



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Efrain Martinez,
Clifton, Department of Public Safety

CSC Docket No. 2021-1136
OAL Docket No. CSV 02549-21

ISSUED: FEBRUARY 1, 2023

The appeal of Efrain Martinez, Police Officer, Clifton, Department of Public Safety, 90 working day suspension, on charges, was heard by Administrative Law Judge Ernest M. Bongiovanni (ALJ), who rendered his initial decision on December 15, 2022. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the 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 February 1, 2023, adopted the ALJ's Findings of Facts and Conclusion and his recommendation to modify the 90 working day suspension to a five working day suspension.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions filed by the appointing authority, the Commission agrees with the ALJ's determinations regarding the charges, which were substantially based on his assessment of the credibility of the witnesses. In this regard, 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 his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463.

In this matter, the Commission agrees with a reduction of the penalty. Clearly, the infraction committed, for a Police Officer, is serious and worthy of a suspension. Specifically, the appellant was found guilty of failing to keep identifying information of a citizen attempting to report a purported crime. The fact that the report was ultimately invalid does not make the appellant's failure any less serious. Nevertheless, for the reasons expressed by the ALJ, the five working day suspension is appropriate. Further, apparently underlying the ALJ's reasoning was that since the infraction, the appellant's performance improved. The Commission notes that aside from penalizing an employee for misconduct, discipline short of removal should be remedial. In the appellant's case, it appears that the originally imposed 90 working day suspension may have had that desired effect. While that penalty has been significantly reduced, the five working day suspension should continue to serve as a clear warning to the appellant that further misconduct could lead to more severe disciplinary penalties.

Since the suspension has been modified, the appellant is entitled to 85 working days of mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, he is not entitled to counsel fees. *N.J.A.C. 4A:2-2.12(a)* provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the

Commission, charges were sustained, and discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

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 are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore modifies that action to a five working day suspension. The Commission further orders that the appellant be granted 85 working days of back pay, benefits, and seniority. 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. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 1ST DAY OF FEBRUARY 1, 2023



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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSV 02549-21

AGENCY DKT. NO. 2021-1136

**IN THE MATTER OF EFRAIN MARTINEZ,
CITY OF CLIFTON, DEPARTMENT OF
PUBLIC SAFETY.**

Stuart J. Alterman, Esq., for appellant Efrain Martinez (Alterman & Associates, attorneys)

Michael J. Montanari, Esq., for respondent City of Clifton (Montanari Law Group, attorneys)

Record Closed: September 16, 2022

Decided: December 15, 2022

BEFORE **ERNEST M. BONGIOVANNI, ALJ**:

STATEMENT OF THE CASE

Appellant, Efrain Martinez (appellant/Martinez), challenges the Final Notice of Disciplinary Action (FNDA) of February 4, 2021 which determined that Martinez by his actions or inactions in dealing with a report of a possible crime, violated Clifton Police Department Rules and Regulations Section 3:1.1, 3:1.5(7), 3:1.5(10), 3:1.5(15), 3:1.5(16), 3:1.7, 3:1.10, 3:1.11, 3:1.13, 3:1.36, said acts allegedly also constituting violations of N.J.A.C. 4A:2-2.3m General Causes (a)1. Incompetency, inefficiency, or

failure to perform duties, (a)6. Conduct unbecoming a public employee, (a)7. Neglect of Duty, (a)12. Other Sufficient Cause, the result of which was a ninety-day suspension from his position as a Police Officer with the City of Clifton Police Department (the Respondent/City).

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 March 3, 2021. Hearings were held on March 31, 2022 and on June 10, 2022. The record remained open until September 16, 2022, for the parties to submit written summations, at which time the record was closed.

BACKGROUND

The issue in this case is whether there is sufficient credible evidence to sustain the charge or charges of Incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; Neglect of Duty, and other sufficient cause, and/or violations of Clifton Police Department's Rules and Regulations, based on Martinez's actions or failure to act, in the taking of a citizen's complaint while on desk duty at the Clifton Police Department on June 29, 2020, and if sustained, whether a penalty of a ninety-day suspension is warranted.

SUMMARY OF RELEVANT TESTIMONY

The Respondent's Case

The respondent argues that Patrolman Martinez mishandled a complaint by a Mr. Sandoval. Sandoval's complaint was that his son had his cell phone taken from him by a person or persons who then drove him to and left him at a ShopRite parking lot.

Sergeant Gary Giardina testified¹that at approximately 4:30 p.m., on June 29, 2020, he was asked to join two patrolmen, Hill and Valez, who were meeting Mr. Sandoval, the father of a juvenile at the scene of an alleged robbery on West First Street. The alleged crime occurred the evening before. The perpetrator(s) robbed Sandoval's son "at gunpoint."² When the officers asked why there was a delay in reporting the crime, Sandoval, who speaks only Spanish, explained to Valez his difficulty and/or confusion in reporting the crime. First, he had gone to Passaic Police Headquarters who explained to Sandoval that he should report the offense to the Clifton Police Department. According to Gardina, Sandoval explained to Valez that he was at the Clifton Police Department at around 10:00 a.m. and talked to the desk officer (Martinez) but Martinez "advised him to call back later." Upon hearing this, Gardina called Martinez, who was by then off duty and asked Martinez if he recalled a man coming to headquarters at 10:00 or 10:30 that day. Martinez, according to Gardina responded that the "[P]erson was not reporting a robbery and he advised him he was busy with some reports and to either wait or call back." 1T 24:13-16. Because Martinez's and Sandoval's explanations as to how the crime was reported differed, Gardina said that "as a supervisor I had to dig into it a little bit."

He did this first by checking just how many reports Martinez had "actually completed" and found there were only two, one which involved a domestic violence and request for a TRO. However, there were another six or seven which were incomplete or "pending/open."

Sgt. Gardina also testified that when he explained to Martinez that Sandoval had been trying to report a robbery, Martinez seemed "taken aback." He is saying "that's not what I understood it to be." Regardless of whether Martinez fully understood Sandoval, Sgt. Gardina thought it was inappropriate for Martinez to tell Sandoval that

¹ References to the transcripts of the hearings begin with 1T pertaining to the hearing which took place March 31, 2022 and begin with 2T pertaining to the hearing which took place June 10, 2022.

² The reference to robbery at gunpoint is mentioned in an email by Giardina to his supervisor Tovos, which mentioned an incident report; however, the incident report was never offered in evidence. However in the phone call from Sandoval to Martinez which Favio Tovos, fluent in Spanish translated Sandoval's actual words and at no point did Sandoval mention "at gunpoint" or refer to any weapons.

he (Martinez) was busy with reports and that he would have to wait unless he wanted to call back at 4:00 p.m.

On Cross examination, Gardina admitted there are times when the desk officer is a “busy” job. It varies but the day shift, the one Martinez was working is usually the busiest shift. The officer usually takes walk-in complaints and reports and “teleservice reports.” He is also in charge of the cell block. Giardina testified and the parties stipulated that at this point in time, during Martinez’s first year of service he was experiencing a “learning curve.”

At that time, owing to COVID protocols, people with complaints who arrived at headquarters were instructed to use the phone outside the building first to talk to officers within the building. That is where the conversation by Sandoval which Gardina translated for the court took place. The call has been recorded. Martinez told Gardina that the voice over this line was staticky. The recording of this call is and was in possession of the police Department. They chose not to use it as an exhibit to disprove Martinez’s claim that the call was staticky.

Under cross-examination, Giardina said Martinez never told him that he told Sandoval to come inside the building and wait. Rather he told Sandoval on the phone that he could “wait” or come back at 4:00 p.m. He did not take a written statement from Martinez.

Gardina wrote an email a few hours after responding to the scene, talking to Sandoval, talking to Martinez and checking Martinez’s reports for that day. Lieutenant Favio Toyos, requesting among other things, further investigation of Sandoval’s complaint. (R-9.)

Lieutenant Favio Toyos testified that Gardinia’s email to him expressed concern that Sandoval’s complaint was not handled properly because, a “report wasn’t taken in and the victim wasn’t afforded all his – all his rights as a victim.” Toyos testified he listened to the phone call Sandoval made from outside the Clifton Police building to

Patrolman Martinez's desk phone. Toyos, who testified he speaks Spanish fluently said, that as noted in his first report of this matter the call "clearly states in Spanish that his son was robbed. His cell phone was taken, and he was put into a car that dropped him off near ShopRite." Martinez recounted that there was some confusion as to the location of the incident and that the call showed Martinez told Sandoval to wait at the phone and then met the caller in person. Martinez supposedly told Sandoval he speaks very little Spanish, was busy and that he should call back again at 4:00 p.m.

On cross-examination, Toyos admitted that he could not verify that Martinez was able to hear everything Sandoval had to say over the phone, and that he was aware that Martinez hung up the phone so that he could have a face-to-face conversation with Sandoval.

Detective Joshua Eckert testified that he is in the special investigations division and in that capacity investigated the June 29, 2020 incident involving Martinez. The Detective listened to the phone call Sandoval had with Martinez. Because he is not bilingual he had a fellow Detective who is bilingual interpret the phone call. The Detective related that Martinez spoke Spanish throughout the call, and that when Sandoval said he was "here" meaning at the police building, Martinez told Sandoval "you can't be here you have to call." The Detective who interpreted the phone call told Eckert that she believed Martinez did not question Sandoval "properly." Eckert also checked Gardina's email of concern about how Martinez had handled the matter, and noted that Martinez told Gardinia that he was backed up with work, and that he told Sandoval to wait or to come back at 4:00 p.m.

Detective Eckert's investigation included talking to other officers who worked with Martinez on the date of the incident. They related that Martinez had submitted a report that had been rejected. Martinez was at that time either not fully familiar or not comfortable with handling Extreme Risk Protection Orders, (ERPO) which he was working on that day. Also that day a Lieutenant Kelly had noted that Martinez had teleservice reports that were outstanding, and Officer Diaz came off patrol to assist with those reports. Kelly's written report related that Martinez never said he needed

assistance to complete reports and he did not recall a report of a crime against a juvenile.

Eckert stated that Martinez wrote a report concerning Domestic Violence with a "time and number of 10:34 A.M." and "submitted it for review at 11:10. A.M." However, the "Verint" system software showed that Sandoval made his initial phone call which would have been received at the desk by Martinez at 10:24 a.m. This implied that Martinez was not busy with the Domestic Violence report when he first spoke to Sandoval. Eckert stated that Martinez told him he was "proficient" in Spanish. However, regarding what Sandoval told him regarding his son, Martinez told Eckert he was "able to understand Sandoval's Spanish but the content of the conversation was unclear to him." However, Detective Eckert said that based on what Martinez could understand he should have taken a written statement from Sandoval due to the allegation of possible robbery. Moreover, Det. Eckert did, however, concede that depending on the how fresh the complaint was, the domestic violence report that Martinez was working on may have been more serious than the report of the possible robbery kidnapping. Ultimately, however, in Eckert's opinion, Martinez did not "handle this situation properly".

Under cross-examination, Detective Eckert stated Martinez told Sandoval to "hang out a little bit." Further Eckert stated that Martinez was told by Sandoval that his son was home and safe notwithstanding the theft of his cellular phone and being driven to ShopRite. According to Eckert there is no evidence to the contrary. Further Eckert had no evidence to refute Martinez's claim that he told Sandoval to "come in, have a seat, I'll be with you." Detective Eckert never asked Sandoval why he did not wait at police headquarters after talking to Martinez. Nor did any other officer involved in the IA investigation ask this of Sandoval.

The Appellant's Case

Patrolman Efrain Martinez testified as his sole witness. His testimony follows:

He graduated the Police Academy in September 2019. After three months of field training, he became a probationary police officer in December 2019. After COVID restrictions were imposed in March 2020, many things changed in the manner of reporting of crimes in Clifton.

In June 2020, Martinez was on the day shift 7:00 a.m. to 3:00 p.m. He was assigned front desk duty. Only one officer mans that desk. He watches prisoners and does a lot of administrative paperwork. Regarding taking phone calls, teleservices are referred to as low priority calls that do not need an officer to make contact with that person immediately. He also answers the intercom for people seeking to enter the building and he controls that door.

Regarding Mr. Sandoval, Martinez had begun work on a domestic violence report for a victim who was in the building when a call came in, he believed from the phone outside the station. He knew the caller was speaking Spanish although there was a lot of interference- "crackling" -which made it difficult for Martinez to get details. He "wasn't 100 percent sure what the Spanish speaking man had to say so he asked him where he was, and the man said outside the station. Martinez walked about seventy-five feet to the front door and went out to talk to Mr. Sandoval in-person. Sandoval told Martinez he had first been to Passaic Police Headquarters. Sandoval told him that his son's cellphone had been stolen the prior night, at around 7:00 or 8:00 p.m. at the ShopRite in Passaic. He asked where his son was as he figured the son should give the story of what happened. Mr. Sandoval said his son was home. Asked if his son was ok, Sandoval said he's perfectly fine.

Martinez described himself as "proficient" in Spanish, understanding it "completely," and can hold a pretty decent conversation when it comes to speaking Spanish. He is not fluent or proficient enough to be an "interpreter."

Based on the fact that the theft occurred in the City of Passaic around fourteen hours earlier and it was a third party reporting it, Martinez asked Sandoval if he would come in and "hang out a bit" until he could get to him after finishing what he was

working on. The station at that time had a small table and “a whole bunch of chairs” in front of it. Martinez recalled how Sandoval reacted to his invitation to enter the building:

[Sandoval] acted like he didn't want to [come in] at all. He then asked if he could come in at a later time, I said that he could. He was also given that option again just come inside, sit down. It's going to be a little bit, but it's not going to be anything you know multiple hours, you're gonna have to sit there. I'm just going to finish tending to what I'm doing and then we can figure out your Passaic/Clifton situation.

Martinez also told Sandoval he could call headquarters later if he would rather go back home, and the call would be returned sometime that day. Martinez believed this was a matter of a stolen phone in the City of Passaic. Sandoval did not tell Martinez further what he wanted to do and just walked away.

Soon after his shift was over, and Martinez was home he got a “one minute” call from Sgt. Giardina who asked about the male party who had shown up at HQ that morning. He recounted to Giardina that Sandoval “told me his son's phone was stolen in the City of Passaic and he didn't want to wait.” Giardina said no that actually he was trying to report a kidnapping. After this one-minute conversation with Giardina, no one from the Department asked him to write a report regarding Sandoval, to give any explanation of his actions, that he gave Sandoval several opportunities to stay and talk more about the stolen cellphone and that Sandoval did not want to, that the theft had taken place fourteen hours ago, and that there was no sense of urgency on Sandoval's part. Instead there was no communication until IA pulled him in randomly off the road for an interview.

Martinez had another two years of experience as a police officer by the time of the hearing and when asked if he would have done anything differently, he openly admitted that he should have gotten Sandoval's complete name, phone number and address. That information in turn could have been put in their CAD system to check a history with names and addresses so that police could follow up. Instead he did not “write any sort of report about this incident of June 29.” On questioning if he ever found out what happened with Sandoval's complaint, Martinez said he found out “the juvenile

was hanging out with friends lied to his father because he didn't want to get in trouble-it was just some made up story by a teenager who didn't want to get in trouble." Nevertheless, Martinez admitted that with hindsight and with great regret he should have, at a minimum, taken Sandoval's name, phone number and address so someone could have contacted him after Sandoval chose to leave the police station. The 90-day suspension cost him \$35-40,000. He expressed no resentment and proper remorse for his imperfections. He also detailed some of his good service recommendation including a commendation, he has received since the suspension.

On cross examination, it was brought out that June 29, 2020 was not the first time he had worked the front desk, and Martinez testified he notified the tech services about the static on the phone. He reiterated that never did have information that kidnapping, or a robbery was alleged. He explained that while the Domestic Violence report starts with an entry at 10:34 a.m. at the top did not mean the woman reporting the DV came in at that time. Rather, she was handed a form to fill out concerning the incident and that when she returned it to Martinez he noticed she left the time at the top blank and filled in the time of 10:34 which was when she handed in the report. So he was well involved with the DV incident before Mr. Sandoval's call came in at about 10:20 a.m.

FACTUAL ANALYSIS

CREDIBILITY

When witnesses present conflicting testimony, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value that a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2D 718 (9TH Cir. 1963); see In Re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474

(1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 847, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witnesses, and credibility does not automatically rest on the party with more witnesses. In Re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middleton Twp. V. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

In this case, I found Patrolman Martinez to be highly credible. Despite having “everything but the kitchen sink” charges leveled at him, his testimony was direct, factual and to the point. I found all the officers to be truthful, but they were hampered to excessive reliance on hearsay, and double hearsay, some of which possibly should have been stricken or not allowed. They had, they said, a copy of a recording of the Sandoval phone call but did not produce it to show that there was no interference on it. They did not call Sandoval as a witness which could have possibly bolstered their credibility. Further I find that Giardina’s statement that Martinez seemed “taken aback” when told by him that they were looking at a robbery or kidnapping bolsters Martinez’s credibility in saying he did not understand completely what Sandoval told him on the phone. Finally none of the police officers asked Sandoval what he said to Martinez face-to-face but seemed to ignore that in favor of what they could hear was said on the phone. Yet Detective Eckert admitted he could not be sure what Martinez understood from that brief phone call.

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, I **FIND** the following **FACTS**:

1. Martinez was in his first year employed as a Clifton Township police officers when the events of June 29, 2020 occurred.
2. The parties stipulated that there is a "learning curve" that all police officers experience in their first year as a police officer.
3. At approximately 10:30 a.m., a Mr. Sandoval, a Clifton resident, went to the police department to report a crime against his son.
4. Sandoval's report came via a telephone outside the police department, where citizens were making initial reports instead of immediately being admitted into the building.
5. After a brief explanation over the phone which was only partly understood by Martinez who is "proficient" in Spanish, Martinez, not believing he completely understood Sandoval, invited Sandoval into the police department and asked him to wait while he was performing other desk duties such as writing a report on a domestic violence incident reported to him that day. I **FIND** that Martinez's recounting of his interaction with Sandoval occurred while he was working on a Domestic violence complaint and TRO application was truthful and consistent with the facts of Eckert's investigation.
6. After being given entirely appropriate options by Martinez, Sandoval, rather than waiting and without explanation left the department.
7. Sandoval again called around 4:00 p.m. and spoke to another Clifton police officer who was on a later shift. By that time, Martinez was off duty.
8. Officers Giardina, Hill and Velez responded to Sandoval's call. Sandoval said that the officer on desk duty at 10:30 told him to call back later.
9. When questioned about it, Martinez stated that after not really understanding everything Sandoval was trying to say over a staticky phone he spoke to him face-to-face learned that his son's cellphone had been taken away from him while he was at ShopRite in the City of Passaic. This had occurred some fourteen hours ago. His son was not with him, but was rather at home and well.

10. Martinez believed he was looking at a report of a stolen phone from fourteen hours ago that occurred in a different City and that the police in Passaic probably erroneously told Sandoval to report the theft in Clifton simply because he resided there. In any event, he asked him to wait a while before he could talk to him some more about it or he could call it in from home or come back later if he did not want to wait. Sandoval chose to leave without apparently any other comment to Martinez.
11. I **FIND** that Martinez was credible, and I believe he did not understand Sandoval to be talking about robbery, armed or not, or kidnapping, attempted or not, but rather that Sandoval was complaining about his son's stolen phone which occurred in a ShopRite in Passaic City.
12. Further Sandoval told Sgt. Giardina that he called at 4:00 p.m. as the desk officer had told him to, and three officers were addressing his complaints after about a five-hour delay. They found out the son was not kidnapped but was home safe, there apparently was no gun, and soon enough would learn that the entire story was phony, having been made up by Sandoval's son, so it is perhaps understandable that Mr. Sandoval did not testify. The City chose not to produce the "incident report" of their interactions with Sandoval nor the phone call recording between Sandoval and Martinez or an exact transcription of the phone call recording.
13. The Special Investigations Division report (R-4) concluded "the level of culpability of P.O. E. Martinez's actions could be questioned with his claims of not fully understanding Mr. Sandoval", but that "[t]ranslations of the phone conversation . . . revealed his son did state he was victim of a crime" In response, the report said, Martinez only offered Sandoval the option to sit and wait or call back at another time. The report specifically cited City of Clinton's Police Department Rules and Regulations 3.15 and three subsections, one of which requires that officers "perform their duties promptly faithfully and diligently."

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 Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee’s prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, 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)).

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” 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.” Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. 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.”

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when “respondent has not given any substance to the allegation.” Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm’r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/>. Other sufficient cause is an offense for 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.

As noted in respondent's post hearing brief, the City of Clifton thinks Martinez's lack of action, was so "egregious" as to warrant the 90-day penalty. It neglects to say just how his lack of action fits squarely into the definition of "neglect of duty," "conduct unbecoming," "other sufficient cause," "incompetency, inefficiency or failure to perform duties." In any event I fail to find any basis that Martinez's lack of action (perhaps lack of initiative) proves any of those charge, unless by failure to perform duties for example, means failure on one occasion to not perform perhaps to the best of your ability and training, even where your actions caused no harm except to give more work to the next shift, which apparently happened here. I note with concern the City chose not to produce the "incident report" of those officers' interactions with Sandoval nor the phone call recording or an exact transcription of the phone call recording.

I **CONCLUDE** by the clear preponderance of the evidence that Martinez violated the Clifton Police Department Rules and Regulations 3.1.5 subsection 15, which is cited in the Special Investigation Report (R-4, page 10) by failing to "perform his duties promptly faithfully diligently," because by his own admission, Martinez failed to keep identifying records of Sandoval before Sandoval hastily left police HQ which caused a possible delay in processing what turned out to be, however, a phony complaint.

Accordingly, I **CONCLUDE** that Martinez violated the City of Clifton Police Department's Rules and Regulation 3.15 subsection 15 and that he did not otherwise commit any offense and therefore I dismiss all other charges.

PENALTY

On appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, 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)).

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.

Thus, short of removal, the penalty of 90-day suspension imposed on Martinez is one-half the maximum suspension it could issue. This is the first disciplinary finding Martinez had no previous disciplinary history except for two performance deficiencies that seem not to have been repeated. Since this incident, it seems undeniable his performance has improved (P-5, Performance Evaluation) and he received a Commendable conduct Notation in February 2022 (P-6). Further, I find the requested 90-day suspension, or half the maximum suspension to be far too disproportionate to the offense and not appropriate to the goals of progressive discipline. Accordingly, I **CONCLUDE** and impose a proportionate penalty of a five working days suspension as the appropriate penalty. This penalty will both adequately encourage the employee to

work harder to avoid infractions and at the same time better advance the goal of progressive discipline than the harsher 90-day suspension.

ORDER

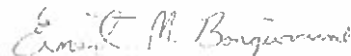
I **ORDER** that the charge of violation of Police Rules and Regulations 3.1.5, subsection 15 by failure to perform his duties promptly faithfully diligently, in not keeping identifying records or a would-be complaint be sustained, and all other charges dismissed, and that the action of the respondent imposing a ninety-day suspension on the appellant is hereby **MODIFIED** to a five-day suspension. It is further **ORDERED** that Martinez be recredited for any time, credits, or other benefits lost beyond the five days 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.

December 15, 2022



DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

12/16/22

Date Mailed to Parties:

12/16/22

id

APPENDIX

LIST OF WITNESSES

For Appellant

Efrain Martinez

For Respondent

Sargent Gary Giardina

Lieutenant Favio Toyos

Lieutenant Joshua Eckert

LIST OF EXHIBITS IN EVIDENCE

For Appellant

P-1 Martinez Field Training and Evaluation Program report 10/7/19 -10/11/19

P-2 Field Training Daily Observation report for 11/05/19

P-3 June 29, 2020 report of alleged robbery of juvenile on June 28, 2020

P-4 June 29, 2020 supplemental report advising that report of alleged robbery was a false report

P-5 Martinez employee evaluation report for 2021

P-6 Commendable conduct report for P.O. Martinez occurring 2/13/22

For Respondent

R-1 Preliminary Notice of Disciplinary Action, dated 9/25/20

R-2 Final Notice of Disciplinary Action dated 2/04/21

R-3 Clifton Police Dept. Rules and Regulations, effective 7/29/20

R-4 Special Investigation report dated 9/10/20

R-5 Certificate of completeness of Training of P.O. Martinez dated 9/23/19

R-6 Performance Deficiency notice of P.O. Martinez dated 6/30/20 (failing to note he was outside his jurisdiction)

R-7 Performance Deficiency Notice dated 8/11/20 (entering log of missing

Person two hours after it being reported to him)

- R-8 Report that Martinez went to “wrong Lebanese restaurant” on noise complaint
- R-9 Emails in chain of command regarding the incident (subject matter), dated 6/29/20