A-2

STATE OF NEW JERSEY

In the Matter of Zane Batten

CSC Docket No. 2015-3161
OAL Docket No. CSV 09681-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: DEC 22 2016 (JET)

The appeal of Zane Batten, a Conservation Officer 2, Department of Environmental Protection, of his 70 working day suspension, on charges, was heard by Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on October 18, 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 attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on December 7, 2016, accepted and adopted the Findings of Facts and Conclusions as contained in the ALJ's initial decision and the recommendation to uphold the 70 working day suspension.

DISCUSSION

The appellant was suspended for 70 working days on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority alleged that, on November 9, 2013, the appellant, without authorization or notifying his superior officers, conducted an investigation and posted a fake advertisement on Craigslist inviting the public to a suspect's property for free scrap metal. The appellant conducted surveillance for eight to ten hours and removed the advertisement from Craigslist when no activity was observed. Additionally, the appointing authority alleged that the appellant refused to provide a report regarding the incident to the Special Investigations Unit (SIU) at the time

of the investigation. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

In the initial decision, the ALJ found that, in the fall of 2013, the appellant received a tip about a suspect cultivating marijuana in a barn behind his mother's house. Around the same time, appellant received a complaint from a hunter advising of a strong odor of marijuana coming from the barn on the suspect's property. Although he notified the Cumberland County Prosecutor's Office, the appellant was told they were too busy to look into the matter. Further, the ALJ found that, on November 13, 2013, the appellant placed an advertisement on Craigslist advising the public that there was free scrap metal on the suspect's property. The appellant hoped that the suspect would try to move the marijuana if strangers showed up on the property. The appellant conducted surveillance of the area for eight to ten hours after placing the advertisement, after which he terminated his surveillance and removed the advertisement. The ALJ concluded that the appellant did not obtain authorization to initiate an investigation, place the advertisement on Craigslist, or conduct surveillance on the property.

Subsequently, the suspect discovered that the appellant placed the Craigslist advertisement and filed harassment charges against him. The Prosecutor's Office referred the matter to the SIU for an investigation after determining that the appellant had placed the Craigslist advertisement. The appellant met with the appointing authority's Labor Relations unit and explained that he placed the advertisement on Craigslist and the circumstances surrounding his investigation. He acknowledged that he never advised his supervisors about it and never obtained authorization to conduct the investigation. Additionally, the ALJ found that the appellant declined union representation when he met with the Labor Relations unit and he refused to provide a written statement regarding the incident.

As the facts were not disputed by the appellant,[1] the ALJ concluded that the evidence showed that his actions in conducting an investigation without authorization constituted conduct unbecoming a public employee. The ALJ also concluded that the appellant's failure to provide a written report after he admitted to the conduct was a violation of the appointing authority's policies which was sufficient to constitute other sufficient cause. Although the appellant did not have a prior disciplinary history, the ALJ concluded that his behavior was egregious and recommended upholding the 70 working day suspension.

---

[1] It is noted that the ALJ found that, in a separate incident, the appellant and the suspect property owner had a minor altercation on a previous occasion where the appellant filed assault charges against the suspect. Approximately one year after the separate incident occurred, the suspect discovered that the appellant placed the fake advertisement on Craigslist and filed a harassment complaint against the appellant.

In his exceptions, the appellant asserts that the ALJ improperly questioned and cross-examined the witnesses. The appellant explains that during the hearing, the ALJ regularly interrupted counsel and inappropriately questioned the witnesses. The appellant adds that the ALJ directed a protracted line of questioning toward him pertaining to his law enforcement experience in the eradication of marijuana. The appellant states that such questioning shows that the ALJ attempted to box him into a corner so he would admit that he was only permitted to pursue an investigation on State property. Further, the appellant maintains that it was improper for the ALJ to ask such questions, as it prevented his attorney from laying the framework to show that the appellant properly conducted an investigation. In addition, the appellant states that as a result of the ALJ's questions, he had no choice but to provide the answer that the ALJ expected.

Additionally, the appellant argues that the ALJ failed to address the testimony from retired Chief Mark Chicketano. The appellant asserts that Chicketano corroborated the appellant's testimony that he did not refuse to provide a written statement. Specifically, Chicketano's testimony established that he did not instruct the appellant to complete the written statement regarding the incident without first addressing OPRA concerns. As such, Chicketano's testimony did not establish that the appellant was directed to provide a written statement. Additionally, the appellant argues that the ALJ failed to consider that the Labor Relations unit improperly exceeded its discretion to issue disciplinary action as he was previously disciplined by Chicketano, who verbally counseled him. Therefore, he contends that he should not be disciplined again for the same incident. Moreover, the appellant argues that the ALJ merely concludes that initiating the investigation without authorization, as well as his failure to render a written statement, amounted to egregious conduct. Therefore, he contends that his suspension is not consistent with progressive discipline. Further, the appellant avers that the ALJ did not consider the fact that he has no prior disciplinary history, that he was promoted after the incident occurred, and that he had wide discretion to utilize various investigatory techniques.

In response, the appointing authority asserts that the facts in this matter are undisputed. Specifically, the appellant admitted that he placed the fake advertisement on Craigslist in order to encourage random people to remove scrap metal from the suspect's property. The appointing authority adds that the appellant admitted that he did not inform or receive permission from his chain of command regarding his actions before initiating the investigation or at any point thereafter which is required. Additionally, the appointing authority asserts that the appellant admitted that he did not provide a written statement regarding the incident. In this regard, the appointing authority explains that employees are required to cooperate and provide information when requested. The appointing authority adds that, as the fact finder, an ALJ may ask questions of witnesses. The ALJ's inquiries were entirely appropriate, as they were aimed at assisting with

understanding the background of the case and the duties performed by a Conservation Officer.

Moreover, the appointing authority asserts that the appellant's claim that Labor Relations should not have issued disciplinary action is of no moment. The appellant's argument that he had already been disciplined in the form of a verbal reprimand was not overlooked. Rather, it was unpersuasive to the ALJ. In this case, the ALJ noted that the appellant did not have a prior disciplinary record. However, the ALJ indicated that penalties up to and including removal may be appropriate for a first offense when the conduct is egregious. Thus, the appointing authority maintains that the 70 working day suspension was appropriate given the nature of the appellant's conduct.

Upon independent review of the entire record, including the exceptions and reply to exceptions filed by the parties, the Commission agrees with the ALJ's determination regarding the charges and the determination to uphold the 70 working day suspension.

The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings ... are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In the instant matter, the ALJ amply supported her determination that the appellant was not credible. Specifically, the ALJ found that the appellant's testimony that he was given wide discretion to do what he wanted to do was not credible given that he failed to report the investigation, even after the fact, and his ongoing issues with the suspect. Additionally, there is no substantive evidence to show that the ALJ's actions of questioning the appellant and the witnesses prevented her from acting as a neutral and independent fact finder during the hearing, or that such behavior somehow adversely affected the case. Indeed, *N.J.A.C.* 1:1-14.6(o) permits an ALJ to require any party at any time to clarify confusion or gaps in the proofs and an ALJ may question any witness to further develop the record. The appellant has not set forth anything in his appeal which convinces the Commission that the ALJ's questioning

of the witnesses was unreasonable or her credibility determinations were unreasonable or not based on the evidence in the record.

In determining the proper penalty, the Commission's review is *de novo.* In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center,* 96 *N.J.A.R.* 2d (CSV) 463. Moreover, it is well established that 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. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (1980).

In the instant matter, the Commission is not swayed by the appellant's attempts to minimize the situation by claiming that he was trained in various investigatory techniques and that his job expectations allowed him to independently conduct investigations. The appellant is an experienced Conservation Officer and he should have known that he was required to obtain authorization before conducting an investigation. Without obtaining permission to conduct an investigation, the appellant's actions were highly inappropriate, especially since he had previous dealings with the alleged suspect. The fact that the appellant had prior involvement with the alleged suspect, was afraid the evidence would be moved, and his alleged reliance on Chicketano's instructions, does not mitigate the egregious nature of his actions. His utterly inappropriate conduct of placing a fake advertisement on Craigslist compounds the situation. In fact, since he admittedly has nearly 20 years of experience in performing such duties, the appellant should have known that he was *not* supposed to have engaged in such inappropriate behavior.

A review of the appellant's personnel record does not reflect any prior major disciplinary history in his lengthy employment as a Conservation Officer. However, based on the severity of the appellant's actions, his record does not serve to mitigate the penalty in this matter. The appellant's offenses of inappropriately conducting an investigation without authorization, failing to notify his supervisors of the investigation, placing a fake advertisement on Craigslist, and failing to submit a report of the incident, is sufficiently egregious to warrant a 70 working day suspension. Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense

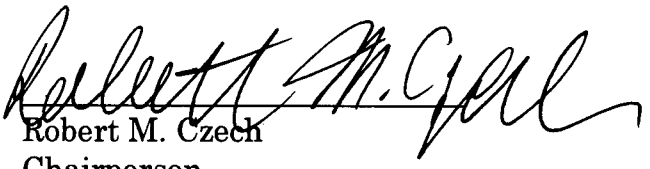
and there is sufficient basis to uphold the appellant's 70 working day suspension. As a final note, the Commission rejects the appellant's contention that he could not receive such a penalty since he was already disciplined by Chicketano. In order to be considered actual discipline, a penalty of at least a formal written reprimand is required, as that is the lowest form of formal discipline contemplated under Civil Service law and rules. *See N.J.A.C.* 4A:2-2.2 and *N.J.A.C.* 4A:2-3.1.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a 70 working day suspension was justified. Therefore, the Commission affirms that action and dismisses the appeal of Zane Batten.

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
THE 7th DAY OF DECEMBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09681-15
AGENCY DKT. NO. 2015-3161

IN THE MATTER OF ZANE BATTEN, DEPARTMENT OF ENVIRONMENTAL PROTECTION, WINSLOW TOWNSHIP.

Frank M. Crivelli, Esq., for appellant (Crivelli and Barbati, LLC, attorneys)

Jennifer L. Dalia, Deputy Attorney General, for respondent (Christopher S. Porrino, Acting Attorney General of New Jersey, attorney)

Record Closed: September 6, 2016 Decided: October 18, 2016

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

STATEMENT OF THE CASE

Appellant, Zane Batten, is a conservation officer (CO) for respondent New Jersey Department of Environmental Protection (DEP). He appeals the action of respondent imposing a seventy-day suspension on charges of conduct unbecoming a public employee and other sufficient cause, specifically, refusing to provide a statement in connection with the investigation into his conduct, stemming from an incident that occurred in November 2013. The appellant put an ad on Craigslist inviting the public to come to an individual's property for "free scrap metal." Appellant had received a tip that

the individual was growing and storing marijuana on the property, and he hoped that the ad would induce him to move it. He conducted surveillance for eight to ten hours, and after he observed no activity, he took the ad down and did not pursue the matter any further.

The appellant did not obtain authorization from his supervisor to initiate such an investigation, and, thereafter, never advised anyone about it. He also refused to give a report regarding the incident to the Special Investigations Unit (SIU) when they were conducting an investigation. There is no dispute that he never advised anyone about the matter, posted the ad, conducted surveillance, and declined to provide a written report. Appellant claims that he didn't get approval for everything that he did, and that he declined to give a report because he was afraid that the property owner might get a copy of it.

PROCEDURAL HISTORY

On March 11, 2015, the respondent issued a Preliminary Notice of Disciplinary Action imposing a seventy-day suspension on appellant. Appellant was charged with conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)), and other sufficient cause (N.J.A.C. 4A:2-2.3(a)(12)), specifically, failure to cooperate, in violation of Policy and Procedure 2.35. Following a departmental hearing, respondent issued a Final Notice of Disciplinary Action on May 19, 2015, sustaining the charges and the suspension of seventy days. The appellant requested a hearing and the matter was filed at the Office of Administrative Law (OAL) on July 1, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was heard on May 3, 2016, and May 12, 2016, and the record closed after receipt of written submissions by the parties on September 6, 2016.

UNDISPUTED FACTS

In November 2013 appellant received a tip regarding someone growing marijuana in an area adjacent to State lands that he patrols. He was told that they were keeping the marijuana in a garage on the property. He referred the tip to the

Cumberland County Prosecutor's Office, who advised him that they did not have any information on the matter and they did not have the manpower to investigate it. On November 9, 2013, appellant posted a Craigslist advertisement for "free scrap metal" on the property of the alleged perpetrator. Appellant claims that he hoped to scare the offender into moving the marijuana if random people showed up at the property, and he would observe it, and have probable cause for a warrant. After nothing happened, he removed the ad after one day. He took no further action with respect to the alleged tip regarding the marijuana on the property. Appellant never advised anyone at work about the tip, the ad, or the surveillance, nor did he request authority to conduct such an investigation.

Prior to the posting of the ad on Craigslist, appellant and the property owner, John Gonzalez, had a minor altercation. The appellant was patrolling State property when he encountered Gonzalez and asked to see his hunting license. Appellant claimed that Gonzalez hit him with a bucket and ran away. Appellant filed assault charges against Gonzalez as a result of this incident. Approximately one year later, Gonzalez discovered that it was appellant that placed the Craigslist advertisement, and Gonzalez filed a harassment complaint against appellant. This harassment complaint led to an investigation by the local police and the involvement of the SIU of appellant's office. It was confirmed that appellant posted the advertisement and conducted the surveillance without obtaining any authorization or notifying his superiors.

FACTUAL DISCUSSION AND TESTIMONY

For respondent:

Matthew Brown, acting chief of the Bureau of Law Enforcement within the Division of Fish and Wildlife (DFW) at the DEP, testified that he was the deputy chief when the incident occurred with appellant. His department is responsible for enforcement of law relating to fish and wildlife resources and pollution of the waterways. There are four different regions in the state and each region has two conservation officers. Conservation officers, such as appellant, are supposed to be in constant communication with their supervisor to let them know what they are doing in the field.

Chief Brown testified that appellant was assigned to the SIU in Cumberland County, which investigates wildlife violations. He explained that although the unlawful commercialization of natural resources is investigated by their department, they do not typically investigate suspected marijuana cultivation, and would refer the matter to local, county or State detectives for investigation.

Chief Brown identified the standard operating procedures (SOP) for the SIU. The essential duties are "to gather intelligence and/or evidence to enable uniformed offers to make apprehensions for the unlawful commercialization of our natural resources." (R-19.) He testified that a conservation officer must report to his or her supervisor and must make contact with a supervisor before initiating an investigation. In early 2015 a complaint was lodged against appellant by a John Gonzalez as a result of the Craigslist posting. Johnathan Flynn of the Cumberland County Prosecutor's Office was involved due to the criminal-assault charges filed by appellant against Gonzales. Flynn reported the matter to Chief Chicketano, who was the chief at the DFW at the time. An Internal Affairs investigation was commenced to look into the matter. Chief Brown testified that they concluded that it was totally inappropriate for appellant to place such an advertisement, as telling people to come to someone's private property and essentially steal things was improper and dangerous. Furthermore, appellant did not clear the investigation with his supervisor.

Chief Brown testified that he discussed the matter with appellant, and appellant explained why he had placed the advertisement, and conceded that he did not get prior approval or tell anyone about it. In addition to not obtaining any authorization to conduct the investigation, it was not his job, and he should have contacted municipal detectives about the matter. Local law enforcement would usually take the lead on such a matter, and the DFW would have an ancillary role. He testified that appellant not only exceeded the bounds of his job, he failed to go through the proper chain of command. Chief Brown said he never knew about the matter until a year later, when Gonzalez filed the harassment complaint against appellant. Brown, as deputy chief, prepared a report, and forwarded it to the then chief, who decided how to proceed in terms of discipline.

Jason Strapp, the administrator of the Office of Labor Relations for DEP, handles labor relations and grievances. He testified that he reports to the director, Robin Liebeskind, on everything that rises to a level of major discipline. Mr. Strapp identified the Policies and Procedures for Disciplinary Action at the DEP. He testified that penalties imposed are supposed to be progressive, unless it is a very egregious action. He was familiar with the case involving appellant. A civilian had filed a harassment complaint against the appellant, and that civilian had been a defendant in an assault charge involving appellant. The Prosecutor's Office was investigating the matter in connection with the criminal charges pending against Gonzalez. When they discovered that appellant had placed a Craigslist ad inviting people to come to the complainant's mother's property for free scrap metal, they referred the matter to Strapp's office for an internal investigation.

Office of Labor Relations conducted interviews internally regarding the incident, and Chief Brown and Rina Heading, the head of the Labor Relations Department, were present. When they interviewed appellant, he was offered a union representative, but declined. Appellant not dispute that he placed the ad and conducted an investigation without authorization. However, he refused to give a written statement. They had a second meeting with appellant, and he again declined to give a written statement.

Robin Liebeskind is employed by the DEP and is responsible for administering discipline to State employees. She was briefed on the appellant's case by Jason Strapp, after they completed their investigation. She discussed the matter and the discipline that should be imposed with several people, including the deputy commissioner and the chief of staff. Everyone was in agreement that it was a very serious offense that had placed appellant as well as other people in danger. They also concurred that it was not the appellant's job to be doing this kind of investigation, and were very concerned that he had refused to provide a written statement. They determined that a seventy-day suspension was appropriate.

For appellant:

Marc Chicketano is now retired, but had been employed in the SIU and worked with the appellant for ten years. He was present at one of the meetings in Trenton regarding the appellant. He the felt that the appellant was very cooperative. Chicketano agreed that placing the advertisement on Craigslist was not the best decision. He testified that he thought appellant was concerned about Gonzalez getting a copy of the report through the Open Public Records Act (OPRA), and that is why he did not provide a written statement. He testified that he thought a written reprimand was a sufficient penalty for the violations, but he had no involvement in the discipline in the matter.

Zane Batten has been a conservation officer with the DEP since 2000. He was a deputy conservation officer prior to that. He graduated from the Police Academy in 2001, and has been with the DEP for over twenty years, since 1994. He did receive training on marijuana irradiation. His territory covers Camden, Gloucester, Salem and Cumberland Counties. He was primarily in Cumberland and a portion of northern Cape May. He testified that if he received a tip regarding something illegal, such as the growth and distribution of marijuana, he would contact local law enforcement. Deputy Chief Matt Brown was his supervisor, and there were no specific rules about how often or what you needed to communicate to your supervisor. The appellant maintains that he was given a lot of discretion to conduct investigations, and did not have to report his every move to his supervisor. He testified that he would communicate with his supervisor weekly unless there was a hot investigation. He did not report the investigation in question to his supervisor at any time.

Appellant had several encounters with John Gonzalez over the years. The first time he encountered John Gonzalez was in 2007, when they had a report of trespassers in the woods on State property, and a report of multiple ATVs being stolen and hidden in the woods. He went out on foot patrol and found one UTV and one ATV, and confirmed that one was stolen. He waited for local law enforcement, and John Gonzalez was arrested. Appellant testified that sometime in 2013 he received a complaint from a hunter that he had trespassers on his property. He went to the

property and confronted the bow hunters. Two of them were convicted felons and they had no license to hunt. About an hour later, he saw another individual coming out of the woods towards him and he said, "Police officer, don't move, I want to look at your license." Appellant testified that as he reached over to look at the license, the individual hit him with a bucket and ran off. The individual was John Gonzalez, and appellant filed criminal assault charges against him as a result of the incident.

Appellant received confidential information about marijuana being cultivated on John Gonzalez's mother's property in the fall of 2013. Initially he just turned the information over to the marijuana-eradication unit of the State Police. Appellant then received a complaint from a hunter in that area that someone kept leaving notes on his truck that he should not hunt there. The hunter told him that he had permission to hunt there, and that there was a strong odor of marijuana coming from the barn behind the Gonzalez house. It was the same where Gonzalez's mother lived. The Cumberland County Prosecutor's Office told him that "they were so buried in gangs and guns" that they did not have any time to look into it.

Appellant testified that he knew he did not have probable cause to get a search warrant, so he tried to come up with a way to get Gonzalez to move the marijuana off the property. He testified that he decided to post an ad on Craigslist that there was free scrap metal on the property. He thought that if people started coming onto the property, Gonzalez might get nervous and try to move the marijuana. Appellant posted the ad in the evening, and conducted surveillance the next day to see if Gonzalez tried to move the marijuana. He sat on the shed all day, eight to ten hours, but Gonzalez didn't move the marijuana, so appellant took the ad down. He never contacted his supervisor about it, as he was not pursuing it any further. He testified that when Chicketano found out about it about a year later, he gave him a strong reprimand about it, but that was it.

Appellant testified that when Labor Relations asked to talk to him, he went to Matt Brown's office with Chicketano. He answered all the questions, and was there for an hour and a half. He said he did not deny anything, as he had nothing to hide. He declined union representation because he did not think he needed any. After discussing the matter for an hour and a half, he was asked for a written statement. He

conceded that he refused. He claims he was concerned about John Gonzalez getting a copy of any report, because Gonzalez is a known gang member. He said, "I did not want him to know I was surveilling his house for suspected drug activity." Appellant asked them if the report was subject to OPRA and they could not answer the question, so he declined to prepare a report. He testified that he was fully cooperative in the meeting, but was afraid to write a report.

FINDINGS OF FACT

The resolution of the charges against appellant requires that I make a credibility determination with regard to some of the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. Super. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. In re Perrone, 5 N.J. Super. 514, 521–22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that the appellant was not credible. I **FIND** the appellant's testimony that he was given wide discretion to do what he wanted to do and did not need authorization to initiate and conduct investigations was not credible. I also **FIND** that appellant's failure to report the investigation, even after the fact, is further evidence that he knew such conduct was not permitted. I further **FIND** that appellant had ongoing issues with

Gonzalez, which may have been why he failed to obtain the necessary authorization to investigate and conduct surveillance on this individual.

I further **FIND** that appellant's testimony that he did not want to give a written statement because he did not want Gonzalez to know he was conducting surveillance on the property was not credible. Appellant knew that Gonzalez figured out that he placed the Craigslist advertisement. In addition, appellant had arrested Gonzalez in the past and had personally filed assault charges against him. Accordingly, I further **FIND** his testimony that he was afraid of Gonzalez finding out about his surveillance was not credible.

With respect to the underlying charges of conduct unbecoming, based upon a review of the totality of the evidence, and having had the opportunity to assess the demeanor and credibility of the witnesses who testified, I make the following **FINDINGS** of **FACT**:

1. Appellant was a conservation officer for the Department of Environmental Protection. He was assigned a region that included Cumberland County and part of Camden County. He has been employed by the DEP for over twenty years and has no disciplinary history.

2. In the fall of 2013, appellant received a tip about an individual named John Gonzalez cultivating marijuana in a barn behind his mother's house. He turned the matter over to local law enforcement.

3. Around the same time, appellant received a complaint from a hunter advising of a strong odor of marijuana coming from the barn on the Gonzalez property. He notified the Cumberland County Prosecutor's Office and was told they were too busy to look into it.

4. On November 13, 2013, appellant placed an ad on Craigslist advising the public that there was free scrap metal on the Gonzalez property. Appellant

hoped that Gonzalez would try to move the marijuana if strangers showed up on the property.

5. Appellant conducted surveillance of the area for eight to ten hours after placing the ad, after which he terminated his surveillance and removed the Craigslist advertisement.

6. Appellant never obtained authorization to initiate an investigation, to place the ad on Craigslist, or to conduct surveillance on the property.

7. The SOPs for the NJ Division of Fish and Wildlife, Bureau of Law Enforcement, require that "the initiation of all investigation and case assignment must be approved by the SIU supervisor, and the Chief."

8. Appellant never advised anyone after the fact of his investigation, the advertisement on Craigslist, or the surveillance that he conducted on the Gonzalez property.

9. Appellant was familiar with John Gonzalez, having arrested him before for having stolen property, and having recently filed assault charges against him in November 2013.

10. After Mr. Gonzalez determined that it was appellant who placed the Craigslist advertisement, he filed harassment charges against him.

11. The Prosecutor's Office referred the matter to the Special Investigations Unit of the DEP after determining that the appellant had placed the Craigslist advertisement.

12. Appellant met with Labor Relations and advised them that he did place the advertisement on Craigslist and explained the circumstances surrounding his investigation. He acknowledged that he never advised his supervisors about it and never obtained authorization to conduct the investigation.

13. Appellant declined union representation when he met with Labor Relations. When they requested that he provided a written statement, he refused.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 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. 1971); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. Super. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. Super. 143 (1962); In re Polk License Revocation, 90 N.J. Super. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. Super. 487 (1962).

Conduct unbecoming a public employee has been interpreted broadly as conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in the

delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "'be such as to offend publicly accepted standards of decency.'" Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not "'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior.'" Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In this matter, the appellant does not dispute the essential facts. Appellant acknowledges that he conducted an investigation by posting an advertisement on Craigslist and doing surveillance on a suspect's property. Appellant acknowledges that he failed to obtain authorization for such an investigation. Appellant also acknowledges that he never advised anyone about it after the fact. Finally, appellant acknowledges that he refused to give a written statement regarding this activity.

Accordingly, based upon the testimony and findings, and applying the law to the facts, I **CONCLUDE** that the Department has proven by a preponderance of the credible evidence that the appellant violated DEP policy with respect to obtaining authorization for conducting investigations, constituting conduct unbecoming a public employee. I further **CONCLUDE** that the Department has proven by a preponderance of the credible evidence that appellant violated DEP Policy and Procedure 2.35 by refusing to give a written statement in connection with the Labor Relations investigation, constituting other sufficient cause.

PENALTY

The issue then becomes the level of discipline to be imposed. The Department urges a seventy-day suspension, and the appellant urges something much less. Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. West New York v. Bock, 38 N.J. 500 (1962). However, it is well established that 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).

In this matter, although appellant has no prior disciplinary history, I **CONCLUDE** that initiating an investigation such as this without any authorization is egregious enough to merit a severe penalty. In addition, the failure to provide a written report after conceding to the conduct is a clear violation of the policies, as well as insubordination. Accordingly, the penalty imposed by respondent should be affirmed.

ORDER

I **ORDER** that the action of the appointing authority in imposing a seventy-day suspension is hereby **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.

October 18, 2016
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: October 18, 2016 (emailed)

Date Mailed to Parties: October 18, 2016 (emailed)

SGC/mel

APPENDIX

WITNESSES

For appellant:

Zane Batten

Marc Chicketano

For respondent:

Matthew Brown

Jason Strapp

Robin Liebeskind

EXHIBITS

For appellant:

P-1 Confidential Memorandum to Acting Chief Chicketano from Deputy Chief Brown dated March 1, 2015

P-2 Job Specification for Conservation Officer 2

For respondent:

R-1 Internal Affairs Complaint Form for John K. Gonzalez dated January 5, 2015

R-2 Email dated January 12, 2015, to Matt Brown from John Cianciulli with attachment of assistant prosecutor's letter regarding the Internal Affairs investigation

R-3 Confidential Memorandum dated February 6, 2015, to Deputy Chief Matt Brown from Dominick Fresco regarding interview with John K. Gonzalez re: CO Zane Batten IA investigation

R-6 Job Specification for Conservation Officer 3

R-7 Standard Operating Procedure, Chain-of-Command, effective October 1, 1986, revised March 1, 2007

R-9 Email dated February 23, 2015, to Zane Batten from Rina Heading regarding investigation interview

R-16 Department of Environmental Protection Policy and Procedure No. 2.35, Disciplinary Action and Conduct of Hearings, effective May 18, 2006

R-17 New Jersey Department of Environmental Protection, Division of Human Resources, Office of Labor Relations, Disciplinary Guidelines, dated April 21, 2016

R-19 Standard Operating Procedure, Special Investigation Unit, effective December 1, 1997