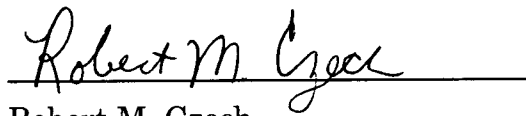




Re: Fernando Sanchez

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

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
OCTOBER 7, 2015

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a solid horizontal line.

Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
Unit H  
P. O. Box 312  
Trenton, New Jersey 08625-0312

attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. CSR 13162-14  
CSC Docket No. 2015-1019

**IN THE MATTER OF FERNANDO SANCHEZ,  
CITY OF PLAINFIELD (POLICE DIVISION).**

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**Michael J. Mitzner**, Esq., for appellant Fernando Sanchez (Mitzner & Mitzner,  
attorneys)

**David L. Minchello**, Esq., for respondent City of Plainfield (DeCotiis, Fitzpatrick  
& Cole, LLP, attorneys)

Record Closed: July 29, 2015

Decided: September 14, 2015

BEFORE **LESLIE Z. CELENTANO**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant, Fernando Sanchez (Sanchez), appeals his removal from employment with respondent, the City of Plainfield (Plainfield), predicated on disciplinary charges related to Sanchez's sexual acts with a civilian in his police car, while on duty. Specifically, Sanchez is charged with the following violations of Plainfield's department rules and regulations:<sup>1</sup>

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<sup>1</sup> This is a direct quote from the Preliminary Notice of Disciplinary Action; the format, spelling, and grammatical errors reflect the original document.

**1. 3.1.6 Conduct Themselves in Accordance with High Ethical Standards On and Off-Duty**

Specifically, knowingly and purposely engaging in sexual activities while on duty in a marked police vehicle.

**2. 4.1.1 Performance of Duty**

Specifically, knowingly and purposely engaging in sexual activities on duty while in a marked police vehicle violating his duties as required by law, Division Rule and Police Division Rules and Regulations.

**3. 4.1.3 Obedience to Laws and Rules**

Specifically failing to obey all applicable Federal & State laws, City ordinances and rules, policies, procedures, and directives by engaging in sexual activities while on duty in a marked police vehicle.

**4. 4.3.3 Reports**

Specifically, failing to disclose pertinent information such as Tanya Johnson [sic] name from the P-10 report dated 24 Jul 11 and from Interview statement dated 7 May 14, 2014 [sic].

**5. 4.6.4 Prohibited Activity on Duty**

Specifically, engaging in prohibited sexual activities with Ms. Connelly in a police vehicle while on duty.

**6. 4.12.6 Truthfulness**

Specifically, failing to disclose pertinent information such as Tanya Johnson's name on the P-10 report dated 24 Jul 11, Incident report dated 24 Jul 11[,] Union County interview transcript dated 10<sup>[2]</sup> May 13[,] and on the Internal Affairs [IA] statement dated 7 May 14.

**7. 6.2.22 Conduct Subversive to the Good order and Discipline of the Division**

Specifically, knowingly and purposely engaging in sexual activities while on duty and in a marked police vehicle.

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<sup>2</sup> The number "10" is printed, but another handwritten number, probably a "6," is superimposed on the printed number "10."

**8. 6.2.40 Failure to remove keys from city vehicle when unattended<sup>3]</sup>**

Specifically, failing to remove keys from city vehicle when unattended.

**9. 6.2.59 Unauthorized person in radio car**

Specifically, allowing unauthorized person (Ms. Connelly) in radio car.

[Joint Stipulation Ex. G.]

Moreover, Sanchez was charged with the following violations of the New Jersey Administrative Code:

**10. 4A:2-2.3(a)(6) Conduct Unbecoming a Public Employee**

Specifically, knowingly and purposely engaging in sexual activities while on duty and in a police marked vehicle.

**11. 4A:2-2.3(a)(8) Misuse of Public Property Including Mv's**

Specifically, knowingly and purposely engaging in sexual activities while on duty and in police marked vehicle.

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

Specifically, knowingly and purposely engaging in sexual activities while on duty and in marked police vehicle.

[Ibid.]

On May 16, 2014, the Preliminary Notice of Disciplinary Action (PNDA) was filed and served on Sanchez. (Ibid.) On June 20, 2014, the charges were sustained at a departmental hearing, and on September 23, 2014, the Final Notice of Disciplinary Action (FNDA) was served. (Joint Stipulation Ex. H.) On October 2, 2014, Sanchez

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<sup>3</sup> A handwritten "X" is superimposed on this specification, possibly indicating that Plainfield decided not to pursue this charge.

filed an appeal with the Civil Service Commission (the Commission) and the Office of Administrative Law (OAL) pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed that the matter could be decided on cross-motions for summary decision, and on June 17, 2015, filed a Joint Stipulation of Facts. (See Joint Stipulation.) Following the receipt of the briefs, the record was closed.

### **STIPULATED FACTS**<sup>4</sup>

1. On May 9, 2013, Plainfield Police Officer Fernando Sanchez was interviewed by the Union County Prosecutor's Office in connection with a criminal investigation involving Sergeant Samuel Woody. (See the transcript of the Union County Prosecutor's Interview with Fernando Sanchez, attached hereto as Exhibit A.)
2. The victim in the Sergeant Woody investigation was civilian, Kimah Connolly. (Exhibit A.)
3. During the interview with Officer Sanchez, he revealed that he had a previous sexual relationship with Kimah Connelly<sup>5</sup> and they had sex while on duty. (Exhibit A, p. 5; 15-8.2.)
4. During the interview, when asked if he had sexual relations in his patrol car, Officer Sanchez said, "I honestly don't think so." (Exhibit A, p. 7:18-7:20.)
5. When Lt. Troy Edwards took over control of Plainfield's IA section, in November of 2013, from discussions with Sgt. Grey and Det. Barrio at that time, he became aware as to their knowledge of the statement to the Prosecutor's Office by Officer Sanchez and of the fact that it was a basis for possible charges against Officer Sanchez.
6. At the conclusion of the Woody criminal trial on April 9, 2014, Internal Affairs Sergeant Gray was provided with the transcript of the Union County Prosecutor's interview

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<sup>4</sup> The facts are quoted verbatim from the Joint Stipulation of Facts; the format, spelling, and grammatical errors reflect the original document.

<sup>5</sup> Throughout the stipulation and pleadings, this individual is alternatively named "Connolly" and "Connelly," with no indication of the correct spelling. Accordingly, references to this individual will follow the spelling used in that quotation or document.

with Officer Sanchez. (See Sgt. Gray's Internal Affairs Investigation Report, attached hereto as Exhibit B.)

7. On April 9, 2014, Sergeant Gray served an Internal Affairs Complaint Notification on Officer Sanchez. (Exhibit C.)

8. An Administrative Advisement Form was served on Officer Sanchez on May 7, 2014. (Exhibit D.)

9. On May 7, 2014, Internal Affairs Detective Nora Berrio interviewed Officer Sanchez and obtained a sworn statement from him. (See Officer Sanchez's May 7, 2014 sworn statement to Internal Affairs, attached hereto as Exhibit E.)

10. During the May 7, 2014 Internal Affairs interview, Detective Barrio asked Officer Sanchez, "Did you ever have sexual intercourse with Ms. Connelly in your marked/unmarked police vehicle?" (Exhibit E, p. 2.)

11. Officer Sanchez responded, "No."

12. On May 9, 2014 Officer Sanchez requested to give, and gave a second interview to Detective Berrio which produced a second sworn statement. (See Officer Sanchez's May 9, 2014 sworn statement to Internal Affairs, attached hereto as Exhibit F.)

13. During the May 9, 2014 statement, Officer Sanchez admitted that he had sex with Kimah Connelly in his patrol car.

14. The PNDA in connection with this case was dated May 16, 2014 and served upon Officer Sanchez on or about that date. (Exhibit G.)

15. The Final Notice of Discipline was dated September 23, 2014 and removed Officer Sanchez as a Plainfield police officer effective September 22, 2014. (Exhibit H.)

16. After receipt of the FNDA, Officer Sanchez sought a Stay of all penalties pursuant to Plainfield Police Department Rule and Reg 6.3.17 (Exhibit I), which Stay was not granted.

17. Following the service of the FNDA, Officer Sanchez filed a timely appeal to the Civil Service Commission and OAL on October 2, 2014.

18. The hearing date on this appeal was scheduled for March 27, 2015, at which session both sides appeared and agreed to try to work out Stipulations for submissions to the Court [sic].

19. One of the issues raised by Officer Sanchez below, and again to be argued here, is dismissal of all charges based upon the 45-day Rule of N.J.S.A. 40A:14-147 and Plainfield Police Department Rule and Reg 6.5.15. (Annexed as Exhibit J.)

20. The parties further agree that the City is not pursuing any charges of truthfulness.

21. The investigation leading to the charges was conducted by Officer Nora Berrio, who did not prepare or submit a written investigative report to her superiors, including the Police Director.

22. The only thing provided to Director Riley before he signed the PNDA was the actual PNDA itself and the charges and specifications attached to it.

23. All of the alleged sexual activities which form the basis of the complaints against Officer Sanchez occurred prior to July 24, 2011.

24. The only prior suspension whatsoever as a result of any disciplinary charges against Officer Sanchez was a 40-hour suspension in 2007.

### **THE STANDARD FOR SUMMARY DECISION**

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the summary-judgment language of R. 4:46-2. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), the motion for summary decision may be granted

if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.



The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. at 536 (citation omitted). If the non-moving party’s evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). The New Jersey Supreme Court’s standard for summary judgment is thus designed to “liberalize the standards so as to permit summary judgment in a larger number of cases” due to the perception that we live in “a time of great increase in litigation and one in which many meritless cases are filed.” Brill, supra, 142 N.J. at 539 (citation omitted).

Since there exists no genuine issue that can only be determined in an evidentiary proceeding, I **CONCLUDE** that the matter is ripe for summary decision.

### **Parties’ Arguments:**

As the parties raise numerous arguments in the briefs and reply briefs, each party’s position on each issue will be addressed in turn.

### **The 45-Day Limitation**

First, Sanchez argues that “all charges must be dismissed because of violation of the 45-day time frame set forth in Plainfield Rule and Reg [sic] 6.5.15 and N.J.S.A. 40A:14-147.” (Appellant’s Br. at 1.) Sanchez recognizes that N.J.S.A. 40A:14-147 does not apply to Administrative Code violations, but argues that “Rule & Regulation 6.5.15 does cover Administrative Code Violations.” (Id. at 2.) Specifically, Sanchez argues that the 45-day limitation should run from November 2013, as the Joint Stipulation provides:

When Lt. Troy Edwards took over control of Plainfield's IA section, in November of 2013, from discussions with Sgt. Grey and Det. Barrio at that time, he became aware as to their knowledge of the statement to the Prosecutor's Office by Officer Sanchez and of the fact that it was a basis for possible charges against Officer Sanchez.

[Ibid. (quoting Joint Stipulation).]

Sanchez reasons that as the PNDA was filed on May 16, 2014, Plainfield violated the 45-day rule, and all charges must be dismissed.

Plainfield responds that the plain language of N.J.S.A. 40A:14-147 restricts application of the 45-day limitation to charges involving violations of "internal rules and regulations." (Resp't's Br. at 5.) Moreover, assuming, arguendo, that the 45-day limitation is applicable to this appeal, the director did not have sufficient information to file the charges until May 9, 2014, when Sanchez requested to amend his original statement, and added that he had, in fact, had sexual relations with a civilian in his police car when on duty. (Id. at 6–8.)

In reply, Sanchez argues that Plainfield improperly relies on testimony presented at the departmental hearing. (Appellant's Reply Br. at 2.) Since the parties agreed to cross-move for summary decision on the stipulated facts alone, and since the transcript of the departmental hearing is not part of the record, that testimony will not be recounted here.

In reply, Plainfield reiterates that Plainfield did not have sufficient information to file the present charges until May 9, 2014, when Sanchez disclosed that he had sexual relations in his marked police car while on duty. (Resp't's Reply Br. at 1–5.) Moreover, Plainfield notes that the 45-day limitation of Plainfield Rule and Regulation 6.5.15 does not apply to Administrative Code violations. (Id. at 5.)

Attorney General's Guidelines and Sufficient Basis

Second, Sanchez argues that “the complaint must be dismissed because the complainant, Director Riley, had insufficient basis [sic] for bringing the complaint.” (Appellant’s Br. at 3.) Sanchez argues that the Attorney General’s Guidelines for Internal Affairs Policy and Procedure require that an IA investigation conclude with a written report that includes “an objective investigative report which recounts all of the facts of the case and a summary of the case along with conclusions for each allegation and recommendations for further action.” (Ibid. [quoting Attorney General’s Guidelines for Internal Affairs Policy and Procedure, <[http://www.state.nj.us/lps/dcj/agguide/internalaffairs2000v1\\_2.pdf](http://www.state.nj.us/lps/dcj/agguide/internalaffairs2000v1_2.pdf)> (last visited August 18, 2015) (hereinafter “the AG Guidelines”)].) He further argues that the Guidelines require that “[t]he first part of the report will be an objective recounting of all the relevant information disclosed during the investigation, including statements, documents, and other evidence.” (Ibid.) Finally, he argues that “[a]ny aggravating or mitigating circumstances surrounding the situation . . . shall be noted.” (Ibid.) Sanchez argues that Plainfield did not comply with any of these requirements, and reasons that

[n]ot only the failure to provide the required report, but also the failure to provide anything to the Director other than the PNDA and the incorporated charges and specification, clearly prevented the Director from making any informed decision as to whether or not to sign the complaint, eliminate some of the charges involved in it, refuse to charge at all, or provide for a different penalty being sought. That requires dismissal of all charges.

[Ibid.]

In response, Plainfield argues that the AG Guidelines include both mandatory procedures and recommendations, and the cited sections are recommendations. (Resp’t’s Reply Br. at 7.) Plainfield emphasizes that “the AG Guidelines do not articulate a mandatory requirement for what investigatory documents, if any, must be provided to a Director before disciplinary charges are filed against an officer.” (Ibid.)

### Consolidation

Third, Sanchez argues that “charges number 1, 2, 3, 5, 7, 9, 10, 11, and 12 all relate to allegations of engaging in sexual activities while on duty, including allowing an unauthorized person in a radio car (charge number 9).” (Appellant’s Br. at 3.) He reasons that since all of these charges “charge basically the same conduct, based upon the same admission made by Officer Sanchez, these should be grouped together and handled as one violation.” (*Id.* at 3–4.) However, Sanchez does not cite any statute, regulation, or case law, or offer any reason why the same conduct cannot predicate multiple violations of internal policies or the Administrative Code. Indeed, civil-service disciplinary and removal cases are generally predicated on a single event, but involve numerous separate violations of internal regulations and the Administrative Code.

Separately, Sanchez argues that with respect to the other charges “4 (R&R 4.3.3 – Reports), 6 (R&R 4.12.6 – Truthfulness) and number 8 (R&R 6.2.40 – Failure to Remove Keys), Stipulation 20 confirms that Plainfield is not pursuing any charges associated with Truthfulness, which would cover charges 4 and 6 and there is no proof of any kind regarding charge 8.” (Appellant’s Br. at 4.) Sanchez reasons that “[a]ccordingly, all of these charges should be dismissed.” (*Ibid.*)

Plainfield does not respond to either of these arguments. (*See* Resp’t’s Br.; Resp’t’s Reply Br.) Accordingly, I **FIND** that the parties stipulated that Plainfield “is not pursuing any charges associated with truthfulness.” (Joint Stipulation.) I **FIND** that charge 4, which alleges that Sanchez failed to disclose information in a report and interview, and charge 6, which alleges that Sanchez failed to disclose the same information in the same report and interview and in an additional interview, are predicated on Sanchez’s truthfulness. (Joint Stipulation Ex. G.) I **FIND** that the parties have agreed to proceed on cross-motions for summary decision and the Joint Stipulation of Facts, and the Joint Stipulation is silent with respect to Sanchez’s failure to remove keys from a vehicle. (Joint Stipulation.) I **FIND** that charge 8 alleges that Sanchez failed to remove keys from a vehicle. (Joint Stipulation Ex. G.) Accordingly, I **CONCLUDE** that charges 4, 6, and 8 must be dismissed.

## Penalty

Fourth, Sanchez argues that “the penalty imposed should be limited to a suspension, not removal or termination.” (Appellant’s Br. at 4.) He offers a number of factual assertions to support a reduced penalty. (Ibid.) First, he argues that “[t]he remaining alleged improper conduct all relates to alleged sexual activities while on duty, all of which occurred prior to July 24, 2011.” (Ibid.)

Second, he argues that since July 24, 2011, he has not been disciplined for any other reason. Sanchez offers, as fact, that “[h]e continued to function as an effective and productive police officer for the City of Plainfield and nothing relating to any finding that may be made regarding the charges here in any way lessens the performance of his duties since the date on which the alleged activities took place.” (Ibid.) Of course, since the parties agreed to proceed on the stipulated facts, and that assertion is not included in the Joint Stipulation, that factual assertion will not be considered.

Third, Sanchez emphasizes that his only prior disciplinary action was a forty-hour suspension in 2007. (Ibid.; Joint Stipulation.) Fourth, Sanchez asserts that “[w]hen questioned about any improper sexual activities on duty by the County Prosecutor’s Office in connection with the Woody Criminal Investigation, Officer Sanchez readily admitted what he had done and that he had engaged in sexual activities while on duty.” Ibid. Again, that factual assertion is directly contradicted by the Joint Stipulation. (See Joint Stipulation.) The parties stipulated that “[d]uring the [County Prosecutor’s Office] interview, when asked if he had sexual relations in his patrol car, Officer Sanchez said, ‘I honestly don’t think so.’” (Joint Stipulation ¶ 4; Ex. A.) On May 7, 2014, during the IA interview, he again denied that he had sexual relations in a police car. (Joint Stipulation ¶¶ 10–11.) On May 9, 2014, he requested to amend his answers, and finally divulged that he had, in fact, had sexual relations in a police car. (Joint Stipulation ¶¶ 12–13.) Accordingly, Sanchez’s factual assertion that he “readily admitted what he had done” to the prosecutor is directly contradicted by the Joint Stipulation, and accordingly, will not be considered as fact. (Cf. Appellant’s Br. at 4; Joint Stipulation.)

Fifth, Sanchez asserts that “[t]here is nothing about the alleged activities that make them so egregious as to justify termination/removal. A suspension, even as a minor disciplinary [sic] is sufficient punishment for the alleged sexual activities.” (Appellant’s Br. at 4.) Notably, Sanchez fully admits to the fact that he had sexual relations with a civilian in his police car, while on duty, and that is the only basis for the instant disciplinary action, so such behavior is no longer merely “alleged,” but actual fact. (See ibid.) Finally, Sanchez asserts that the PNDA was issued nearly three years after the events underlying the PNDA, but does not explain how this fact should mitigate his penalty. (Id. at 5.)

In response, Plainfield notes that police officers are subject to a higher standard of conduct than other public employees, and, certainly, the general public. (Resp’t’s Reply Br. at 8.) Plainfield notes that Sanchez’s decision to have sexual relations in a police car with a civilian while on duty “shows a lack of respect for the public, a disregard for the duties of a police officer, and lack of consideration for the civilian involved. Officer Sanchez obviously thought so little of his badge that he found it acceptable to have sex in public while on duty.” (Ibid.) Plainfield reasons that “[a]n officer who engages in such conduct clearly cannot be relied upon to exercise the necessary tact, restraint, and good judgment in his relationships with the public and, as a result, should not be entrusted with the solemn responsibility to represent law and order in the community.” (Ibid.) Moreover, Plainfield argues that while, generally, an officer’s prior disciplinary history should be considered to determine a penalty, the principles of progressive discipline do not apply “where conduct or actions are so egregious in nature and/or so detrimental to the public welfare that immediate termination is warranted.” (Ibid.) Plainfield asserts that “[e]ven though Officer Sanchez’s prior disciplinary history involves only minor offenses (40-hour suspension in 2007), this current offense certainly warrants removal due to its egregious nature.” (Ibid.)

#### Stay Pending Appeal

Fifth, Sanchez argues that “[s]ince the penalty imposed was more than a five-day suspension, it should have been stayed pending appeal. (Appellant’s Br. at 5.)

Sanchez reasons that he “sought a stay of all penalties pursuant to Plainfield Police Department Rule & Reg 6.3.17 (EXHIBIT I), which stay was not granted.” (Ibid.) That regulation provides that “[w]here the sentence or penalty is in excess of five (5) days suspension without pay, or its monetary equivalent, said sentence or penalty shall not be imposed or carried out until the time for filing of an appeal as provided in R&R 6.4.1 below has elapsed.” (Ibid.) Sanchez argues that not only should the penalty have been stayed through the time he was permitted to file an appeal, but “since an appeal was taken to the OAL, the penalty should have been stayed pending the determination of that appeal and until all appeals have been exhausted.” (Id. at 5.) Sanchez reasons that he “is entitled to back pay and benefits from the September 22, 2014 date of his removal through the conclusion of this appeal, regardless of the result.” (Ibid.) Sanchez cites no other legal support for that proposition, besides that plain language of Plainfield Police Department Rule and Regulation 6.3.17. (See ibid.)

In response, Plainfield notes that the plain language of the cited Plainfield Police Rule and Regulation does not stay a penalty through the duration of the appeal, but only until the period to file an appeal elapses. (Resp’t’s Br. at 10.) Accordingly, Sanchez’s arguments with respect to a stay are without merit. (Ibid.)

### Back Pay

Finally, Sanchez argues that even if back pay is not warranted pursuant to Plainfield Police Department Rule and Regulation 6.3.17, he “is entitled to back pay for all time beyond 180 calendar days from his September 22, 2014 removal.” (Appellant’s Br. at 5.) He argues that “N.J.A.C. 4A:2-2.13g and h [sic] provide for remedies to an officer such as Officer Sanchez where the final administrative determination by the Civil Service Commission is not rendered within 180 calendar days from the date on which the officer was initially suspended without pay.” (Ibid.) He concedes that the nine days between the September 23, 2014, issuance of the FNDA and his October 2, 2014, appeal are not included in the calculation. (Appellant’s Br. at 6.) However, he asserts that “[s]ince the removal was effective September 22, 2014, and since clearly well beyond 189 days from that date have expired, Officer Sanchez is entitled to his base salary at the time of his removal for all days since the expiration of 189 days.” (Ibid.)

In response, Plainfield argues that while “180 days have passed since the date of Officer Sanchez’s removal, N.J.A.C. 4A:2-2.13(h) provides numerous exceptions which would not count towards the running of this time period.” (Resp’t’s Br. at 10.) Plainfield argues that “N.J.A.C. 4A:2-2.13(h)(7) provides that ‘[t]he period of time during which the appellant or his or her attorney or negotiations representative causes by his or her actions at a postponement, adjournment or delay of a hearing’ will not count towards the 180 day period.” (Resp’t’s Br. at 11.) Plainfield asserts that it “made every reasonable attempt to move this case along and did not cause any unnecessary delays in pursuing disciplinary charges against Officer Sanchez or participating in any appeal.” (ibid.) Without reference to any specific dates or events, Plainfield generally asserts that “[n]umerous events outside [Plainfield’s] control have occurred including the unavailability of witnesses, at the initial hearing resulting from a Federal holiday, as well as protracted negotiations with counsel for Officer Sanchez regarding the Stipulation of Facts.”<sup>6</sup>

### **Discussion:**

Again, as the parties raise numerous arguments in the briefs and reply briefs, each issue will be addressed in turn.

### **The 45-Day Limitation**

Pursuant to statute, “[a] complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based.” N.J.S.A. 40A:14-147. The Appellate Division has emphasized that “the requirement that a complaint be filed within forty-five days of the date when the complainant has sufficient

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<sup>6</sup> Notably, the “initial hearing” presumably refers to the departmental hearing, because the parties agreed to waive the administrative hearing and proceed on the Joint Stipulation. Since Sanchez claims back pay from 180 days after he filed his administrative appeal, on October 2, 2014, Plainfield’s arguments based on delays prior to the issuance of the FNDA are completely irrelevant, and will not be addressed. (See Resp’t’s Br. at 10–11.)



information to make the complaint pertains to alleged violations of ‘internal rules and regulations established for the conduct of [the] law enforcement unit[.]’” McElwee v. Fieldsboro, 400 N.J. Super. 388, 394 (App. Div. 2008). However, the Appellate Division recognized that “a violation of ‘internal rules and regulations’ is only one of the grounds upon which a police officer may be disciplined. The statute also allows a police officer to be removed for incapacity or misconduct but imposes no time constraints on asserting a complaint seeking removal on those grounds.” Ibid.

Here, Sanchez fully conceded that “Plainfield may thus argue that the three Administrative Code violations are not affected by that delay.” (Appellant’s Br. at 2.) Thus, assuming, arguendo, that N.J.S.A. 40A:14-147 is applicable to this matter at all, the provision is only relevant to the alleged violations of Plainfield’s Rules and Regulations. (See ibid.) Moreover, Sanchez provides no authority or explanation for his assertion that “Rule & Regulation 6.5.15 does cover Administrative Code Violations.” (Id. at 2.) As Plainfield notes, Plainfield Rule and Regulation 6.5.15 does not apply to Administrative Code violations. (Resp’t’s Reply Br. at 5.) Rather, Plainfield Rule and Regulation 6.5.15 provides that

[a]fter an investigation establishes sufficient cause to substantiate the existence of alleged or suspected misconduct, a formal charge must be filed against and presented to the employee within the 45 day time-frame guideline as codified in Title 4A. The 45 day time-frame guideline begins when the Division has enough information to warrant a complaint. Missing the 45 day time-frame guideline for the filing of charges does not automatically result in the dismissal of charges. Division management must provide sufficient and compelling reasons for not filing and serving charges within 45 days of having sufficient information.

[Joint Stipulation Ex. J.]

As Plainfield Rule and Regulation 6.5.15 expressly references the 45-day limit of N.J.S.A. 40A:14-147, any suggestion that the internal regulation is more expansive than the referenced administrative regulation is unreasonable. (Cf. ibid.); N.J.S.A. 40A:14-147. Moreover, N.J.S.A. 40A:14-147 provides that failure to comply with the 45-day

limitation “shall require a dismissal of the complaint.” N.J.S.A. 40A:14-147. In stark contrast, Plainfield Rule and Regulation 6.5.15 expressly provides that “[m]issing the 45 day time-frame guideline for the filing of charges does not automatically result in the dismissal of charges. Division management must provide sufficient and compelling reasons for not filing and serving charges within 45 days of having sufficient information.” (Joint Stipulation Ex. J.) Accordingly, even if Plainfield Rule and Regulation 6.5.15 applied to Administrative Code violations, that internal rule would not require dismissal, but only “sufficient and compelling reasons for not filing and serving charges within 45 days of having sufficient information.” (Ibid.) Sanchez baldly asserts that “no such reasons were provided at all and dismissal is required.” (Appellant’s Br. at 2.) However, as explained more fully below, Plainfield did not have “sufficient information” to file the instant charges until Sanchez amended his IA interview answers on May 9, 2014. (See Joint Stipulation Exs. F, G.) The reason that Plainfield did not have sufficient information until May 9, 2014, is that Sanchez lied twice to investigators: on May 9, 2013, to the County Prosecutor, and on May 7, 2014, to the IA investigator. (Cf. Joint Stipulation Exs. A, E, F.) While the parties have agreed not to pursue the charges based on truthfulness, the fact that Sanchez twice lied to investigators, and delayed revelation of the severity of his behavior, must be considered to determine whether the charges were timely. In other words, the charges were not filed earlier because Sanchez effectively concealed his conduct from investigators. Accordingly, assuming, arguendo, that Plainfield Rule and Regulation 6.5.15 applies to Administrative Code violations, Plainfield had a “sufficient and compelling reason” not to file the instant charges earlier, as Plainfield did not have “sufficient information” to file such charges before Sanchez revealed the extent of his misconduct, on May 9, 2014.

The Law Division has noted that “[t]he 45-day period runs from the date upon which the person responsible for the filing of the disciplinary complaint receives sufficient information upon which to base a complaint.” Aristizibal v. City of Atl. City, 380 N.J. Super. 405, 427–28 (Law Div. 2005). Indeed, Sanchez’s 45-day-limitation arguments are predicated on his clear misreading of the instant charges. (See Appellant’s Br. at 1–2; Appellant’s Reply at 2–4.) In his briefs, Sanchez repeatedly refers to the charged conduct vaguely, and suggests that the transcript of his interview with the County Prosecutor demonstrates that he “admitted to having sex with Kimah

Connolly on several occasions while he was on duty. That admission alone would have been the basis for the bulk of the charges ultimately brought against Officer Sanchez in the PNDA involved here.” (Appellant’s Br. at 2.) Accordingly, he argues that the 45-day limitation should run from November 2013, as the Joint Stipulation provides that

[w]hen Lt. Troy Edwards took over control of Plainfield’s IA section, in November of 2013, from discussions with Sgt. Grey and Det. Barrio at that time, he became aware as to their knowledge of the statement to the Prosecutor’s Office by Officer Sanchez and of the fact that it was a basis for possible charges against Officer Sanchez.

[Id. at 2 (quoting Joint Stipulation).]

However, Sanchez was not merely charged with having sexual relations while on duty. (See Joint Stipulation Ex. G.) Rather, every single charge, based on both internal regulations and the Administrative Code, alleges that Sanchez engaged “in sexual activities while on duty in a marked police vehicle.”<sup>7</sup> (Ibid.) Pursuant to the Joint Stipulation, Sanchez did not disclose the fact that he had sexual relations while on duty in his marked police car until May 9, 2014. (See Joint Stipulation Ex. F.) Again, on two prior occasions, he expressly denied that he had sexual relations in a police vehicle. (See Joint Stipulation Exs. A, E.) Thus, any suggestion that “sufficient information” existed to file the charges prior to May 9, 2014, has no merit. The fact that Lieutenant Edwards may have had “a basis for possible charges” prior to Sanchez’s admission does not necessarily mean that Lt. Edwards had a “sufficient basis” for the instant charges. (See Appellant’s Br. at 2; Joint Stipulation Ex. G.) Moreover, Director Riley, not Lieutenant Edwards, had the authority to file the complaint. (See Joint Stipulation Ex. G; N.J.S.A. 40A:14-147.) Accordingly, Lieutenant Edwards’s knowledge of Sanchez’s statement to the Prosecutor’s Office, in which he expressly denied having sexual relations in his police vehicle, is not relevant to the instant charges, which uniformly allege that Sanchez had sexual relations in his police vehicle. (See Joint Stipulation Ex. G.)

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<sup>7</sup> Granted, the truthfulness charges do not include this specification, but the parties agreed not to pursue those charges. (Ibid.) Moreover, charge 5 does not use the term “marked,” but only “police vehicle,” and charge 9 uses the term “radio car” rather than “marked police vehicle.” (Ibid.) However, these are distinctions without differences.

Attorney General's Guidelines and Sufficient Basis

The page of the AG Guidelines cited by Sanchez provides guidance to police departments on internal investigations. (See Appellant's Br. Ex. K<sup>8</sup> [quoting AG Guidelines].) The page does not address disciplinary charges, but only the record-keeping requirements for internal investigation. Ibid. The page does not create, or even suggest, any requirement that a disciplinary charge must have a "sufficient basis." (Cf. ibid.; Appellant's Br. at 3.) Certainly, nothing about this guidance document, which solely addresses record-keeping requirements, could be interpreted to require dismissal of formal disciplinary charges for failure to comply with such record-keeping requirements. Ibid.

Moreover, assuming, arguendo, that this document created any substantive record-keeping requirements that must be complied with to file disciplinary charges, such record-keeping requirements were complied with here. (See Joint Stipulation E, F, G.) Detective Berrio memorialized her May 7 and May 9 interviews with Sanchez, and reduced the interviews to writing. (See Joint Stipulation E, F.) Sanchez alleges that the AG Guidelines require "an objective recounting of all the relevant information disclosed during the investigation, including statements, documents, and other evidence." Ibid. The only statement relevant to the instant disciplinary charge is Sanchez's statement that he had sexual relations in a police vehicle. (See Joint Stipulation G.) That statement is included in Detective Berrio's May 9, 2014, interview report. (See Joint Stipulation F.) As all of the instant charges are based on the same specification, that Sanchez had sexual relations in a police vehicle, no other documents or evidence would be relevant to the instant charge. (See Joint Stipulation F, G.) The PNDA does provide a "conclusion of fact for each allegation," specifically, that Sanchez had sexual relations in his police vehicle. (See Appellant's Br. at 3; Joint Stipulation G.) Sanchez does not suggest what "aggravating or mitigating circumstances" were not included in the report, but are relevant to the charges. (See Appellant's Br. at 3.) Indeed, as discussed below, in the penalty section, Sanchez offers little to support mitigation at all, except for his

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<sup>8</sup> This is Sanchez's only exhibit, but the document is marked "Exhibit K."

scant prior disciplinary history, and the fact that he ceased having sexual relations with a civilian while on duty by July 24, 2011 (when the fact that he did came to light). (Appellant's Br. at 3–4.) Certainly, Sanchez offers no mitigating circumstances regarding his decision to have sexual relations in a police car, and any such mitigating circumstances are difficult to imagine. (See ibid.) Rather, the only information Director Riley needed to file the instant charges was Sanchez's own admission that he had sexual relations in a police car. (See Joint Stipulation F, G.) Accordingly, Sanchez's suggestion is preposterous that lack of information "clearly prevented the Director from making any informed decision as to whether or not to sign the complaint, eliminate some of the charges involved in it, refuse to charge at all, or provide for a different penalty being sought." (Appellant's Br. at 3.) To the contrary, in light of Sanchez's May 9 admission, Plainfield would be remiss not to file numerous disciplinary charges against Sanchez, and seek his removal. (See Joint Stipulation F, G.)

### Consolidation

Sanchez provides no legal authority for his assertion that charges 1, 2, 3, 5, 7, 9, 10, 11, and 12 should be "consolidated." (Appellant's Br. at 3.) Sanchez does not explain why consolidation is necessary or useful. Again, civil-service disciplinary and removal cases are generally predicated on a single event, but involve numerous separate violations of internal regulations and the Administrative Code. Here, for example, the underlying conduct clearly violates numerous provisions of Plainfield's internal rules, as well as the Administrative Code. (See Joint Stipulation G.) For example, Sanchez's conduct of having sexual relations with a civilian while on duty, in a marked police car, clearly violates N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, and separately, N.J.A.C. 4A:2-2.3(a)(8), misuse of public property. (Ibid.) Hypothetically, other, less egregious, behavior could solely constitute conduct unbecoming, or misuse of public property. Here, Sanchez's behavior clearly constitutes both violations.

Accordingly, as Sanchez provides no legal authority or reason to "consolidate" the charges, his request to evaluate the charges "as one violation" is denied. (See Appellant's Br. at 4.) However, as noted above, the parties stipulated that the charges

related to truthfulness should be dismissed, and the parties have not presented any evidence on the charge that Sanchez failed to remove keys from a police vehicle. (See Joint Stipulation.) Accordingly, I **CONCLUDE** that charges 4, 6, and 8 must be dismissed.

### Penalty

Generally, principles of progressive discipline require consideration of an employee's past disciplinary record to determine the appropriate penalty for a pending disciplinary charge. See W. New York v. Bock, 38 N.J. 500 (1962). However, New Jersey courts recognized that principles of progressive discipline are not "a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Herrmann, 192 N.J. 19, 33 (2007). Rather, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." Ibid. In particular, appellate courts "have upheld dismissal of employees, without regard to whether the employees have had substantial past disciplinary records, for engaging in conduct that is unbecoming to the position." Id. at 34. For example, "the Appellate Division affirmed the dismissal of a police officer for infractions that went to the heart of the officer's ability to be trusted to function appropriately in his position." Id. at 35 (citing Cosme v. E. Newark Twp. Comm., 304 N.J. Super. 191, 206 (App. Div. 1997), certif. denied, 156 N.J. 381 (1998) [municipal police officer dismissed, and application of progressive discipline unnecessary, because "charges of basic misconduct that included willful disobedience of orders, neglect of duty, and placing personal interests ahead of police duties . . . go to the heart of plaintiff's capacity to function appropriately as an officer in the East Newark Police Department"]).

Accordingly, principles of progressive discipline are not "a fixed and immutable rule to be followed without question." In re Carter, 191 N.J. 474, 484 (2007). To the contrary, "some disciplinary infractions are so serious that removal is appropriate

notwithstanding a largely unblemished prior record.” Ibid. Moreover, “[i]n matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction.” Id. at 185. New Jersey courts have long

recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . .

[Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).]

Accordingly, in Carter, a police officer was dismissed for sleeping in his police vehicle, while on duty. Carter, supra, 191 N.J. at 486. The administrative law judge concluded, and the Appellate Division affirmed, that the offense, standing alone, could support the penalty of removal, even though the officer had a significant disciplinary history, as well. Ibid.

Here, Sanchez admitted that he had sexual relations with a civilian in a police vehicle, while on duty. (Joint Stipulation 13.) Certainly, if a police officer should be removed for sleeping in a police vehicle while on duty, logic dictates that a police officer must be removed for having sexual relations in a police vehicle while on duty. See Carter, supra, 191 N.J. at 486. Certainly, such egregious behavior “is unbecoming to the employee’s position or renders the employee unsuitable for continuation in the position.” See Herrmann, supra, 192 N.J. at 33. Here, any penalty short of removal “would be contrary to the public interest.” Ibid.

Indeed, Sanchez’s arguments for mitigation border on ludicrous. (See Appellant’s Br. at 4.) He asserts that “[t]he remaining alleged improper conduct all relates to alleged sexual activities while on duty, all of which occurred prior to July 24, 2011.” Ibid. Notably, Sanchez has only been charged with having sexual relations with

a civilian in a police vehicle while on duty, but the record reveals that he frequently met with this (and other) paramours, to have sexual relations, while on duty. (Joint Stipulation Ex. A.) Sanchez's suggestion that the penalty should be mitigated, because he ceased such behavior, after his indiscretions became the subject of a criminal investigation, is absurd. (See Appellant's Br. at 4.)

Alternatively, he argues that "[w]hen questioned about any improper sexual activities on duty by the County Prosecutor's Office in connection with the Woody Criminal Investigation, Officer Sanchez readily admitted what he had done and that he had engaged in sexual activities while on duty." Ibid. Again, that factual assertion is directly contradicted by the Joint Stipulation. (See Joint Stipulation.) The parties stipulated that "[d]uring the [County Prosecutor's Office] interview, when asked if he had sexual relations in his patrol car, Officer Sanchez said, 'I honestly don't think so.'" (Joint Stipulation ¶ 4; Ex. A.) On May 7, 2014, during the IA interview, he again denied that he had sexual relations in a police car. (Joint Stipulation ¶¶ 10–11.) On May 9, 2014, he requested to amend his answers, and finally divulged that he had, in fact, had sexual relations in a police car. (Joint Stipulation ¶¶ 12–13.) Sanchez's factual assertion that he "readily admitted what he had done" to the prosecutor is directly contradicted by the Joint Stipulation, and, accordingly, will not be considered as fact. (Cf. Appellant's Br. at 4; Joint Stipulation.) To the contrary, Sanchez clearly lied about his behavior, absurdly asserting that he didn't think he had sexual relations in his police vehicle. (Joint Stipulation ¶ 4; Ex. A.) Accordingly, Sanchez's statements to the prosecutor should aggravate, rather than mitigate, the penalty.

While Sanchez accurately asserts that he has only one prior disciplinary infraction, a forty-hour suspension, this is precisely the type of case that does not require application of principles of progressive discipline. (Appellant's Br. at 4; Joint Stipulation.) To the contrary, Sanchez's failure to comprehend the gravity of his actions, as evidenced by his statements to the Prosecutor and the IA investigator, compel the penalty of removal. (See Appellant's Br. at 4; Joint Stipulation A, E, F.) As Plainfield argues, Sanchez's behavior "shows a lack of respect for the public, a disregard for the duties of a police officer, and lack of consideration for the civilian involved. Officer Sanchez obviously thought so little of his badge that he found it acceptable to have sex



in public while on duty.” (Resp’t’s Reply Br. at 8.) Plainfield correctly asserts that “[a]n officer who engages in such conduct clearly cannot be relied upon to exercise the necessary tact, restraint, and good judgment in his relationships with the public and, as a result, should not be entrusted with the solemn responsibility to represent law and order in the community.” (Ibid.) Accordingly, I **CONCLUDE** that removal is the only appropriate penalty.

### Stay Pending Appeal

Plainfield Police Rule and Regulation 6.3.17 provides that “where the sentence or penalty is in excess of five (5) days suspension without pay, or its monetary equivalent, said sentence or penalty shall not be imposed or carried out until the time for filing an appeal as provided in R&R 6.4.1 below has elapsed.” (Joint Stipulation Ex. I.) Sanchez argues that not only should the penalty have been stayed through the time he was permitted to file an appeal, but “since an appeal was taken to the OAL, the penalty should have been stayed pending the determination of that appeal and until all appeals have been exhausted.” (Appellant’s Br. at 5.) Sanchez reasons that he is entitled to back pay and benefits from the September 22, 2014, date of his removal through the conclusion of this appeal, regardless of the result. (Ibid.) However, as Plainfield correctly argues, the plain language of Plainfield Police Rule and Regulation 6.3.17 does not stay a penalty until the completion of an appeal, only until the time to file an appeal has elapsed. (Resp’t’s Br. at 8.) Certainly, Plainfield Police Rule and Regulation 6.3.17 does not address appeals to the Commission, which are transmitted to the OAL. (Joint Stipulation Ex. I.) Nothing in the plain language of Plainfield Police Rule and Regulation 6.3.17 addresses back pay, regardless of the result. (Ibid.) Indeed, the logical result of Sanchez’s argument would be that Plainfield could never suspend or remove a police officer without a continuing obligation to pay the officer through the exhaustion of all appeals, even if the officer presents a serious risk to public safety. (Appellant’s Br. at 5.)

### Back Pay

In a police officer's civil-service removal appeal, "[t]he Commission's final administrative determination shall be rendered within 180 calendar days from the date on which the officer or firefighter was initially suspended without pay." N.J.A.C. 4A:2-2.13(g). If the Commission does not "render a final administrative determination of an appeal of an officer's or firefighter's removal from employment within the required 180 days, the appellant shall begin receiving the base salary that he or she was receiving at the time of his or her removal and shall continue to receive such salary until the Commission renders a final administrative determination." N.J.A.C. 4A:2-2.13(h). However, the police officer will not "receive his or her base salary if the administrative law judge's initial decision recommends that the appellant's appeal be denied, unless and until such time as the Civil Service Commission renders a final administrative decision rejecting the administrative law judge's recommendation and ordering the appellant's reinstatement to employment." N.J.A.C. 4A:2-2.13(i)(2). Finally, if the police officer's appeal is denied by the Commission, the police officer must "reimburse the appointing authority all pay he or she has received during the period of appeal." N.J.A.C. 4A:2-2.13(j)(1).

Here, as Sanchez's removal is necessary and appropriate, Sanchez is not entitled to back pay. Granted, this administrative proceeding did take more than 180 days, and Plainfield only offers vague explanations for the delay. (Resp't's Br. at 11.) However, Sanchez would ultimately have to reimburse Plainfield for any back pay he may have been entitled to during the pendency of this proceeding. See N.J.A.C. 4A:2-2.13(j)(1). Accordingly, Sanchez's request for back pay, based on N.J.A.C. 4A:2-2.13(g), is **DENIED**.

### CONCLUSIONS

Based upon all of the foregoing, I hereby **CONCLUDE** as follows:

The 45-day time limitation of N.J.S.A. 40A:14-147 does not apply to administrative violations, and Plainfield did not have sufficient information to file the

instant charges based on violations of internal regulations until Sanchez disclosed his misconduct, several days before the charges were filed. The charges should not be dismissed due to an insufficient basis, because the only relevant basis for the instant charges was Sanchez's admission that he had sexual relations with a civilian in a police car, while on duty, and the cited Attorney General Guidelines do not address disciplinary charges. The charges should not be consolidated, because numerous violations of the Administrative Code and internal regulations can, and often do, arise from the same event, and "consolidation" would have no practical effect. In light of Sanchez's conduct, removal is the only appropriate penalty, as law-enforcement officers are held to the highest standard, and such egregious behavior is a clear violation of the public trust. The plain language of Plainfield Rule and Regulation 6.3.17 does not require a stay of all penalties through the exhaustion of all appeals, but only through the time period to file an appeal. As Sanchez's removal is necessary, back pay is not appropriate, because he would have to reimburse any back pay he may have been entitled to during the pendency of this appeal.

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

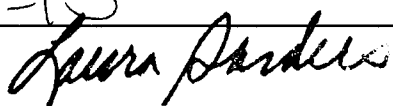
This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise 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.

Sept 14, 2015  
DATE

  
LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

9-14-15  


Date Mailed to Parties:

SEP 15 2015

DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

dr