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STATE OF NEW JERSEY

DECISION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Anthony Larino

CSC Docket No. 2014-2584
OAL Docket No. CSV 05202-14

ISSUED: December 7, 2016 (ABR)

The appeal of Anthony Larino, a Police Captain[1] with the City of Bayonne, of his 180 calendar day suspension, on charges, was heard by Administrative Law Judge Joan Bedrin Murray (ALJ), who rendered her initial decision on October 24, 2016. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 23, 2016, did not adopt the ALJ's recommendation to uphold the 180 calendar day suspension. Rather, the Commission modified the 180 calendar day suspension to a 120 calendar day suspension.

DISCUSSION

The appellant was charged with failure to perform duties and conduct unbecoming a public employee based upon alleged violations of the Rules and Regulations of the City of Bayonne Police Department (the "Rules"). Specifically, the appointing authority asserted that the appellant, while off duty, became involved in a dispute involving his wife's family, despite the presence of on-duty officers, in violation of Rule 4.1.3. The appointing authority also contended that the

[1] At the time of the underlying incident, which occurred on December 14, 2012, the appellant held the rank of Police Lieutenant. The appellant was subsequently promoted to the title of Police Captain, effective February 22, 2013.

appellant violated Rule 4.1.4 by making an arrest during that family-related dispute and violated Rule 4.1.9 by behaving in a discourteous and uncivil manner towards his subordinate, who was attempting to arrest the appellant's brother-in-law. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in her initial decision that the appellant, while off duty, involved himself in on-duty officers' response to a dispute between Tyrone Johnson and the appellant's brothers-in-law, Frank Russell, Jr. and Scott Russell, which occurred at a body shop owned by the appellant's in-laws. The ALJ noted that Police Officers James Mahoney and Kelly McKeand had responded to the scene before the appellant arrived from his nearby business. The ALJ found that the appellant diverted Mahoney's attention from the scene and interfered with the arrest of Scott Russell by moving Mahoney away from the body shop's office while he waited for Scott Russell to emerge; pulling Scott Russell away from Mahoney after he exited the body shop's office; and after Scott Russell was arrested, telling Mahoney: "If you're gonna fucking lock him up I want the other fucking guy [Johnson] locked up." In that regard, the ALJ noted that when the appellant pulled Scott Russell away from Mahoney, a number of body shop employees encircled Mahoney and created a barrier between him and Scott Russell.

The ALJ also determined that the appellant essentially gave Mahoney an ultimatum to either arrest Johnson also or to drop the whole matter when he pressed for Johnson's arrest. The ALJ found that there were no exigent circumstances that required the appellant to insert himself into on-duty officers' efforts to respond to the dispute and that the appellant's actions served to escalate the situation and impeded Mahoney's efforts to arrest Scott Russell. The ALJ also found that while Johnson was later arrested pursuant to a criminal complaint signed by the appellant, Police Officer Martin Gill, another on-duty responding officer, made the physical arrest at the direction of Police Captain Eric Deitrich. As such, the ALJ determined that the appellant did not violate Rule 4.1.4 because he did not make an arrest in his own or his family's quarrel. Based on the foregoing, the ALJ found that the evidence supported the charge of conduct unbecoming a public employee, but dismissed the charge of failure to perform duties. With regard to the penalty, the ALJ noted that the appellant had an unblemished disciplinary record, but concluded that the 180 calendar day suspension was warranted in light of the appellant's conduct and its impact upon the appointing authority.

In his exceptions, the appellant argues that the ALJ erred in upholding the 180 calendar day suspension. The appellant contends that the charge of conduct unbecoming a public employee is not supported by the record and does not warrant such a lengthy suspension, particularly given that the appellant is a 17-year veteran officer with no prior disciplinary record. Specifically, the appellant notes that the ALJ found that the appellant did not violate Rule 4.1.4, while finding that

he violated Rule 4.1.3. In that regard, the appellant notes that Rule 4.1.4 prohibits officers from "mak[ing] arrests in their own quarrels or those of their families," except under grave circumstances, while Rule 4.1.3 prevents officers from "intentionally becom[ing] involved in their own neighborhood disputes, when off duty." The appellant contends that the record does not support a finding that he violated Rule 4.1.3 because it only prohibits officers from getting involved in their own disputes and does not extend to disputes involving family members. The appellant also argues that his alleged rudeness towards Mahoney does not rise to the level of "conduct unbecoming" or support a 180 calendar day suspension, as it is commonplace for police officers to use profanities as adjectives when speaking with one another. The appellant also contends that his actions in restraining Scott Russell and testimony that the appellant told Frank Russell, Jr. not to call the Chief of Police or the Mayor after Scott Russell was arrested show that he was trying to get Scott Russell to submit to the arrest, rather than interfering to prevent Mahoney from making the arrest.

In its reply, the appointing authority argues that the Commission should adopt the ALJ's decision and uphold the 180 calendar day suspension. The appointing authority contends that the record, including a surveillance video recording showing the appellant in the middle of the dispute, demonstrates that the appellant did violate Rule 4.1.3. The appointing authority stresses that the ALJ found that the appellant directed profanities at Mahoney in a heated manner during the course of the dispute. It notes that the ALJ found the appellant's account of his actions and intentions to be contradictory and improbable and concluded that the appellant intentionally frustrated the responding, subordinate officer's attempt to arrest the appellant's brother-in-law and escalated the tension at the scene. It also notes that the ALJ found the appellant later gave Mahoney an ultimatum to either arrest Johnson also or to drop the entire matter. The appointing authority contends that the foregoing demonstrates ample support for the ALJ's findings of fact and conclusions of law.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination upholding the charge of conduct unbecoming a public employee and dismissing the charge of failure to perform duties, but does not agree with the imposition of a 180 calendar day suspension. Rather, the Commission modifies the penalty to a 120 calendar day suspension.

The appellant has argued in his exceptions that the ALJ erred in upholding both the charge of conduct unbecoming a public employee and the 180 calendar day suspension. With regard to the charge of conduct unbecoming a public employee, the appellant contends there was no basis for the ALJ to uphold the charge since the underlying dispute surrounding the charges was not his own, but rather one between two of his brothers-in-law and another individual from the neighborhood

where their shop is located. Thus, he contends that Rule 4.1.3 was not violated. Rule 4.1.3 provides that:

> Officers shall not intentionally become involved in their own neighborhood quarrels or disputes when off duty. These disputes shall be handled by on-duty personnel called to the scene.

However, the charge of conduct unbecoming an employee does not require a finding that a particular rule or regulation has been violated, but instead is broadly defined to include conduct that undermines public respect for the performance of governmental services and falls below the implied standard of good behavior expected of an individual holding a public sector position. The appellant's actions showed that the charge of conduct unbecoming a public employee was justified because his actions served to inhibit the attempts of on-duty officers to arrest Scott Russell and maintain order at the scene. Clearly, the appellant's actions while off duty, which impeded an on-duty subordinate's efforts to effectuate the arrest of a family member and included a hostile, profanity-laced statement dismissive of Mahoney's judgment within view of members the public, supports the ALJ's finding that the appellant engaged in conduct unbecoming a public employee.[2]

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). Although the charge of conduct unbecoming a public employee was upheld and the appellant's actions were extremely serious, the charge of failure to perform duties was dismissed. Additionally, the appellant was off duty at the time of the incident and was not involved in the underlying argument between his brothers-in-law and Johnson. Moreover, the record reflects that the appellant had no prior discipline in his 18 years of employment.[3] Therefore, the 180 calendar day suspension should be modified to a 120 calendar day suspension based on the circumstances and the

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[2] Moreover, a finding that the appellant violated Rule 4.1.3 is also supportable. In this regard, the wording of the rule seems to imply not that the quarrel or dispute need be the actual officer's, but rather, a dispute occurring "in their own neighborhood." Indeed, if the rule was meant to only apply to the officer's disputes, there would not be a need to include the word "intentionally," as clearly an individual must necessarily become involved in their *own* quarrels or disputes.

[3] It is also noted that the appellant was promoted to Police Captain subsequent to the incident.

appellant's record. However, the appellant is reminded that a 120 calendar day suspension is a very severe penalty and should place him on notice that any further incident may result in his removal from employment. Accordingly, based on the totality of the record, the Commission concludes that a 120 calendar day suspension is appropriate.

Since the penalty has been reduced, the appellant is entitled to 60 calendar days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. *N.J.A.C.* 4A:2-2.12 provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this matter, the Commission dismissed one of the charges against the appellant, but it did sustain the serious charge of conduct unbecoming a public employee and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal and is not entitled to any counsel fees. *See In the Matter of Bazyt Bergus* (MSB, decided December 19, 2000), *aff'd, Bazyt Bergus v. City of Newark, unpublished,* Docket No. A-3382-00T5 (App. Div. June 3, 2002); *In the Matter of Mario Simmons* (MSB, decided October 26, 1999). *See also, In the Matter of Kathleen Rhoads* (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issue concerning back pay is finally resolved.

ORDER

The Commission finds that the appointing authority's action in imposing a 180 calendar day suspension was not justified. Therefore, the Commission modifies the 180 calendar day suspension to a 120 calendar day suspension. The Commission further orders that the appellant be granted 60 calendar days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an Affidavit of Mitigation shall be submitted by or on behalf of the appellant to the

appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF NOVEMBER, 2016

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05202-14
AGENCY DKT. NO. 2014-2584

IN THE MATTER OF ANTHONY LARINO, CITY OF BAYONNE, DEPARTMENT OF PUBLIC SAFETY.

Robert L. Galantucci, Esq., for appellant (Galantucci & Patuto, Counsellors at Law)

William J. Maslo, Esq., appearing for respondent City of Bayonne, Department of Public Safety (Florio & Kenny, L.L.P., attorneys)

Record Closed: July 18, 2016 Decided: October 24, 2016

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The City of Bayonne, Department of Public Safety ("the City" or "Respondent") suspended Bayonne Police Lieutenant Anthony Larino ("Larino" or "Appellant") for a period of one hundred eighty days beginning April 9, 2014, and ending October 5, 2014, for failure to perform duties and conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)1, N.J.A.C. 4A:2-2.3(a)6. These charges stem from alleged violations of the Rules and Regulations of the City of Bayonne Police Department ("the Rules"). In short,

Larino, off-duty at the time, is charged with injecting himself into a dispute in his own neighborhood that involved his wife's family, despite the presence of on-duty officers on the scene, contrary to Rule 4.1.3. Further, it is alleged that Larino made an arrest during this family-related dispute, which is a violation of Rule 4.1.4. Finally, Larino is charged with behaving in a discourteous and uncivil manner to his subordinate, Officer Mahoney, who was attempting to arrest Larino's brother-in-law, in violation of Rule 4.1.9. Larino counters that his actions were appropriate, citing Rule 4.1.2 as requiring an off-duty police officer to take appropriate action as needed in any police matter that comes to his attention.

At issue is whether Larino's actions constitute a violation of the above regulations and if so, whether a one hundred eighty-day suspension is warranted.

On June 19, 2013 and August 7, 2013, the City filed Preliminary Notices of Disciplinary Action (PNDA) against appellant. After a departmental hearing, the City prepared a Final Notice of Disciplinary Action (FNDA) on April 8, 2014, suspending Larino for one hundred eighty days effective April 9, 2014. After Larino filed an appeal on April 23, 2014, 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 April 30, 2014. The matter was initially assigned to the Honorable Sandra Robinson, A.L.J., who recused herself on December 15, 2014. The matter was reassigned to and heard by the undersigned on April 14, 2015. Post-hearing submissions were filed, and the record closed and then reopened at the request of the undersigned for additional documentation. The record closed on July 18, 2016.

FACTUAL DISCUSSION AND FINDINGS

At the hearing, respondent offered testimony by Timothy Sullivan, Martin Gill, Peter Nevins, and Brian Borow. Appellant testified on his own behalf, and offered testimony by Darren Burke, Eric Deitrich, Kimberly Larino, Sonia Baez, and Frank Russell, Jr. Based upon a review of the testimony and other evidence presented, including a video recording made on the premises of Russell's Auto Body Shop, and

certain stipulated facts that provide the backdrop to the charges herein, I **FIND** the following preliminary **FACTS**:

On the afternoon of December 14, 2012, a confrontation took place in the street outside Russell's Auto Body Shop ("RAB") on 22nd Street in Bayonne, New Jersey, which resulted in the dispatch of a number of Bayonne police officers to the scene. (J-1.) RAB is owned by appellant's father-in-law. The body shop's garage bay fronts on 22nd Street, and an entry door is installed on one side of the bay. Another door is situated a few feet from the bay that leads into the business office. There is also a large window between the bay and the office door. Appellant's brothers-in-laws, Frank Russell, Jr. (Frank Jr.) and Scott Russell (Scott), are employed at RAB along with appellant's wife, Kimberly Larino (Kimberly). Ibid. The cause of the confrontation was a conflict between members of the Russell family, specifically Frank Jr. and Scott, and another individual who lives in the neighborhood, Tyrone Johnson. Ibid. Appellant owns a business known as Vital Signs, which is located behind and adjacent to RAB, and is accessible to RAB from the rear. Ibid. At the time of the incident, appellant was off-duty and working in his shop. Upon hearing the sound of sirens in the street, appellant made his way through the yard area of RAB onto 22nd Street, and to the front of the auto body shop. Ibid. There, he encountered a chaotic situation marked by a throng of people including employees, neighbors, and Bayonne police officers. Ibid. Officers James Mahoney (Mahoney) and Kelly McKeand (McKeand) had already responded to the scene. Appellant observed Mahoney dealing with Scott, while Frank Jr. was embroiled in an argument with Johnson. Ibid. Scott Russell then entered the garage through the bay door, with Mahoney close behind. (R-1/07 at 15:56; J-1.)[1] When Mahoney walked into the garage, Scott headed into the office, which is located along the wall on one side of the garage. (R-1/07 at 15:56.) Mahoney stood outside the office door while family members and RAB employees flowed into the garage, along

[1] R-1 is the video footage recorded inside and outside the garage of Russell's Auto Body Shop. It is contained on a DVD-R (disc). Upon inserting the disc, an index appears. The video is found in the file marked: "Russell's Video." Clicking on this tab then reveals a series of numbered videos. The most pertinent footage takes place inside the auto body shop, and is marked "20121214_154006_07." It will be referred to as "R-1/07" along with the time stamp that is visible at the top of the screen. R-1/07 begins at 15:40, but there is no substantive activity until about 15:55, fifteen minutes later. The disc also contains a number of other files that are listed in the index. These files are not evidence in the instant matter, nor have they been reviewed by the undersigned.

with appellant. Ibid. Appellant headed directly for Mahoney, who was maintaining his position outside the office. Id. at 15:57. Appellant, dressed in light blue denim jeans, a grey jacket or sweatshirt with an emblem on the back, and wearing a cap, placed his arm around Mahoney and walked him away from the office doorway toward the center of the garage, attempting to talk to him. Ibid.; (also, J-1.) Mahoney separated himself from appellant and walked away. During this time, Scott Russell emerged from the office. Appellant then placed himself between Mahoney and Scott, finally pulling his brother-in-law away from Mahoney. (R-1/07 at 15:57-59.) A number of employees then encircled Mahoney, providing a barrier between Mahoney and Scott. Ibid. The crowd moved to another part of the garage. By then, other police officers had entered the garage and Mahoney completed the arrest of Scott Russell. Ibid. (Also, J-1.) At that point, appellant indicated that Johnson should also be arrested. (J-1.) Mahoney refused to do so, telling appellant that he would have to arrest Johnson himself. Ibid. After being handcuffed, Scott was taken to a patrol car outside. Most of those inside the garage, including appellant, moved outside, where the altercation between various parties continued. Ibid. Officer Martin Gill then arrested Johnson at the direction of Captain Dietrich.

TESTIMONY

For Respondent

Timothy Sullivan

Timothy Sullivan (Sullivan) had been a Bayonne Police Officer for approximately twenty years at the time of the subject incident. His shift nearly over, Sullivan left police headquarters to respond to the disturbance at RAB. Upon his arrival, he noted the chaotic scene with a large number of police officers present. Sullivan looked through the garage bay window and saw some type of melee going on inside RAB. He proceeded through the door into the garage. At first he thought that he was the only officer inside, which he attributed to "tunnel vision" but then realized there were two other officers present. He observed Mahoney attempting to handcuff someone while encircled by a group of people he believed to be RAB employees. He testified that the

scene was intense, calling it a "real bad situation." Verbal slurs were being tossed around. According to Sullivan, he thought he saw appellant come into the garage after he arrived, but was not sure. He did not recognize appellant in plain clothes until he and Mahoney began exchanging profanities, casting verbal slurs toward one another in a very heated manner. He overheard appellant telling Mahoney that he thought it was unfair that the other man was not being arrested. He recalled Mahoney's response as follows: "If you saw, then you lock him up." On cross-examination, Sullivan was pressed to characterize both men as having maintained their professionalism. In response, he asked what the definition of a professional was, concluding that it was a bad situation. He added that everyone gets into arguments sometimes. Sullivan later transported Scott Russell to police headquarters.

Martin Gill

Martin Gill (Gill), a ten-year patrolman with the Bayonne Police Department, was ending his shift when he heard a call from Mahoney, requesting another unit. Mahoney's voice sounded "elevated." Upon arriving at RAB, Gill looked inside the garage window and saw appellant and Mahoney. He did not see any superior officer inside the garage other than appellant. Also inside the garage were Scott Russell, Frank Russell, Jr., Frank Russell, Sr. (Frank Sr.), Kimberly Larino, Officer Sullivan, and a few other individuals. Gill was acquainted with the Russell family through their business interactions with the City, and also knew of a familial relationship between appellant and the Russells. He stated that approximately six to eight people were talking, but that he remembered only the words of appellant, Mahoney, and Frank Sr., which he could clearly hear from his position outside the bay. The voices of appellant and Mahoney were readily identifiable to him. He heard appellant and Mahoney arguing over the arrest of Scott Russell. Gill stated that he heard both men screaming at each other, with appellant saying: "If you're gonna fucking lock him up I want the other fucking guy locked up." Mahoney responded: "I'm not fucking locking him up; if you want him locked up, lock him up yourself." At some point during this interchange, Gill also heard Frank Sr. asking that his son, Frank Jr., not be locked up.

Gill observed Scott Russell being handcuffed, and then ushered outside. The group inside the garage followed, with appellant emerging next. At some point thereafter, Police Captain Eric Deitrich (Deitrich) told Gill to arrest Johnson on appellant's complaint, which Gill believed was for making terroristic threats. Gill arrested Johnson in Deitrich's presence but not in front of appellant.

Peter Nevins

Captain Peter Nevins (Nevins) was Commander of the Internal Affairs Unit of the Bayonne Police Department for eight years at the time of this incident. He testified that in the course of his investigation of this matter, he learned that a video recording of the incident was made on equipment installed both inside and outside the RAB garage. Portions of the video, which contained no audio component, were shown at the hearing. (R-1.) Nevins narrated the footage that took place inside the garage. He was not present during the incident. He did, however, identify the parties as they entered and exited the garage and interacted inside the premises. (R-1/07.)

Brian Borow

Bayonne Police Officer Brian Borow (Borow) responded to Mahoney's call for assistance on the day of the incident. Borow arrived at the scene to find approximately one dozen people, both civilians and police officers, in the street outside RAB. He stated that a heated incident was taking place outside, and that it was difficult to understand what was happening. He saw both appellant and Mahoney in the crowd, and testified that appellant was yelling along with everyone else. On cross-examination, he could not confirm that appellant and Larino exchanged words. However, he stated that he recalled appellant saying: "Fuck Mahoney, he's only got a month left on the job." Borow could not say to whom those words, or approximate words, were spoken.

For Appellant

Darren Burke

Sergeant Burke (Burke) arrived on the scene after the incident inside the garage ended. In the street outside RAB, groups of people were yelling. He joined appellant, who was standing alone, and remained with him until Captain Eric Deitrich arrived. Burke stated that he did not see appellant have contact with or speak to any other party outside.

Eric Deitrich

Captain Eric Deitrich (Deitrich), a Bayonne Police Lieutenant at the time of the incident, like appellant, had just come off duty when he responded to a call from Mahoney, who sounded urgent. By the time he arrived at RAB, Scott Russell had already been arrested and was standing next to a police vehicle. The activity that took place inside the garage and was captured on video had ended. The Russell and Johnson families were outside and were separated. Appellant made statements to Deitrich detailing what he had seen and heard regarding Johnson's behavior, namely that Johnson had made terroristic threats against members of the Russell family. Deitrich told appellant that Johnson's arrest would be considered appellant's arrest, and that the complaint against Johnson would be appellant's complaint. Deitrich then directed Gill to make the physical arrest of Johnson. He stated that appellant's statements and his insistence on Johnson being arrested were the sole basis for the arrest. However, Deitrich stressed that the actual arrest was made by Gill. In addition, Deitrich testified that he did not hear appellant scream, holler, or otherwise behave in a disrespectful manner.

Kimberly Larino

Kimberly Larino (Kimberly), appellant's wife, is employed at RAB along with her two brothers, Scott Russell and Frank Russell, Jr. She ran outside the garage when she heard a commotion outside, along with Sonia Baez, an RAB employee. Her

children typically reported to RAB after school, and remained inside the garage. She testified that she was still outside when Mahoney followed Scott into the bay. Mahoney said that he needed a "400", which she knew was "a big, bad thing." According to Kimberly, once Scott entered the garage, appellant tried to calm him down and advised Scott to listen to what he was being told. Mahoney was still trying to talk to Scott, but Scott walked into the office. (See also R-1/07 at 15:56.) At some point after Scott emerged from the office, appellant pulled him away from Mahoney. (See also R-1/07 at 15:57.) Kimberly did not remember who handcuffed Scott. She testified that she has known Mahoney for a long time, and that his wife is her daughter's therapist. After Scott's arrest and the emptying of the garage, Kimberly saw her brother, Scott, about to be placed in the patrol car. She began yelling at Mahoney, who did not respond.

Sonia Baez

Sonia Baez (Baez) has worked at RAB for ten years. She walked outside upon hearing the noise in the street, but was directed to return inside by Kimberly. There were many police officers inside the garage, and arguing back and forth. She testified that Scott was arguing with a police officer, and that appellant was telling Scott to do what the officer told him to do. She stated that she did not hear any profanity uttered. Baez remained inside the bay when Scott was taken outside, and did not witness anything else pertinent to this matter.

Frank Russell, Jr.

Frank Jr. testified that the instant matter arose from a confrontation between Scott and someone living down the street from RAB. Scott had grown up with many of the Bayonne Police Officers, including Mahoney. Inside the garage, appellant attempted to speak with Mahoney. Frank Jr. told his father to call "Ralph" and "Mark", later identified as the Police Chief and Mayor of Bayonne, respectively. Appellant responded by telling Frank Jr. to "let it go, Mahoney's got a month to go. Nothing's gonna happen." Frank Jr. did not hear any foul language being exchanged, but did hear Kimberly screaming at Mahoney.

Anthony Larino

Appellant Anthony Larino had been employed by the Bayonne Police Department for seventeen years, and was a lieutenant at the time of the incident. He was working at his business, Vital Signs, around the corner from RAB when he heard sirens in the street. He made his way onto 22nd Street. There, he found a confrontation taking place about two to three houses away from RAB involving his in-laws and Johnson, who he had not seen before that day. Mahoney and McKeand were already on the scene. McKeand remained outside when Mahoney entered the garage. Describing the video taken inside the garage, appellant stated that the reason he headed straight for Mahoney, who was standing outside the office door, was to ask him what was going on. He wanted to know if Scott Russell was under arrest. Mahoney turned away from him. Appellant told him that "You've got the other guy outside screaming threats up the block." Then, appellant put his hand on Mahoney's elbow and walked him a few steps away from the office. At this point, he was standing between Mahoney and the office door. Appellant explained that he was trying to find out what Mahoney had heard. Mahoney pulled his arm away and walked off. Scott remained in the office. Appellant testified that once Mahoney pulled away from him and said: "Fuck you, you arrest him yourself," he realized that Mahoney did not want to have any interaction with him. However, appellant still tried to understand what Mahoney was going to do. He stated that Mahoney was not making any attempt to arrest Scott, who then appeared in the office doorway. Appellant was standing to the side. Mahoney then stated that he was going to arrest Scott. Appellant testified that he was just trying to figure out if Mahoney was "making the arrest or not making the arrest."

Scott and Mahoney began yelling back and forth. Appellant did not know what was going on. He said that the two men were old friends but had a recent falling out over a business transaction involving Mahoney's car. Appellant saw Scott lean into Mahoney to yell at him, and this prompted him to place his arms around Scott's middle section and pull him back. Appellant testified that he said to his brother-in-law: "Knock this shit off; this is ridiculous." He told Scott to listen to what Mahoney was saying, and stated that Scott was being "a real ass at this point." Appellant stated that the problem

was that Mahoney did not arrest Scott right away, which led to his trying to find out from Mahoney what his intentions were regarding Scott.

Appellant then stated that after he pulled Scott away from Mahoney, he went to the garage door to "get the ball rolling" and to make sure the patrol car was waiting outside. He told an officer to get the car. Mahoney handcuffed Scott. Appellant checked to ensure everything was ready and the parties left the garage.

Outside in the street, Frank Jr. told someone to call Ralph and Mark, referring to the Police Chief and Mayor of Bayonne. Appellant testified that he replied: "Knock this off. You'll deal with this later; Mahoney's got a month to go on the job, he's retiring."

Appellant testified that he did not intentionally become involved in the neighborhood dispute. He believes that the entire incident was a misunderstanding. He was a bystander attempting to obtain information. He claimed that Johnson committed a crime by threatening people and children. At that point, he walked inside the garage to relay this information to Mahoney, and then to assist him. He testified that he heard something, referring to Johnson's statements, and had to react. He did not do anything to obstruct the activity inside the bay, instead assisting the officers who were there. Appellant also stated that he was never disrespectful to Mahoney. He denied directing any profanities to Mahoney or anyone else; instead, it was Mahoney who used obscene language. He stated that he raised his voice at his wife and brother-in-law, but not at Mahoney.

When the parties moved outside the garage, Deitrich appeared on the scene and appellant told him what he had witnessed regarding Johnson. He signed the complaint against Johnson, but did not arrest him or otherwise confront him. In sum, appellant believed that he acted in accordance with the rules and regulations of the Bayonne Police Department. In fact, he stated that he could have been charged for failing to take appropriate action while off duty; namely, if he simply ignored the confrontation.

ADDITIONAL FINDINGS OF FACT

Given the apparent contradiction of the events as seen in the video footage and divergent testimony regarding the incident, it is necessary for me to make credibility determinations as to the critical facts. 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 experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's 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 (9th Cir. 1963).

After carefully considering the testimonial and video evidence presented, and having had the opportunity to observe the demeanor of the witnesses, I found appellant's explanation of his actions and intentions during the incident in question to be contradictory and improbable, and not "hanging together" with other credible evidence in the record. Beginning with his arrival on the scene outside RAB, appellant offered two reasons as to why he followed Mahoney, his subordinate, into the garage and immediately approached him. He first stated that he was trying to determine what was going on, and whether Scott Russell was under arrest. He characterized himself as a bystander attempting to obtain information. He then asserted that he heard Johnson's statements outside, and needed to relay this information to Mahoney as well as assist him. He testified that he was obligated to render such assistance under the circumstances and pursuant to the Rules.

However, appellant's version of events is overborne by the video footage and credible testimony of Officers Sullivan and Gill. They supplied the missing piece of the exchange between the two men. Whereas appellant stated only that he told Mahoney that there was another guy outside making threats, Sullivan testified that he overheard him telling Mahoney that he thought it was unfair that the other man was not being arrested. Sullivan, who was plainly uncomfortable testifying and faltered on occasion, also stated that the two men were hurling verbal slurs and profanities at each other in a

heated manner. Gill, standing just outside the garage, stated that he heard both men screaming at each other, with appellant saying: "If you're gonna fucking lock him up I want the other fucking guy locked up." According to Gill, Mahoney responded: "I'm not fucking locking him up; if you want him locked up, lock him up yourself." Appellant testified to essentially the same response by Mahoney, yet omitted his own words that precipitated the response. These words as offered by Sullivan and Gill hang together with the other credible evidence in the record. As such, I **FIND** that rather than assist Mahoney, appellant intentionally frustrated the officer's efforts to effectuate Scott's arrest. I also **FIND** that he essentially gave Mahoney an ultimatum; namely, to arrest Johnson also or just drop the whole matter. Appellant first interceded outside the office door. Despite being rebuffed by Mahoney, he proceeded to physically escort him away from the office. Appellant then continued to interfere in the arrest by placing himself between Mahoney and Scott, even after Mahoney pulled away from him in an apparent effort to perform his duties unfettered. Shortly thereafter, he pulled Scott away from Mahoney, explaining that he did so because Scott leaned in toward Mahoney and was acting like an "ass". Rather than back off and permit Mahoney to handcuff Scott, he dragged out the arrest and added fuel to an already inflamed situation that had RAB employees encircling Mahoney. I further **FIND** that no exigent circumstances existed that would require appellant to provide Mahoney with certain information about Johnson, at the very moment that Mahoney was attempting to arrest Scott. I also **FIND** that appellant's assistance was not needed at the scene. In addition, I **FIND** that appellant's actions inside the garage created a dangerous situation by emboldening other individuals to interfere with the arrest of Scott Russell. Finally, based on the foregoing, I **FIND** that while appellant signed the criminal complaint against Johnson, it was Gill who effectuated his arrest.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A:2-2.2, -2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied 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. Metropolitan Bottling Co., 26 N.J. 263 (1958). 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).

Appellant has been charged with failure to perform duties and conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(1) and (6). The specifications underlying these charges assert violations of Bayonne Police Department Rules 4.1.3, 4.1.4, and 4.1.9.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. N.J. Dep't. of Agric., 1 N.J.A.R. 315 (1980). Conduct unbecoming a public employee is broadly defined as any conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. 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 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) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Turning to the Rules, Rule 4.1.3 states that:

> Officers shall not intentionally become involved in their own neighborhood quarrels or disputes when off duty. These disputes shall be handled by on duty personnel called to the scene.

Appellant counters that he was bound to comply with Rule 4.1.2, which states in pertinent part:

> While off duty, police officers shall take appropriate action as needed in any police matter that comes to their attention within their jurisdiction authorized by New Jersey State law and departmental policy. (Emphasis added.)

Addressing the remaining specifications underlying the sustained charges, Rules 4.1.4 and 4.1.9 state in pertinent part:

> Officers shall not make arrests in their own quarrels or those of their families, except under grave circumstances such as would justify them in using measures of self-defense. Rule 4.1.4.
>
> Officers shall treat other Department employees with respect. They shall be courteous and civil at all times in their relationships with one another. Rule 4.1.9.

Based on the foregoing **FINDINGS of FACT**, I **CONCLUDE** that the City has proven by a preponderance of the credible evidence that appellant engaged in conduct unbecoming a public employee. Appellant's reliance on Rule 4.1.2 to justify his intervention in the dispute involving his brother-in-law is misplaced, as set forth in the **FACTS** above. Simply put, appellant's assistance was not needed. Rather, his intervention inside the garage exacerbated an already chaotic situation by delaying the arrest of Scott Russell. While Mahoney should have been able to focus solely on Scott, his attention was diverted by appellant, a superior officer who was related to the individual about to be arrested.

Although the City also charges appellant with failure to perform duties, I **CONCLUDE** that the facts more appropriately fit the charge of conduct unbecoming a public employee. Further, the City also relies on alleged violations of Rules 4.1.4 and 4.1.9 above to substantiate the sustained charges in the FNDA. I **CONCLUDE** that the proofs, as noted above, fail to demonstrate that appellant violated Rule 4.1.4 by making an arrest in his own or his family's quarrel. As for Rule 4.1.9, which mandates respect, civility, and courtesy between police department employees, I **CONCLUDE** that it is

duplicative in light of the above-sustained charge of conduct unbecoming a public official, which encompasses appellant's initiating a heated exchange with Mahoney.

The only remaining issue concerns the penalty that should be imposed. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

Appellant, at the time a police lieutenant, is responsible for supervising other officers. He is sworn to uphold and protect the law, and ensure that those reporting to him do the same. He is charged with evaluating the judgments exercised by his subordinates. As such, his own judgment must not be compromised. When he came upon the incident at his in-laws' garage, appellant was duty-bound to remove himself from the scene and permit the on-duty police officers present to handle the chaotic situation, however difficult that may have been. There was no credible threat to his family or exigency that required him to follow Mahoney into the garage. In fact, appellant exacerbated the situation by using his authority to shield his brother-in-law from arrest, and potentially place Mahoney in a precarious position.

Here, appellant has an unblemished disciplinary record. However, after having considered all of the proofs offered in this matter, and the impact upon the City as a result of his actions, and after having given due deference to the role of progressive discipline, I **CONCLUDE** that a one hundred eighty-day suspension is warranted.

ORDER

It is **ORDERED** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated April 8, 2014, the charge of conduct unbecoming a public employee be and hereby is **SUSTAINED** and the charge of failure to perform duties be and hereby is **DISMISSED**. It is further **ORDERED** that, based upon the aforesaid

sustained charge, the penalty of a one hundred eighty-day suspension be and hereby is **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 24, 2016
DATE

Joan Bedrin Murray
JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 10-24-16

Date Mailed to Parties: 10-24-16

dr

APPENDIX

WITNESSES

For Appellant:

Timothy Sullivan
Martin Gill
Peter Nevins
Brian Borow

For Respondent:

Darren Burke
Eric Deitrich
Kimberly Larino
Sonia Baez
Frank Russell
Anthony Larino

EXHIBITS

Joint Exhibit:

J-1 Stipulation of Facts

For Appellant:

None

For Respondent:

R-1 DVD/Video footage