatedly referred to a "patten" of domestic violence but conceded neither of the two incidents involved any claims of domestic violence. He declined to explain why the appellant was sent for the fitness for duty evaluation if he had decided to terminate him regardless of the opinion of the Township doctor who declared him fit for full duty. He did not discuss any other aggravating factors in his determination to terminate the appellant, with the exception of the prior minor disciplinary infraction. He did not consider discussing and mitigating factors. Mr. Capp discussed the litigation with the county over his rearming and the issue of whether he should get his job back before he was reamed. Monmouth County did initially deem him fit to be rearmed and the township doctor deemed him fit to return to full duty.

The FNDA, dated June 6, 2016, provides as follows:

> On 8/20/15 you were served with a Minor Notice of Disciplinary Action for an incident that occurred on 5/10/15 resulting in your conditional arming by the County Prosecutor. On 10/16/15 you were involved in an off-duty incident involving similar conduct whereby you threatened to harm yourself. You were deemed unfit for duty and your right to carry a firearm was revoked by the County Prosecutor. Further, it has been disclosed that you have a 30% disability from the Federal Government which prevents you from serving as a police officer.

Mr. Capp identified the rules and regulations of the Township and identified several rules and procedures which were violated by the appellant as a result of the October 2015 incident which relate to good conduct. Several general duties and responsibilities in section three and disciplinary rules in section six. Mr. Capp relied heavily on a prior minor discipline and referred to these matters as a combined "pattern of domestic violence." However, on cross examination he again conceded that domestic violence charges were not brought in the first matter, nor was anyone injured or threatened. There was no element of domestic violence in the second matter which led to the within charges. Moreover, there were no details of the first incident and only the one statement alleged to have been made by his former girlfriend in the second which led her to the call for a safety check. The incident which forms the basis for the within charge occurred when the

appellant was off duty. The rules and regulations that are relied upon relate to the general standards of conduct for which officers are to hold themselves to on and off duty.

Mr. Capp testified that during the pendency of the action or following the October 16, 2015, incident, it came to his attention that the appellant had received a thirty percent disability award from the military. The appellant listed his military service in his application and a letter from the Division of Military and Veterans Affair, dated January of 2009, was provided to the Township wherein he was found qualified to be designated as a "disabled veteran" under the civil service regulations. It was unclear from the testimony, or the documentation presented in this matter, when the application was filed for the disabled veteran status. There was no testimony, expert or otherwise as what this award from the US military means in terms of the appellants fitness for duty or ability to perform his duties as a police officer, which he performed for ten years. Mr. Capp provided no testimony to support a finding of mental or physical unfitness as a result of this military status.

Timothy Snyder testified on his behalf. He discussed his military service and the tours of duty and military training that he received. He was in the military for four years and was honorably discharged in 2004. He discussed his educational background and his employment with Marlboro Township Police Department. He had been employed there for ten years when the incident which led to his removal occurred. He discussed a volatile relationship he had with his then girlfriend and his off-duty abuse of alcohol. He never abused alcohol when he was on duty, and never had any disciplinary issues with work before the August 2015 off-duty incident with his girlfriend. He testified that he had some issues from his time in the service and had begun to self-medicate with alcohol. He has since been to rehabilitation, continues to attend therapy and has been sober since going into a rehabilitation facility in 2015.

He described the October 2015 incident as an isolated event which occurred off-duty after he had been drinking. He was having some issues with his girlfriend, and he said something stupid to her on the phone in the heat of the moment. He testified that he was not suicidal. He said something like "if you don't stop calling me, I am going to blow my brains out." When the police arrived for a safety check, he went to crisis willingly and thereafter, realized that he had a problem with alcohol and needed to get some help. He

went to a rehabilitation facility in Florida immediately after the incident and has been sober ever since. He attends meetings and counseling sessions. He has always wanted to serve his country and his community, and he wants to return to serving Marlboro Township as a police officer.

He discussed his application for military disability. He testified that when he was honorably discharged, they scheduled a meeting to discuss any possible disability award. It is done in the ordinary course of leaving the military. He was waiting to get an appointment with the military when he applied for a job in Marlboro Township as a police officer. He had not been declared a disabled veteran, nor did he think such an award following his services affected his fitness for duty as a police officer. It was something they did automatically upon discharge from the military. He did receive compensation from the military as a result of it, but it never affected his job or his ability to do his job. He does not believe he is disabled in any way from performing the duties of a police officer.

FINDINGS OF FACT

The resolution of the claims made by the appellant requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency, and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re

Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view, that the testimony of Timothy Snyder was sincere and credible. As to the testimony of Mr. Capp, his testimony was not credible and was inconsistent with the facts and the documentation in this matter. Moreover, Mr. Capp provided no testimony to support the claim of unfitness or conduct which would justify removal of appellant considering the isolated nature of the incident and the mitigating factors including an absence of any prior major disciplinary infractions during his ten-year tenure as a police officer and the successful treatment that he sought immediately following the off-duty incident in question. There was no support provided for the Township's claim of unfitness for duty, violation of rules and/or procedures or a disability which prevented him from performing the duties of a police officer.

Accordingly, **I FIND** the following as **FACT**:

1. Timothy Snyder was employed by the Marlboro Township Police Department in June of 2005.

2. Prior to his employment he served in the military for four years which included several deployments of active duty. He was honorably discharged in 2004.

3. Upon discharge he followed the normal protocol of determination of any disabled veteran status he might be entitled to.

4. The process was not completed until after he was hired by Malboro.

5. There is documentation from Civil Service to Marlboro regarding his disabled veteran status. This documentation was provided years before the incident in question. There is no evidence that the disability award from the U.S. Military renders the appellant unfit or unable to perform all the duties of a police officer.

6. Police were dispatched to appellant's home on October 16, 2015, for a safety check after appellant made a comment to his girlfriend and she thought he might harm himself.

7. The appellant was taken without incident to crisis and thereafter, sought treatments for abuse of alcohol.

8. The appellant successfully completed one month of rehabilitation and thereafter, has continued with Alcohol Anonymous (AA) meetings and therapy without incident.

9. Dr. Guller was retained by Marlboro Township Police Department to conduct a fitness for duty evaluation of Timothy Snyder and deemed him fit for return to full duty with no restriction in March 2016.

10. He was initially rearmed by the Monmouth County Prosecutor's office but after significant delays of the within matter, it was rescinded pending the outcome of this matter.

11. The appellant will have to apply separately to Monmouth County to be rearmed after his employment litigation is resolved.

12. The appellant is fit for return to full duty.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. 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 Co. Park Comm'n, 46 N.J. 138, 147 (1965). The Act states that state policy is to provide appropriate appointment, supervisory and other personnel

authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline and termination of public employees.

N.J.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The burden of proof is always on the appointing authority in disciplinary matters to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The employee's guilt of the charge(s) must be established by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may also be described as the greater weight of the 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, 49 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In this matter, the township seeks the removal of appellant as a result of an off-duty incident that occurred on October 16, 2015. The appointing authority has alleged conduct unbecoming, unfitness, violation of rules and procedures and other sufficient causes. The final charge in the FNDA relates to the appellants disabled veteran issue, and an allegation that his military disability award "prevents him from serving as a police officer." There has been no evidence provided by the Township to support a finding of unfitness, and the township's own physician has found the appellant fit for return to full duty in March 2016.

The Civil Service regulations do not provide guidelines or standards for the removal of an employee on a charge of psychological or mental unfitness. There are, however, rules that relate to the removal by the appointing authority from the eligibility list of a

prospective appointee on such grounds. In that instance, the regulations set forth that such an adverse appointment action must be supported by professional reports. These cases involve extensive testimony from expert witnesses on the fitness of such officers. In this case, the appointing authority does not seek to rely on any such expert, nor on any expert reports. In fact, the appointing authority choose to disregard their own expert who conducted a fitness for duty examination and deemed the appellant fit to return to full duty.

The appointing authority instead choose to rely on the opinion of business administrator to support a fitness for duty charge. It was his opinion, and his alone to remove the appellant because "he saw a pattern of behavior," which constituted conduct unbecoming and rendered him unfit. I would note at the outset the well settled principal in New Jersey Civil Service law that "an employee's past record may not be used to prove the present charges, but it is to be considered when determining the appropriate penalty for the current offense." The appointing authority not only seeks to use the appellant's past record to prove the present charges, but they actually cite a prior minor disciplinary action in the PNDA and FNDA. This pattern alleged was predicated on a minor disciplinary matter which occurred six months prior to the incident in question. There were no criminal or domestic violence charges filed in connection with either matter, and the prior incident resulted in a five-day minor discipline. It would be inappropriate to consider the nature of this incident for anything other than the appropriate penalty to impose. Moreover, there was no testimony regarding the incident itself. The within incident which led to the removal was not a domestic violence charge, and the only similarity was that both incidents involved an allegation from a former girlfriend of the appellant.

On the issue of fitness for duty, the appointing authority sent the appellant to their doctor for a fitness for duty. Notwithstanding several reports issued by their doctor deeming him fit for duty, they failed to call him as a witness or enter any of the reports in to evidence. They choose to disregard the fitness examinations of their own doctor and failed to give any consideration to the successful treatment that the appellant sought immediately following the incident. The respondent did not consider his unblemished disciplinary record and promotions within the department leading up to this incident.

Moreover, he failed to consider that the appellant acknowledged an off-duty issue of alcohol abuse related to his military services, for which he sought treatment and has been successful in his sobriety for seven years. There was no evidence to support the respondents claim of unfitness.

There was no testimony from anyone responding to the incident, no internal affairs investigation, or an incident report from October 16, 2015. Neither the officer responding to the call, or the girlfriend were called to testify regarding the behavior in question. The appellant testified that he made a comment to his then girlfriend that had been taken out of context. He testified that they had a volatile relationship and they had been drinking on the day in question. There was no testimony from the girlfriend or anyone responding to the incident. There had been no history of any other conduct unbecoming or violence by the appellant. He had no prior major disciplinary infractions. As noted above, I found the appellant's testimony sincere and credible and have found as fact that this was an isolated incident, which occurred off duty. Moreover, the appellant immediately sought treatment for some issues related to his military service for which he was self-medicating and has been sober and in active counseling for seven years. The respondent has not demonstrated by a preponderance of the credible evidence conduct unbecoming or a violation of the rules and procedures of the department which would merit removal.

The respondent's final charge relates to a "30% disability award from the miliary" renders him unfit. However, respondent's present no evidence, or testimony, expert or otherwise as to what a thirty percent disability from the military means, or how and why this would render the appellant unfit for duty. Moreover, there was evidence and testimony that the respondent knew about this when they hired the appellant. There was quite a bit of discussion about whether there was disclosure of this in his application of employment. However, regardless of when the respondent learned of this, there was no evidence that the military disability award renders him unable to fulfil the duties of a police officer. Moreover, there are several references to disabled veteran status which were disclosed to the appointing authority prior to this incident. There is no evidence, much less a preponderance of the evidence that such a disability renders him unable to perform the duties of a police officer.

Having found that the appointing authority failed to sustain any of the charges alleges, a review of the concept of progressive discipline is not necessary but I will address it briefly in context of the removal sought by the respondent. If the Township had considered this issue seven years ago, the appellant would have served his penalty and returned to for an isolated off duty incident and returned to work. In this matter, the respondent not only failed to demonstrate any of the changes by a preponderance of the evidence, but they also failed to consider any mitigating factors in deciding the appropriate penalty to impose. To determine the appropriate level of discipline requires a de novo review of the disciplinary action to determine if the punishment is "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted).

New Jersey has an established system of progressive discipline to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is related to an employee's past record, and looks at the nature, number, and proximity of prior disciplinary infractions to determine the reasonableness of the penalty imposed. See In re Disciplinary Procedures of Phillips, 117 N.J. 567, 581 (citing West New York v. Bock, 38 N.J. 500, 523 (1962)). An employee's past record may not be used to prove the present charges, but it is to be considered when determining the appropriate penalty for the current offense. Ibid. An employee's past record may also include reasonably recent promotions and commendations as well as both formal and informal disciplinary actions. West New York v. Bock, at 524.

However, the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Progressive discipline may be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest—such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. 19, 33 (2007).

The conduct in this matter involves one off-duty incident which occurred on October 16, 2015. This incident was the appellant's first major disciplinary action after ten years on the police force. There were several mitigating factors surrounding the incident as well as appellant acknowledged off duty abuse of alcohol and successful treatment of same immediately following the incident. Despite the respondent's allegations of a pattern of behavior, which they failed to demonstrate, there was no allegation of any harm or threatened harm to any other person, no domestic violence charges and no pattern of behavior demonstrated. The appellant acknowledged a poor choice of words and a heated statement to his girlfriend during a telephonic argument which occurred when he was off duty and had been drinking. However, there was no altercation, the girlfriend was not even present, and the appellant went willingly to the crisis center and sought immediate help for the issue which led to the off-duty incident. The responding authority gave no consideration to the isolated nature of the incident, the mitigating circumstance or the opinion of their own doctor who rendered him fit to return to full duty.

CONCLUSION

Accordingly, I **CONCLUDE** that the respondent has not proven by a preponderance of the evidence that the appellant is unfit for duty or that his military disability rendered him unfit or prevents him from serving as a police officer. I further **CONCLUDE** that the incident on October 15, 2016, was an isolated incident which was related to an issue for which the appellant has sought successful treatment for and did not warrant removal under the progressive discipline standards in this jurisdiction. I further **CONCLUDE** that any conduct unbecoming or violation of the rules and regulations from this one isolated incident was mitigated by the circumstances and appellant's then disability, and he has more than served any appropriate discipline due to his removal from his job for seven years. Accordingly, the appellant is ordered to be reinstated as a police officer in Marlboro Township. Due to the waiver of the one-hundred-eighty-day provisions of the statue and the multiple adjournments and inactive status sought by the appellant in this matter, there shall be no back pay award.

ORDER

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sarah G. Crowley

December 6, 2022
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: December 6, 2022 (email)

Date Mailed to Parties: December 6, 2022 (email)

SGC/tat

APPENDIX

Witnesses

For Respondent:

Jonathan Capp

For Appellant:

Timothy Snyder

EXHIBITS

For Appellant:

P-5	Employment Application February 2005
P-22	Chief Hall Memorandum to Mr. Capp
P-23	Minor Disciplinary Action
P-43	Final Notice of Disciplinary Action
P-55	Department Rules and Regulations
P-24	Wall Township Police Report
P-25	Chief Hall's October 16, 2015, letter
P-26	Chief Hall's letter to Monmouth County Prosecutors' office
P-27	November 11, 2015, letter to Snyder regarding fitness for duty evaluation
P-28	November 17, 20215, letter from Dr. Richard Seely
P-29	December 11, 2015, email attaching Dr. Guller's fitness report
P-30	February 15, 2016, email from Hall to the Monmouth County Prosecutors' office

For Respondent:

*The respondent agreed to maintain the "P" references to the exhibits for ease of the record as all the respondent's exhibits were duplicates of "P" exhibits.

Joint Exhibits:

J-1 Joint Stipulations of testimony of Timothy Snyder dated, October 27, 2022