A-11

STATE OF NEW JERSEY

In the Matter of Mieskzo Mazurkiewicz
Borough of Roselle,
Police Department

CSC DKT. NO. 2015-2518
OAL DKT. NO. CSR 03609-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 20, 2016 BW

The appeal of Mieskzo Mazurkiewicz, Police Officer, Borough of Roselle, Police Department, removal effective January 23, 2015, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on August 17, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 19, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Mieskzo Mazurkiewicz.

Re: Mieskzo Mazurkiewicz

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 19, 2016

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 03609-15

MIESZKO MAZURKIEWICZ,

Appellant,

v.

BOROUGH OF ROSELLE

POLICE DEPARTMENT,

Respondent.

Darren M. Gelber, Esq., for appellant (Wilentz, Goldman & Spitzer, attorneys)

Mark A. Tabakin, for respondent (Weiner Lesniak, attorneys)

Record Closed: July 27, 2016 Decided: August 17, 2016

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Miesko Mazurkiewicz, appeals a Final Notice of Disciplinary Action (FNDA) dated March 2, 2015, providing for a penalty of removal effective January 23, 2015, for inability to perform duties, conduct unbecoming a public employee, and other sufficient cause.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13, to the Office of Administrative Law (OAL), where it was filed on March 9, 2015.

The matter was initially assigned to the Honorable Irene Jones, ALJ, now retired. The matter was then reassigned to the undersigned.

A prehearing order, dated May 4, 2015, was entered by Judge Jones.

On May 28, 2015, appellant filed a motion for summary decision to dismiss the disciplinary charges based upon petitioner's failure to comply with two procedural deadlines.

On August 3, 2015, respondent filed a motion to bifurcate the disciplinary charge from the fitness for duty charge, and also moved for summary decision on the disciplinary charge.

On September 9, 2015, appellant filed a cross-motion for summary decision.

By order dated February 2, 2016, Judge Jones ordered the following regarding the above motions:

1. Dismissing the charge of violation of Roselle Police Department internal rules and regulations; and, maintaining the charges of violation of N.J.A.C. 4A:2.2-3(a)(3) inability to perform duties, and, N.J.A.C. 4A:2.2-3(a)(6) conduct unbecoming a public employee;
2. Denying respondent's motion for summary decision;
3. Granting the motion to bifurcate the disciplinary charges from the fitness for duty charge; and,
4. Denying appellant's motion for summary decision.

On June 12, 2015, respondent filed a motion to compel appellant to undergo a fitness for duty examination. Said motion was denied by a letter order of Judge Jones dated March 31, 2016.

On January 11, 2016, appellant filed a motion to be restored to active duty. The motion was denied by Judge Jones in an order dated April 7, 2016.

A hearing on the disciplinary charges was held on June 22, 2016, before the undersigned. The record was kept open until July 27, 2016, to permit counsel to file post-hearing submissions. The record was closed on July 27, 2016.

ISSUES

Whether there is sufficient credible evidence to sustain the charges in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of removal is warranted.

SUMMARY OF TESTIMONY

Respondent's Case

William Brennan testified on direct examination as follows:

He is a lieutenant with the Roselle Police Department (RPD). He has been employed with RPD for thirty years. He has been a lieutenant since 2014. Prior to becoming a lieutenant he was a detective sergeant and supervisor of investigations. As part of Internal Affairs (IA) he did IA investigations, investigated civilian complaints and investigated rules infractions. He was in this position on December 2, 2009.

He is familiar with the Collective Bargaining Agreement. (R-1.) He is familiar with the rules and regulations of the RPD. (R-2.) All officers receive a copy of R-2 and are responsible to read it and be familiar with it. Lieutenant Brennan pointed out those

rules which pertain to officer truthfulness and duty to answer questions truthfully. The New Jersey Attorney General (AG) guidelines also state an officer must be truthful. Truthfulness is not just limited to an IA investigation.

On December 2, 2009, Lieutenant Brennan had a conversation with appellant regarding an overtime slip submitted in November 2009 relative to an overtime swap petitioner did with Officer Robert Dixon. The conversation was part of an IA investigation regarding the overtime swap. During the course of that conversation Lieutenant Brennan twice asked appellant if he was recording their conversation. Appellant responded in the negative both times. Lieutenant Brennan advised appellant during the course of their conversation that it was a terminable offense to lie. In fact, an audio recording was made by appellant of their conversation. (R-3.)

Normally IA interviews take place in a private office. The conversation with appellant on December 2, 2009, took place in private in the "Fish Bowl." During the course of the conversation appellant did not ask for a union representation or other representation. Appellant did ask late in the conversation why the chief or captain was not present. Lieutenant Brennan thought the interview would last only five minutes. The interview lasted about forty minutes. After the interview Lieutenant Brennan requested a To/From[1] from appellant regarding the overtime swap with Officer Dixon. (R-5.)

Lieutenant Brennan prepared an IA memorandum regarding his investigation into the overtime swap between appellant and Officer Dixon. (R-6.) Appellant was charged with a minor disciplinary charge regarding the matter. He was not sure if the charge was ever adjudicated.

Notwithstanding appellant's denials of recording their conversation, Lieutenant Brennan did not believe appellant. He noted that it is permissible to record a conversation, but one must advise the other party they are being recorded.

[1] A To/From is a report submitted by police officers.

He was apprised that a recording of the December 2, 2009, IA interview with appellant did exist by the Borough's labor counsel. This was in 2011. Lieutenant listened to the recording, R-3, in October or November 2011.

In response to the discovery of the recording Lieutenant Brennan prepared an addendum to his initial IA memorandum to accurately reflect what he did and what transpired. (R-7.)

The knowledge that the recording existed led to a Preliminary Notice of Disciplinary Action (PNDA) dated December 8, 2011. (R-8.) R-7 is dated January 2, 2012. The reason for the difference in dates is the lieutenant was out injured when the recording was discovered. The charges were prepared by counsel. Upon his return to work on January 2, 2012, he prepared R-7.

The FNDA, dated March 2, 2015, terminated appellant's employment with RPD. Lieutenant Brennan did not know why there was a time lapse between the PNDA and the FNDA.

Appellant at no time from the date of the conversation to the present ever approached Lieutenant Brennan about the recording. Appellant did apologize to Lieutenant Brennan for the way he acted during the conversation when he was leaving work on December 2, 2009.

On June 15, 2016, Lieutenant Brennan learned of another recording made by appellant. This was through present counsel in the within proceeding. This recording was made by appellant and was a conversation with Officer Dixon, the officer with whom appellant did the overtime swap. (R-10.) Officer Dixon retired from RPD two or three years ago. Lieutenant Brennan was not previously aware of this recording. It was turned over in discovery. He identified the voices on the audio recording as appellant and Officer Dixon.

The audio recording of a conversation between appellant and Officer Dixon was about the overtime swap between them. Lieutenant Brennan noted that what appellant told him during their conversation of December 2, 2009, mirrored the conversation between appellant and Officer Dixon. Lieutenant Brennan thought the Dixon recording was done intentionally. He also thought that the conversation with Dixon took place before appellant's conversation with Lieutenant Brennan on December 2, 2009.

Lieutenant Brennan then discussed what a "Brady"[2] cop is. A Brady cop is an officer with a documented history of being untruthful, which must then be disclosed in discovery. An officer who is documented for being untruthful must be closely monitored and be "under the microscope." Being untruthful severely limits the ability to do the job of police officer. Credibility can be questioned if called upon to testify.

Cross-Examination:

Lieutenant Brennan was aware that appellant had made complaints against supervisors, other officers, and dispatchers. He was also aware that appellant recorded conversations.

Appellant was not given advance notice that Lieutenant Brennan would interview him.

Lieutenant Brennan did not know the date of the Dixon audio recording. (R-10.) Lieutenant Brennan was sure that the conversation between Officer Dixon and appellant took place after he spoke with Dixon, but before he spoke with appellant.

The December 2, 2009, conversation between appellant and Lieutenant Dixon was not intended to be an official IA interview. If it were, notice would have been required and appellant would have the right to representation. The purpose of the conversation was to request a To/From report from appellant regarding the overtime

[2] "Brady" is a reference to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

swap with Officer Dixon and why the overtime slip was in appellant's name when he did not work.

There was no rule at the time prohibiting the recording of a conversation. There is such a rule now in response to the present matter. It is not illegal to record a conversation. If appellant had disclosed he was recording, Lieutenant Brennan would have permitted it. This is permissible pursuant to the AG guidelines.

Lieutenant Brennan asked appellant if he was recording the conversation due to the nature of the questions appellant had asked.

Had the audio recording of the December 2, 2009, conversation not been disclosed in discovery in a civil suit Lieutenant Brennan would not have known about it. The rules and regulation of RPD were in existence at the time of the conversation. The conversation of December 9, 2009, was part of an investigation into the overtime swap. Lieutenant Brennan believes appellant lied to him during that conversation.

The conversation on December 2, 2009, was to be about overtime being assigned to appellant, who then assigned it to Officer Dixon, but the overtime slip was in appellant's name. It was clear to Lieutenant Brennan that appellant attempted to lay the blame on Officer Dixon. At some point during the conversation appellant stated he felt like he was being retaliated against.

Re-Direct Examination:

Lieutenant Brennan stated it did not matter that the conversation was recorded. What mattered was appellant lied. There is no need for a rule or regulation not to lie. Policing is much different today. Much of police activity is questioned. Even if a prohibition on lying was not in the rules and regulations, it still would not be permissible to lie to a superior officer. Police officers should know they need to be truthful with other officers and superior officers.

Re-Cross Examination:

Lieutenant Brennan spoke with appellant again after the December 2, 2009, conversation. He did not recall the second conversation with appellant. It must have been on December 9, 2009, when he served charges on appellant.

Re-Direct Examination:

An audio recording of a conversation between appellant and Lieutenant Brennan from December 9, 2009, was played on the record. (R-11.)

Lieutenant Brennan identified the first two voices on R-11 as Officer Dixon and appellant. Then Lieutenant Downing can be heard with a woman about a car accident.

In this recording Lieutenant Brennan advises appellant about the charges and date of the hearing. There is a conversation about the process.

Re-Cross Examination:

December 2, 2009, is the most plausible date for the audio recording between appellant and Officer Dixon. (R-10.)

Appellant's Case

Mieszko Mazurkiewicz, appellant, testified on direct examination as follows:

He was born in Poland and moved to the United States in 1996. He became a United States citizen in 2003 or 2004. He became a police officer in September 2007.

He obtained a pocket-sized digital recording device sometime before December 2, 2009. Appellant purchased the recorder as the audio recording devices in police vehicles were often defective and not properly synced with video. He had a

conversation with a captain about an incident where the video did not have audio. The captain advised him to get a recorder. This was the reason he obtained a recorder. He believes other officers also had recorders.

Mr. Mazurkiewicz also used the audio recorder to substantiate possible claims of discrimination. He "wanted to document certain conversations that I was having." The recorder was kept in a gear bag or in a pocket on his person.

During the conversation with Lieutenant Brennan he had the recorder in his gear bag. When he went to work that day he checked the battery on the recorder and put it in the gear bag. He did this every day prior to the start of his shift.

He had no advance knowledge that Lieutenant Brennan would speak with him. He does not know what happened that led to this conversation being recorded. He did not intend to record the conversation. He answered no twice to the question by Lieutenant Brennan if he was recording as he did not believe he was recording. When he intended to record a conversation he was aware the conversation was to take place. He would then turn on the recorder prior to the conversation. He turned over the recorder to his counsel in a civil case within a few days after the conversation.

The conversation with Officer Dixon was intentionally recorded. "I wanted to document the conversation just for the sake of keeping a record." He believed the conversation with Officer Dixon occurred after the conversation with Lieutenant Brennan.

Regarding the conversation with Lieutenant Brennan and the question if he was recording appellant stated that he thought the question was completely irrelevant as he was not violating any rules or regulation, or state or federal laws.

The second conversation with Lieutenant Brennan on December 10, 2009, was intentionally recorded.

Cross-Examination:

Mr. Mazurkiewicz affirmed that he had received the rules and regulation of FPD when he became an officer. He knew he was bound by them. He knew he was required to tell the truth. He admitted that truthfulness is a critically important component of the job. When asked if lying to a superior officer adversely affects his ability to be a police officer he stated, "If I intentionally did it."

He does not recall if he called Officer Dixon or if Officer Dixon called him. He did not tell Dixon he had spoken with Lieutenant Brennan. He does not recall what he was thinking at the time he spoke with Dixon. He never told Dixon that he had already spoken with Lieutenant Brennan.

He never advised Lieutenant Brennan that he did in fact record their December 2, 2009, conversation. He knew that day he had recorded the conversation.

He turned on audio device prior to speaking with the person whose conversation he wanted to record.

He recorded "probably more than ten" conversations. Only the conversation with Lieutenant on December 2, 2009, was inadvertent.

Re-Direct Examination:

He checked the audio recorder every day before his shift. He would turn on the device if he expected to have a conversation he wanted to record.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the

overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

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

Lieutenant Brennan testified in a straightforward and direct manner. He answered questions without hesitation. His demeanor was relaxed and professional. I deem him credible.

Appellant was nervous at times during his testimony. His explanation about how the December 2, 2009, conversation was recorded is simply not believable. Appellant admits to recording more than ten conversations intentionally, and surreptitiously. The only conversation that was unintentional was the conversation with Lieutenant Brennan. This strains credulity. Further, the only plausible time frame for the recorded conversation with Officer Dixon would be before the December 2, 2009, conversation with Lieutenant Brennan. Appellant reiterates what Dixon tells him to say in his conversation with Lieutenant Brennan. Appellant also recorded a conversation with Lieutenant Brennan on December 10, 2009. This recording was intentional and without Lieutenant Brennan's knowledge. I cannot state strongly enough how disingenuous Appellant was in his testimony. He seemed unable, or unwilling, to answer a question directly. Appellant is simply not credible in what he says. His testimony seems

contrived. He avoided questions, or attempted to spin his answers. I deem him not credible.

FINDINGS OF FACT

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

1. Appellant was employed by the RPD as a police officer, and was so employed on December 2, 2009.

2. William Brennan is a lieutenant with the RPD. On December 2, 2009, he held the rank of sergeant.

3. On December 2, 2009, Lieutenant Brennan and appellant had a conversation regarding an overtime swap that appellant did with Officer Robert Dixon.

4. Appellant intentionally, and surreptitiously, recorded that conversation.

5. During the course of that conversation Lieutenant Brennan twice asked appellant if he had a recording device.

6. Appellant understood this to ask if he was recording the conversation.

7. Appellant twice denied he was recording the conversation. This was not true and appellant knew when it was not true at the time he said it.

8. Sometime prior to the December 2, 2009, conversation with Lieutenant Brennan, appellant had a conversation with Officer Dixon regarding the overtime swap. This conversation was also surreptitiously recorded. (R-10.)

9. Appellant knew, based upon his conversation with Officer Dixon, that Lieutenant Brennan would be speaking with him about the overtime swap.

10. Lieutenant Brennan prepared an IA report regarding the overtime swap. (R-6.)

11. Appellant turned over the recordings to his civil attorney in furtherance of litigation with the Borough of Roselle.

12. The recordings were provided to the attorney for the Borough of Roselle as part of discovery sometime in 2011. (R-3.)

13. Lieutenant Brennan then discovered the recording of his December 2, 2009, conversation with appellant.

14. Thereafter Lieutenant Brennan prepared an addendum to his initial IA report. (R-7.)

15. Appellant was bound by the rules and regulations of the RPD. (R-2.)

16. Appellant received a copy of R-2 and knew he was to abide by them.

17. Rule 3:12.5 provides that members are to be truthful at all times whether under oath or not. (R-2.)

18. Rule 8:4.4 provides that although every member has a duty to answer truthfully and directly all questions and submit to any and all forms of investigative efforts when so ordered by a supervising or commanding officer, and said duty only applies to questions and investigation which directly relate to one's official duties or directly bears on one's fitness for continued employment. (R-2.)

19. The AG guidelines for IA require officers to answer truthfully during IA investigations.

20. The investigation into the overtime swap between appellant and Officer Dixon by Lieutenant Brennan required appellant to answer truthfully and directly all questions posed.

21. Appellant lied to Lieutenant Brennan twice regarding questions about a recording device during the conversation between them on December 2, 2009, regarding Lieutenant Brennan's investigation into the overtime swap. He did not apprise Lieutenant Brennan when he apologized approximately one hour after the recorded December 2, 2009, conversation. He did not apprise Lieutenant Brennan of the recording at their meeting of December 10, 2009, when Lieutenant Brennan served appellant with notice of discipline regarding the overtime swap. He did not note the same in his To/From dated December 3, 2009. (R-5.)

22. A Preliminary Notice of Disciplinary Action (PNDA) charged appellant with the following: N.J.A.C. 4A:2-2.3(a)(2) insubordination; N.J.A.C. 4A:2-2.3(a)(3) inability to perform duties; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause: violation of RPD rules and regulations. (R-8.)

23. A Final Notice of Disciplinary Action (FNDA), dated March 2, 2015, contained the following sustained charges: N.J.A.C. 4A:2-2.3(a)(3) inability to perform duties; N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause: violation of RPF rules and regulations. (R-9.)

24. The FNDA provided for a penalty of removal, effective January 23, 2015.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-

1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

There is no constitutional or statutory right to a government job. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges

brought against him and, if so, the appropriate penalty, if any, which should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the City of Newark bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "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), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

There is more than ample proof that appellant's conduct was clearly unbecoming and violated the RPD Rules and Regulations. He was questioned by a superior officer during the course of that superior officer's investigation into an overtime swap and twice

lied about having a recording device. Clearly, his behavior is such that it "has a tendency to destroy public respect for government employees and confidence in the operation of governmental services" and "offend[s] publicly accepted standards of decency." Karins, supra, 152 N.J. at 554, 555. And it violates "the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann, supra, 258 N.J. Super. at 40. Appellant, by his own behavior, caused what was minor incident, the overtime swap, to become the subject of major discipline that led to a FNDA removing appellant from his employment.

The Appellate Division noted in In re Torres, A-1450-06T3 (App. Div. June 4, 2008), http://njlaw.rutgers.edu/collections/courts/, the following:

Deliberately filing a false police report is conduct that strikes at the very heart of a police officer's responsibility and undermines public confidence in police. Cosme v. E. Newark Twp. Comm., 304 N.J. Super. 191, 206 (App. Div. 1997), certif. denied, 156 N.J. 381 (1998). If a police department maintains or retains an officer after he has falsified a police report, his credibility in criminal matters as well as in other proceedings can be attacked. Moveover, citizens who are suspected of criminal activity have a right to expect that reports filed by a police officer accurately, fairly, and honestly describe what occurred. Consequently, we have no difficulty concluding that the deliberate filing of a false police report is conduct unbecoming a public employee, especially in light of the strong need to maintain discipline within law enforcement agencies, see Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980), and the capacity of a false police report to "disrupt and destroy order and discipline" in a police organization. Id. at 580.

In the matter herein, appellant knew it was against the RPD rules and regulations to lie. He acknowledged as much in his testimony and stated "It is never okay to lie." Yet he did so knowingly during the course of Lieutenant Brennan's investigation into the overtime swap. Lying to a superior officer during the course of an investigation is akin to filing a false police report. Further, the lie took place as part of appellant's official duties: to submit to any and all forms of investigative efforts when so ordered or

questioned by a superior or commanding officer. (R-2.). His conduct is akin to filing a false police report.

Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). Appellant's entire record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock,supra, 38 N.J. 500.

A court should overturn a final agency decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, 191 N.J. 474, 482 (2007) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). As the Court observed in Carter, a reviewing panel:

> must defer to an agency's expertise and superior knowledge of a particular field. Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result."
>
> [Id. at 483 (citations omitted).]

I **CONCLUDE** that the respondent has proved by a preponderance of the credible evidence that that appellant was guilty of the charge of conduct unbecoming a public employee, N.J.A.C. 4:2-2.3(a)(6), in the Final Notice of Disciplinary Action and that the FNDA should be upheld.

I further **CONCLUDE** that the penalty of removal is appropriate.

ORDER

Based upon the foregoing, I **ORDER** that the sustained charge of N.J.A.C. 2-2.3(a)(6), conduct unbecoming a public employee, in the Final Notice of Disciplinary Action, and the penalty of termination, is hereby **AFFIRMED**.[3]

It is also **ORDERED** that appellant's appeal is **DENIED**.

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.

[3] The charge of N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties, found in the FNDA was bifurcated from the instant matter by order of Judge Jones dated February 2, 2016. The charge of N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause: violation of Roselle Police Department Rules and Regulations 8:1.6(K), conduct unbecoming a public employee, also found in the FNDA, was dismissed in the same order.

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, P.O. 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.

August 17, 2016

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: August 17, 2016

Date Mailed to Parties: August 17, 2016

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APPENDIX

List of Witnesses

For Appellant:

Miesko Mazurkiewicz, appellant

For Respondent:

Lieutenant William Brennan

List of Exhibits

For Appellant:

P-1 Photocopies of photograph of gear bag

For Respondent:

R-1 Collective Bargaining Agreement July 1, 2008, to June 20, 2014

R-2 Department Rules and Regulations

R-3 Audio recording from December 2, 2009, and transcript

R-4 To-From Reports from appellant

R-5 To-From Reports from appellant dated December 3, 2009

R-6 Initial Internal Affairs Report 09-24

R-7 Addendum to Internal Affairs Report 09-24 dated January 1, 2012

R-8 PNDA dated December 8, 2011

R-9 FNDA dated March 2, 2015

R-10 Audio recording from Wilentz, Goldman & Spitzer

R-11 Audio recording December 9, 2009