



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Gerardo Colon,
Union City, Department of Public
Safety

CSC Docket No. 2023-1029
OAL Docket No. CSV 10581-22

ISSUED: JANUARY 15, 2025

The appeal of Gerardo Colon, Police Officer, Union City, Department of Public Safety, 10 working day suspension, on charges, was heard by Administrative Law Judge Joann LaSala Candido (ALJ), who rendered her initial decision on December 4, 2024. Exceptions were filed on behalf of the appellant and a reply was 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 15, 2025, remanded the matter to the Office of Administrative Law (OAL) for further proceedings.

Below, the ALJ's disposed of the appellant's assertion that the "45-day rule" (*N.J.S.A. 40A:14-147*) had been violated, on grounds that he waived that defense. Specifically, although the ALJ found that the charges against the appellant were not timely filed under that statute, because the appellant raised that argument for the first time in his post-hearing brief, it was waived.

Because a hearing on the merits of the charges has occurred, and the statutory argument regarding the 45-day rule was made only thereafter, the appointing authority did not have the opportunity to present documentary or testimonial evidence regarding that issue. In this regard, the present record does not specifically indicate via documentary or testimonial evidence the exact date that the person with the authority to file the charges, generally acknowledged to be the Police Chief,

obtained such information, thus starting the 45-day rule's clock.¹ Further fact finding is thus needed. Specifically, the ALJ should reopen the matter and permit testimony or other evidence pertaining to whether the 45-day rule was violated. Following that evidentiary hearing, the parties shall brief both the issue of whether the 45-day rule was waived by the appellant and whether it was violated by the appointing authority. The ALJ shall issue an initial decision deciding both issues for consideration by the Commission.

To be clear, in remanding this matter for proceedings consistent with this decision, the Commission reserves decision on the question of whether the 45-day rule was waived by the appellant.

ORDER

The Civil Service Commission remands this matter for further proceedings as described above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF JANUARY, 2025

Allison Chris Myers

Allison Chris Myers
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

¹ The ALJ found September 9, 2020, as the operative date that the infractions were known; however, the Commission does not find sufficient evidence in the record to support this finding of fact.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 10581-22
AGENCY DKT. NO.2023-1029

**IN THE MATTER OF GERARDO COLON CITY
OF UNION CITY, DEPARTMENT OF PUBLIC
SAFETY**

Lauren Sandy, Esq., for appellant Gerardo Colon (The Law Offices of Lauren Sandy, LLC)

Kenneth B. Goodman, Esq., for respondent the City of Union City (O'Toole Scrivo, LLC)

Record Closed: November 18, 2024

Decided: December 4, 2024

BEFORE **JOANN CANDIDO, ALAJ**:

STATEMENT OF THE CASE

Appellant, Gerardo Colon (Colon), a Police Officer with the Union City Police Department (UCPD), appeals a 10-day suspension he received as a major discipline for involvement in a motor vehicle accident while on-duty and the subsequent Internal Affairs investigation. UCPD found Colon at fault and determined he violated Union City Police

Department Rules and Regulations 8:1.40, Failure to properly care for assigned equipment and vehicles, damaging same due to neglect. Colon denied being at fault and submitted that he acted appropriately due to the emergent nature of the call for assistance.

PROCEDURAL HISTORY

On November 11, 2020, UCPD issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charge and specifications made against Colon. Following a hearing on December 9, 2020, UCPD issued a Final Notice of Disciplinary Action on October 31, 2022 sustaining the charges in the PNDA and suspending Colon from employment for 10 working days. The matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on November 28, 2022 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

The OAL hearings were on December 19, 2023, and April 10, 2024, before Administrative Law Judge Jude-Anthony Tiscornia. On or about September 1, 2024, Judge Tiscornia was appointed to the Superior Court of New Jersey and was unable to render an Initial Decision. On September 18, 2024, a conference call was held and the parties agreed to the matter being reassigned to Administrative Law Judge JoAnn Candido to render an initial decision based upon the written transcripts, exhibits marked into evidence, and all other material contained in the record. N.J.A.C. 1:1-14.13(a) and (b). The record remained open to allow the parties to submit post-hearing briefings. The City requested additional time to respond to an issue brought to their attention in Appellant's brief and I kept the record open until November 18, 2024. Respondent did not submit additional information, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The following facts are not in dispute. On September 2, 2020, at approximately 5:16 p.m., Officer Colon was on-duty in Union City when a 10-2 code was called. 10-2 is

the code for "officer needs assistance" and requires an urgent response. Colon turned on his lights and sirens and began answering the call, driving north on Hudson Avenue. Officers Peña and Steinhilber also heard the 10-2 call and were stopped in a line of traffic at a red light on 36th Street directly west of the intersection with Hudson Avenue. There were three cars between them and the light. Peña and Steinhilber immediately put on their lights and sirens. The car at the front of the line, a black Honda (Honda), pulled into the intersection. It is not disputed that the Honda did so against a red light. At the same time, Colon approached the intersection going approximately 57-58 mph. Colon had a yellow light as the Honda pulled out, but the light turned red before he drove through the intersection. The video footage and the Bosch Crash Data Retrieval Report (Bosch Report) indicate that Colon began braking about one second before impact. R13, R5. Colon drove through the red light at approximately 41 mph and collided with the Honda. Both cars spun out, damaging five parked cars. Colon was not wearing his seat belt and was knocked unconscious. Officers Peña and Steinhilber got out of their patrol car and began managing the scene. Colon and the driver and passenger of the Honda were all injured and taken to the hospital by ambulance. Because of this incident none of the three officers were able to respond to the 10-2 call.

Summary of Testimony

When a hearing ALJ is unable to issue an initial decision because of departure from State employment, another ALJ may issue the initial decision so long as:

The judge is able to familiarize himself or herself with the proceedings and all testimony taken by reviewing the transcripts, exhibits marked in evidence and any material which are contained in the record; and

The judge determines that the hearing can be completed with or without recalling witness without prejudice to the parties.

[N.J.A.C. 1:1-14.13].

In accordance with this statute, I have reviewed all the transcripts and exhibits, and I find all parties to be credible.

Captain Michael Bergbauer testified on behalf of Union City. He concluded that Colon's "high rate of speed was the cause of the accident" and that he was in violation of UCPD policies regarding the operation of a motor vehicle.

Bergbauer has been a police officer with the Union City Police Department since 2004 and a captain since 2021. His current title is Patrol Division Commander. In September 2020 he was the Internal Affairs Commander. Bergbauer testified that he was in the area of the accident on September 2, 2020, arrived on the scene within ten minutes, and assisted with the gathering of evidence for the investigation. He gathered the bodega video surveillance footage, R13, and ordered the scene investigator to begin investigating. He testified that he reviewed the bodega video surveillance footage, the Union City Police Department General Order: Vehicle Operation and Call Response Guidelines and Union City Police Department Memorandum: Proper Use of Seat Belts Required (UCPD Call Response Guidelines), and the Bosch Report. R2, 5 and 13. He interviewed Officers Colon, Steinhilber, and Peña and signed off on the Internal Affairs report. R8.

Bergbauer testified that Colon's high rate of speed was "egregious" and the cause of the accident. He said it was "not how we train our officers here to drive in such a situation in such a densely populated area" and that Colon was not operating his vehicle in compliance with policy. He stated that the speed limit in Union City is 25 mph and that, based on the Bosch Report, Colon was going 57 mph right before the accident. R5. He also testified that the Hudson County Prosecutor's Office got involved with the case due to the severity of the injuries.¹

Bergbauer conceded that officers are allowed to exceed speed limits and go through red lights, but only when it is safe per UCPD policy, which requires officers to respond to calls in a diligent but safe manner. He testified about UCPD Call Response Guidelines, R2, saying that:

[i]t appears the paragraph in three different ways says that when responding to calls for service you must respond diligently but yet in a safe manner. It says it over and over

¹ No charges were filed.

again—you must respond to the call for service in a safe manner taking the consideration, the conditions of the roadway.

He also conceded that Colon was responding to a 10-2 and the Honda may have gone against a red light but that it made no difference “[b]ecause it’s a congested area. We’re listed as one of the most densely populated areas in the nation. You cannot go that speed on a roadway like that, it goes against our policy and our memorandum.”

Lieutenant Christopher Rengel testified on behalf of Union City. Rengel is a UCPD police officer with over 9 years of patrol experience. He is currently assigned to the Communications Division. In September 2020 he was a sergeant on patrol assigned to temporarily assist Internal Affairs and wrote the Internal Affairs report regarding Colon’s accident. R8.

Rengel testified that Colon was not in compliance with the UCPD Call Response Guidelines because of his speed. R2. Additionally, during his investigation, he found that Colon went through the red light and that it had turned red about “two car lengths” before he went through the intersection. Rengel testified that it did not matter whether the Honda entered the intersection legally or illegally because Colon was going too fast for the surroundings. He further stated that responding to an emergency does not relieve an officer of their duty to drive safely and with caution.

Rengel conceded that a 10-2 is a significant call and “not one we’d like to hear, but it is one that we know that if it’s called out, we need to get there as quickly and safely as possible.” It does not, however, relieve an officer of their obligations under the UCPD Call Response Guidelines. R2. Rengel found that Colon’s speed was “egregious” and “over the amount of what’s tolerated” because the speed limit on Hudson Avenue is 25 mph, and “he was going close to 58 miles per hour.”

Rengel acknowledged that officers are legally allowed to exceed the speed limit and go through red lights, both of which he has done in his time as a patrol officer.

However, he stressed that officers still need to use caution while going through red lights, intersections, and stop signs. He testified that when officers approach a red light they must "stop to make sure the intersection is safe before proceeding through."

Bruce Kuipers testified as an expert on behalf of Union City. Kuiper is a certified accident reconstructionist through Northwestern University and currently works for John Desch Associates. He has trained extensively and has been working as a reconstructionist for twenty-six years. Before that, he was a police officer for 25 years in Mahwah, New Jersey and worked on the road for 15 of those years. He concluded that Colon's excessive speed was the cause of the accident and that Robert Klingen's report was biased and without scientific impartiality. He concluded that this was a preventable accident.

At different points during his police career he investigated accidents, was part of a two-officer team that investigated township vehicle accidents, was a member of the Burgen County Prosecutor's Office Fatal Accident Investigation Unit, investigated accidents that could or would result in criminal prosecutions, and for about ten years was the Mahwah Police Internal Affairs officers. He testified that during his time in Internal Affairs he worked on a few motor vehicle accidents involving damage to police vehicles and personal injury.

Kuiper co-authored the accident report. R17. He testified that they were hired for two purposes: to reconstruct the accident and to analyze Klingen's report for the purpose of critiquing its validity. Kuiper testified that, having reviewed all the documents and videos, this was a preventable accident and that Klingen's report was biased and without scientific impartiality.

Kuiper testified as to dashcam footage recovered from a parked car, observing that Colon "applied the brakes very hard" and "skidded" into the intersection. R13. He testified that the Bosch Report showed about one second before impact Colon was driving "around 57 mph" which was "over double the speed limit" and that he didn't initiate hard breaking

until "he was about one second away from impact." R5. He acknowledged that Colon was going 41.8 mph upon impact. Further, he stated that the white van on the southwest corner of Hudson Avenue and 36th Street, as seen in the dashcam footage, created a visual obstruction that would be grounds to slow down to make sure nobody was coming through the intersection. R13. In Kuiper's opinion, Colon should have taken a "much slower approach" based on the surroundings.

Kuiper observed on the dashcam footage that Colon's light turned yellow before he got into view of the video and that it turned red right around the time of the impact. R13. He observed from the video footage that the Honda's traffic light was also red when it started moving into the intersection. His report stated that:

[a]nticipating that another driver may enter an intersection against a RED light cannot be dismissed by any police officer, especially one traveling at over the double the speed limit while approaching a YELLOW traffic signal.

[P1 at p. 7, ¶1].

Kuiper also testified about 10-2 claims, acknowledging that an "officer needs assistance call is top priority" and requires an "urgent response." He also stated that the 10-2 call did not allow Colon to drive 57 mph on a 25-mph road because "the other side of the coin is to assist the officer that's requesting assistance" and to do that "you have to get there." When asked if Colon operated his vehicle "reasonably and safely" he said

A: No, sir.

Q: And why not?

A: Well, the excessive speed and the fact that he's going well over double the speed limit at rush hour, 5:15. The videos show that there's heavy pedestrian traffic, so it's a densely populated area, the streets are narrow here and I'd have to say that at that speed it's excessive even for that kind of response.

Kuiper testified that during his investigation he went to the intersection of Hudson Avenue and 36th Street, observing that "36th Street is, obviously, very tight . . . Hudson was a little bit wider."

Kuiper confirmed prior testimony that officers are allowed to go through red lights when they use their lights and sirens and that civilian vehicles are supposed to yield, but must do so reasonably, safely, and in accordance with department policies. He based this opinion off personal experience and from reading the UCPD Call Response Guidelines. R2. He also testified that, in his experience, how fast an officer can go depends on the circumstances.

I think there's a limit where it became less beneficial to get there at a higher speed based on conditions. You know . . . if I'm on 287 in Mahwah and I get to an accident call and there's nobody in front of me, naturally, that's going to warrant a higher speed than if I'm on Franklin Turnpike in Mahwah where there's heavy traffic and a lot of traffic lights.

Finally, in his report, he concluded that Colon was not wearing his seat belt, a violation of UCPD Memorandum 2014-264: Proper Use of Seat Belts Required (UCPD Seat Belt Policy). R2, 17.

Robert Klingen testified as an expert on behalf of Colon. Klingen is a senior accident reconstructionist and a police procedures expert with Klingen Kelly Associates. He is the Vice President of the Jersey Association of Accident Reconstructionist, a member of the New York Society of Traffic Accident Reconstructionist, and an associate member of the Society of Automotive Engineering. He has trained extensively in the field of accident reconstruction. Klingen concluded that the accident was caused by the Honda entering the intersection against a red light, and that Colon was operating his vehicle in good faith and in a safe and controlled manner in accordance with department policy.

In 2006 he retired as Police Chief from the Midland Park Police Department. During his time on the force, he was a traffic safety officer and was responsible for overseeing accident investigations in the township, including those that were serious or fatal. He also served on the Bergen County Prosecutor's Fatal Accident Investigation Team for thirteen years.

Klingen performed an independent accident reconstruction analysis of Colon's accident, reviewed all evidence, and wrote an expert opinion. He concluded that the Honda caused the collision.

This crash was clearly caused by a civilian driver that drove her vehicle into an intersection under a red light, directly into the path of Officer Colon who was responding to an emergency request for officer assistance, a 10-2 call which is basically the most urgent type of call an officer can respond to.

He testified that Colon did not have time to stop for the Honda because it pulled out in front of him within two seconds of the collision. In his opinion and experience, it is very rare for a driver to run a red light at the beginning of the signal, it is much more common for civilians to run red lights just after the yellow cycle.

[Colon] entered the intersection just after the end of the yellow phase but during the two second all red clearance phase [and] had the civilian driver not pulled into the intersection in front of his vehicle he would've cleared the green signal.

Had [the Honda] stayed stopped for the traffic signal and waited two more seconds for it to turn green she would've cleared the intersection, or he would've cleared the intersection, and no crash would've taken place.

Klingen conceded that the Internal Affairs report said Colon was at fault but testified that the report lacked the necessary information about the Honda entering the intersection under a red light for the Police Chief to make a fully informed decision. He did not deny that Colon also went through a red light.

Klingen testified about the urgency and nature of 10-2 calls, stating that they are uncommon and the "highest priority call that an officer can respond to" and can indicate a life-threatening situation. In his opinion, the severity of a 10-2 call permitted Officer Colon to "exceed the speed limit and pass through the red signal."

From Officer Colon's perspective and anybody else responding to that call, it's an escalating situation, right? Each time there was a radio transmission it seemed like the situation was becoming more and more dire, and then after

the 10-2 was called there was a transmission that said, "expedite," so it's clear that he was responding to a call that a very reasonable conclusion would be that one of his brother or sister officers was in trouble."

Klingen testified that Colon's actions "were the result of a good faith effort on his part to respond to an-officer-needs-assistance call in which the situation was escalating. I think he was operating his vehicle in good faith to try to get to his officers." He conceded that under normal circumstances 57 mph is not a suitable speed for Union City roads, but considering the circumstances that existed at the time it was safe and necessary.

As Officer Colon approached the intersection, he was traveling approximately 57 to 58 miles per hour. The roadway straight, the weather was clear, the road was dry. . . .

I was able to determine that at the time Officer Colon entered the intersection he had reduced his speed from middle to upper 50's down to 41 miles per hour as he entered the intersection. . . . The video shows that he was covering his brakes, you can see his brake lights illuminated. He was following – basically complying with the fact you're supposed to reduce your speed when you're going through an intersection.

Finally, Klingen testified about the handicap parking spot on the southwest corner of Hudson Avenue and 36th Street, where a white van was parked at the time of the accident. The white van created a blind spot for both Colon and the Honda. He speculated that Union City had put the spot there in "direct violation" of the Manual Uniform Traffic Code, which indicates that no vehicles can park within 25 feet of a crosswalk. As the Chief of Police, he would "not permit" a parking spot to be "that close to a crosswalk."

FINDINGS OF FACT

The facts of this case are not in dispute. Both parties agree that Colon was going 57-58 mph with his lights and sirens on, applied the brakes, went through a red light, and hit the Honda at approximately 41 mph. Both parties agree that the Honda entered the intersection against a red light. Both parties agree that a 10-2 is one of the most urgent calls a police officer can get. The only dispute is whether driving 58 mph in Union City at

rush hour and running a red light at 41 mph is a violation of UCPD's Rules and Regulations.

In view of the above credibility determinations, I make the following **FINDINGS** of critical **FACTS**:

1. On September 2, 2020, at approximately 5:16 p.m., a Union City EMT (emergency medical technician) put out a 10-2 call. 10-2 means an officer needs assistance and requires an urgent response.
2. At the time of the 10-2 call, police officer Gerardo Colon was on-duty in his patrol vehicle driving north on Hudson Avenue towards 36th Street. When he heard the 10-2, he activated his lights and sirens and began responding to the call.
3. At the same time, Officers Peña and Steinhilber were on-duty and in their patrol vehicle facing east on 36th Street. They were stopped in a line of traffic behind a red light at the intersection of Hudson Avenue and 36th Street. The first car in that line of traffic was a black Honda.
4. Peña and Steinhilber activated their lights and sirens when they heard the 10-2 call.
5. After Peña and Steinhilber activated their lights and sirens, and for reasons unknown in this proceeding, the black Honda pulled out into the intersection against a red light.
6. Moments after the Honda pulled into the intersection, Colon drove through the intersection, colliding into the Honda.
7. Five seconds before the collision Colon was driving approximately 58 mph.
8. One second before the collision Colon applied the brakes and was going approximately 41 mph at impact.
9. Colon entered the intersection against a red light.
10. Hudson Avenue and 36th Street are local streets with a speed limit of 25 miles per hour. They are crowded and narrow, with no turning lane

or shoulder. They are surrounded on each side by sidewalks, homes, and businesses. It is a crowded area with substantial pedestrian traffic. Cars can park on both sides of each street and there is very little shoulder room.

11. Police Officers are legally allowed to exceed the speed limit and go through red lights when answering emergency calls, but UCPD policy requires them to do so in a safe and controlled manner, recognizing that police have a responsibility to the public to ensure that, in responding to an emergency, they do not create a greater public health hazard.
12. Driving on Hudson Avenue at 58 mph and driving through a red light at 41 mph is not safe or controlled.
13. Colon violated UCPD Rules and Regulations 8:1.40, Failure to properly care for assigned equipment and vehicles, damaging same due to negligence.
14. Colon violated UCPD Policy by not wearing his seat belt while driving.

LEGAL ANALYSIS AND CONCLUSIONS

45-Day Rule

As a threshold issue, Colon argues that this case should be dismissed because Union City failed to bring charges within 45 days of the conclusion of the internal affairs investigation. However, the first time that Colon raised this argument was in a post-hearing briefing and therefore he waived the right to raise it as a defense by not raising it before or during the administrative hearings.

A complaint charging a violation of law enforcement rules and regulations must be filed no later than 45 days after the complaining party obtains sufficient information to file the complaint. N.J.S.A. 40A:14-147; Roberts v. State, Div. of State Police, 191 N.J. 551, 554 (2007). The Civil Service Commission has held that a "failure to comply" with the 45-day rule "requires a dismissal of the complaint." Fabian v. Town of North Bergen, CSV

3198-97, Final Decision, Merit Sys. Bd.² (Dec. 2, 1998), <<https://njlaw.rutgers.edu/collections/oal/final/csv3198-97.pdf>>.

The question of what constitutes “sufficient information” is a fact-specific inquiry. In McCormick v. Lawrence Twp., charges were brought within 45 days of the conclusion of an internal affairs investigation. McCormick v. Lawrence Twp., CSV 6319-00, Initial Decision (September 21, 2001), rejected, Merit Sys. Bd. Ibid. (Dec. 27, 2001), <https://njlaw.rutgers.edu/collections/oal/html/initial/csv6319-00_1.html>. The ALJ dismissed the charges under the 45-day rule, finding that the internal affairs investigation was unnecessary because sufficient information and evidence existed before the investigation. Ibid. The Civil Service Commission rejected the ALJ’s ruling, finding that the 45-day rule does not “prohibit an appointing authority from doing a proper investigation into a matter to determine whether disciplinary charges are necessary and appropriate.” McCormick v. Lawrence Twp., CSV 6319-00, Final Decision, Merit Sys. Bd. (Dec. 27, 2001), <<https://njlaw.rutgers.edu/collections/oal/final/csv6319-00.pdf>>.

Colon’s collision was on September 2, 2020. The Hudson County Prosecutor’s Office Supplemental Report was filed on September 9, 2020, and approved on September 14, 2020. R4. The UCPD Internal Affairs report was filed on September 9, 2020, with additional entries on September 15, 16, 18, 21, 29, and 30. R8. The additional entries are about the Honda driver’s attempts to retrieve her car and personal belongings, except for the September 29 entry about a tort claim notice. R8. Because the additional entries do not pertain to the investigation, I **CONCLUDE** that the UCPD had sufficient information for a claim by September 9, 2020. The PNDA, dated November 11, 2020, was filed 71 days later.

There are instances of charges being dismissed for a 45-day rule violation after an administrative hearing, but none of them deal with the issue of whether the 45-day rule is an affirmative defense so binding case law does not provide much light on this specific question.

² The Civil Service Commission was previously known as the Merit System Board.

Because of the lack of binding case law on this specific question, we turn to another area of law for guidance. Here, statute of limitations jurisprudence is instructive because the “requirement for the filing of the complaint under N.J.S.A. 40A:14-147 [the 45-day rule] is analogous to the running of the statute of limitations.” Grill v. City of Newark, 311 N.J. Super. 149, 157 (Law Div. 1997). There, Grill argued that the law was violated because he was not served the complaint within 45 days of City of Newark Police Department obtaining sufficient information. Id. at 156. The court found that the 45-day rule had not been violated because the language of the statute required that the complaint be “filed” no later than the 45th day and because “in civil actions the statute of limitations is satisfied by the filing of the complaint with the court, even though service of the summons and complaint takes place after the running of the statute.” Id. at 157, citing N.J.S.A. 2A:14-35; Grubb v. J.C. Penny Co. Inc., 155 N.J. Super. 103, 105 (App. Div. 1978).

Statutes of limitations are not self-executing and must be raised by way of an affirmative defense or they are waived. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 500 (2006). Even an “obvious statute-of-limitations defense” is waived when it was “neither pleaded in defendant’s answer nor raised in defendant’s motion for summary judgment” or when it was not “adverted to by either party at any stage” of the proceedings. Fees v. Trow, 105 N.J. 330, 335 (1987). The policy goals of protecting parties from defending against stale claims are no longer in play after they have finished defending their case in court or in a hearing.

The 45-day rule is analogous to a statute of limitations and therefore is an affirmative defense that must be raised prior to any departmental or administrative proceedings. The goal of the 45-day rule is to protect civil servants from having to defend against stale claims. But here, Colon defended the merits of his case vigorously and thoroughly over the course of a two-day hearing without once mentioning the 45-day rule violation. Only at the very end of his post-hearing brief (after again arguing the merits) did he raise this issue.

Therefore, I **CONCLUDE** that the UCPD violated N.J.S.A. 40A:14-147 by failing to bring charges against Colon within the statutorily required 45 days. However, I also **CONCLUDE** that the 45-day rule is an affirmative defense and must be raised before any hearings on the merits. Colon defended this charge on the merits and did not assert a 45-day rule defense until post-hearing briefings, and therefore it is **WAIVED**. I **CONCLUDE** that the charge will not be dismissed because of the 45-day rule violation.

Colon's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2. In cases involving major discipline, the appointing authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Phillips, 117 N.J. 567, 575 (1990). 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).

The sole issue here is whether the actions of Colon's violated the UCPD Rules and Regulations outlined in 8:1.40, Failure to properly care for assigned equipment and vehicles, damaging same due to neglect. The action and intentions of the other parties—the Honda driver as asserted by appellant as well as the EMT who called the 10-2, and the City that may have illegally put a handicap parking spot on Hudson Avenue—are irrelevant. The Honda driver is not a party or witness to this case and any attempt to determine why she entered the intersection against the red light is not useful.

Police officers are legally allowed—under certain conditions—to violate traffic laws by going through red lights or exceeding the speed limit. N.J.S.A. 39:4-91(a); Rekiec v. Zuzio, 132 N.J. Super. 71, 80 (App. Div. 1975); Finderne Engine Co. v. Morgan Trucking Co., 98 N.J. Super. 421 (App. Div. 1968). They do not, however, have the right to drive recklessly or without regard for safety.

This section **shall not relieve** the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall it protect the driver from the consequences of his reckless disregard for the safety of others.

[N.J.S.A. 39:4-9(b) (emphasis added)].

The UCPD also requires officers to drive in a safe and controlled manner when responding to emergencies.

The purpose of this general order is to provide personnel with clear guidelines for responding to calls for service As a general rule, **no matter how urgent** the call for service, officers are **required to operate department vehicles in a safe and controlled manner at all times**, while taking into consideration the characteristics of the roadway, weather conditions, and the potential actions of other citizens. **The first priority of call response is to arrive safely at the scene with minimal disruption to the public.**

[UCPD Call Response Guidelines. R2. (emphasis added)].

The UCPD Call Response Guidelines take into consideration that “non-specific” calls may result in “uncoordinated, insufficient” or even “overwhelming” responses from officers which may pose a “greater hazard to life and property than that of the original incident.” Ibid. Therefore, officers responding to emergency calls must “ensure that their actions do not create a greater public hazard” than the incident itself. Ibid.

Additionally, the UCPD Seat Belt Policy requires all officers to wear a seat belt while driving, in accordance with state law. N.J.S.A. 39:3-76f(a); UCPD Seat Belt Policy, R2. This policy protects the health and safety of officers and prevents staffing shortages and unnecessary medical costs. UCPD Seat Belt Policy, R2. Officers who do not wear a seat belt “will be subject to disciplinary action.” Ibid.

There is no doubt, and neither side disputes, that Union City police officers are legally allowed to drive faster than 25 mph on Hudson Avenue when responding to an emergency call—but they must do so in a safe and controlled manner. The UCPD Call Response Guidelines do not give a specific number by which officers can go above the

limit, but the testimony at the hearing shows that it is dependent on the circumstances. The video and photographic evidence show that Hudson is narrow and busy, surrounded on both sides by parked cars, sidewalks, homes, and businesses. Accordingly, its speed limit is 25 mph. Both Bergbauer and Rengel testified that driving 58 mph on Hudson Avenue is not in accordance with UCPD training and policies and that Colon's speed was "egregious." Therefore, I **CONCLUDE** that driving more than twice the speed limit is not safe on Hudson Avenue and that therefore Colon's driving was not "safe" or "controlled" as required by the UCPD Call Response Guidelines. R2.

As with speeding, officers are legally permitted to go through red lights, but only after making sure it is safe. Much was made at the hearings about how he slowed down to 41 mph before going through the intersection. But the bodega and dashcam footage shows that Colon didn't purposefully slow down to check the intersection. Instead, the evidence shows that he slammed on the breaks at, quite literally, the last second. R9, 13.

On cross-examination, Bergbauer watched the dashcam footage and testified that the Honda was already in the intersection when Colon's light turned yellow.

Q: Okay. The light is yellow now. Can you see the car into the intersection?

A: Yes, I believe so, yes.

Q: Okay. So, Officer Colon is here on the left, correct, this is his vehicle?

A: Yes.

Q: **The light is currently yellow, and this civilian has already entered the intersection, correct?**

A: **Yes.**

[T1 40:10-18 (emphasis added)].

This testimony was seemingly elicited to show that the Honda pulled into the intersection against a red light, but it also proves that the Honda was in the intersection *before* Colon's light turned red. Not only did he not properly slow down to make sure it was safe to go through the red light, but he ran a red light with a car *already* in the intersection, a direct

violation of the UCPD Call Response Guidelines. Colon's driving resulted in three officers not getting to the 10-2 call as well as damage to his patrol car, damage to civilian vehicles, and severe injury to himself and others.

Based upon the foregoing, I **CONCLUDE** that Colon violated UCPD Rules and Regulations 8:1.40, Failure to properly care for assigned equipment and vehicles, damaging same due to neglect by driving his patrol car through a red light at a speed that was not safe or controlled.

PENALTY

Once a determination is made that a civil servant has violated a statute, regulation, or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a necessary consideration when the misconduct is severe, when the employee's position involves public safety, and when "the misconduct causes risk of harm to persons or property." In re Herrmann, 192 N.J. 19, 33 (2007).

When progressive discipline is bypassed, "the question for the courts 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." In re Carter, 191 N.J. 474, 484 (2007); Herrmann, 192 N.J. at 28-29 (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). Absence of judgment alone can be sufficient to discipline an employee in a "sensitive position requiring public trust." Norton v. Wanaque Police Dep't, CSV 06232-22, Initial Decision (Feb. 7, 2024) adopted, N. J. Civil Serv. Comm'n (Feb. 28, 2024) <https://njlaw.rutgers.edu/collections/oal/html/initial/csv06232-22_1.html>. In Norton, the ALJ affirmed, and the Civil Service Commission adopted, a 45-working-day suspension for an officer who engaged in an unauthorized and extended high-speed chase that "posed serious safety concerns and demonstrated a sizable lack of judgment." Ibid.

Notably, there was no accident or injury in Norton, just a severe lack of judgment that the ALJ and Commission determined “posed serious safety concerns.” Norton v. Wanaque Police Dep’t, CSV 06232-22, Final Decision, N. J. Civil Serv. Comm’n, (Feb. 28, 2024) <https://njlaw.rutgers.edu/collections/oal/final/csv06232-22_3.pdf>.

Unlike Norton, Colon’s lack of judgment did result in an accident as well as serious injuries and extensive property damage. No charges were ever brought against Colon, but the injuries were so severe that the Hudson County Prosecutor’s office got involved. Colon ran a red-light during rush hour at an intersection where a car was already in his way, on a crowded local street at almost double the speed limit while not wearing a seat belt. I **CONCLUDE** that this is severe misconduct which caused actual and severe harm to both persons and property. Herrmann, 192 N.J. at 33. Colon was knocked unconscious and hospitalized, the driver and the passenger of the Honda were both hospitalized, and Colon’s patrol car, the Honda, and 5 parked cars were damaged. Finally, Colon was in violation of UCPD Seat Belt Policy.

As such, I **CONCLUDE** that Colon’s 10-day working suspension is an appropriate penalty under the circumstances and not so disproportionate as to shock one’s sense of fairness. I **CONCLUDE** that progressive discipline was not a necessary consideration and therefore Colon’s 10-day suspension should be **AFFIRMED**.

I further **CONCLUDE** that the UCPD has sustained its burden of proof as to the charge of violating UCPD Rules and Regulations 8:1.40 Failure to properly care of assigned equipment and vehicles, damaging same due to neglect.

ORDER

Accordingly, I **ORDER** that the action of the UCPD in suspending Colon for ten days is **AFFIRMED**.

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 4, 2024



JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

December 4, 2024

Mailed to Parties:

December 4, 2024

ljb

WITNESSES

For Appellant

Captain Michael Bergbauer
Lieutenant Christopher Rengel
Bruce Kuipers

For Respondent

Robert Klingen

EXHIBITS

For Appellant

- P1 Expert Report and CV of Robert Klingen

For Respondent

- R1 Preliminary Notice of Disciplinary Action
 - R2 Union City Police Department General Order: Vehicle Operation and Call Response Guidelines and Union City Police Department Memorandum: Proper Use of Seat Belts Required
 - R3 Crash Investigation Report
 - R4 Hudson County Prosecutor's Office Supplemental Report
 - R5 Bosch Crash Data Retrieval Report
 - R6 Safety Issues and Recalls
 - R7 Union City Police Department Police Manual
 - R8 Internal Affairs Report
 - R9 Video of 36th Street and Hudson Avenue
 - R10 Video of 4211 Hudson Avenue
 - R11 36th Street and Hudson Avenue Video 1
 - R12 36th Street and Hudson Avenue Video 2
 - R13 Dashboard Camera Footage
 - R14 Officer Peña Statement
 - R15 Officer Steinhilber Interview
 - R16 Radio Transmissions
- R17 Expert Report and CVs of Bruce Kuipers and John Desch