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STATE OF NEW JERSEY

In the Matter of Fortunato Montella

CSC Docket No. 2016-2558

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for Back Pay

ISSUED MAR 24 2017 (EG)

The Borough of Stanhope (Borough), represented by Robert J. Merryman, Esq., seeks enforcement of the Civil Service Commission (Commission) decision rendered on June 26, 2013, granting Fortunato Montella, a Police Officer, mitigated back pay, benefits and seniority.

As background, Montella was removed effective February 25, 2015 on charges of conduct unbecoming a public employee and other sufficient cause. Montella appealed his removal to the Commission and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. Following a hearing and the Commission's *de novo* review, Montella's removal was modified to a 120 working day suspension. Further, the Commission ordered that Montella be immediately reinstated and awarded mitigated back pay, benefits and seniority after the imposition of the 120 working day suspension up to his date of reinstatement. The record reflects that the appellant was suspended without pay effective September 10, 2014 and reinstated to the payroll on October 17, 2015. However, the parties have been unable to agree on the amount of back pay due to the appellant, and the appointing authority has requested Commission review.

In the instant matter, the Borough indicates that Montella's base pay for 2015 was $3,415.46 per pay period on a bi-monthly basis and he was entitled to a shift differential of $170.77 per pay period. Further, his healthcare contribution was $250.29 per pay period. The Borough argues that its Police Officers work the "Pitman Schedule," meaning that Montella would work (14) twelve-hour shifts

every twenty-eight (28) days. As such, it argues that a 120 working day suspension would last from September 10, 2014 through May 6, 2015. The Borough states that Montella's salary for the period from May 7, 2015 to October 17, 2015, would have been $39,078.20.

In addition, the Borough argues that Montella failed to mitigate his loss of pay. It asserts that he only provided a listing six positions that he applied for in construction and security work from March 22, 2015 through April 3, 2015, which is only two weeks out of the 13 months he was unemployed. In support of its position, the Borough presents a listing of over 30 construction and security openings listed in the New Jersey Herald from March 6, 2015, through August 28, 2015 and argues that Montella could have earned $13,261 during that time period. Additionally, it states that he received $10,321.04 in unemployment benefits and earned $2,372.54 from his business. Thus, it contends that Montella's back pay should be no more than $13,123.62. With regard to medical expenses, the Borough argues that any medical expenses or payments for COBRA coverage before May 7, 2015 should not be recoverable.

In response, Montella, represented by Peter B. Paris, Esq., asserts that the 120 working day suspension should be determined based on eight hour days, as opposed to the 12-hour days. In this regard, he asserts that his 120 working day suspension should be calculated in eight hour days for a total of 960 work hours. Thus, when the 960 hours are applied to his 12-hour shift work days, it equals 80 working days. Therefore, Montella contends that the period of suspension would have ended February 16, 2015 entitling him to 1,464 hours of back pay. Based on the fact that the Borough indicated that his hourly rate was $46.80, he claims that he is owed $68,515.20 (1,464hours x $46.80) in back pay.

Further, Montella argues that he spent $18,611.67 in out-of-pocket health care costs during his separation from employment. He states that he paid $4,934.37 for COBRA coverage for December 2014 and January 2015; $3,600.15 for private insurance from February 2015 through April 2015; $7,339.28 for health coverage through his wife's employer from May 2015 through November 2015, and $486.67 ($60.81 per month) for COBRA dental coverage from December 2014 through October 2015. Furthermore, Montella indicates that he paid $278 for a medical bill on October 6, 2015 and another $1,973.49 on October 8, 2015.

With regard to mitigation, Montella indicates that he received unemployment benefits in 2015 totaling $16,796. These benefits were last paid for the week ending September 5, 2015. Montella argues that he sought employment and provides a list of employers he contacted from March 22, 2015 to April 5, 2015, which includes four separate employers. Further, he earned $2,372.54 from his private business from March 2015 through October 2015 and $2,772 working for his parent's business. As such, he states that his mitigation income totaled $21,940.54. Therefore, Montella

claims that he is owed $65,186.33 in back pay and benefits.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Additionally, *N.J.A.C.* 4A:2-2.10(d)1 states that back pay shall not include items such as overtime pay, holiday premium pay and retroactive clothing, uniform or equipment allowances for periods in which the employee is not working. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4v. Finally, *N.J.A.C.* 4A:2-2.10(d)7 states that earnings from other employment held at the time of the adverse action shall not be deducted unless the employee increased his or her hours at that employment during the period of separation.

Under the above standard, the Commission finds that Montella made a reasonable effort to secure employment. The petitioner provided documentation that he received the maximum allowable amount of unemployment in 2015. In this regard, there is a presumption that the receipt of unemployment benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such benefits. *See, In the Matter of Donald Hicks*, Docket No. A-3568-03T5 (App. Div. September 6, 2005). Further, he applied for several jobs, re-started his own business, and did some work for his

parents' business. While the Borough has provided a listing of over 30 possible positions and argues that he would have presumably earned between $13,261.00 and $23,076.00 had he diligently sought employment, it does not provide any evidence that he did not actually seek employment while receiving unemployment compensation after April 5, 2015. Further, it does not address the fact that he re-started his own business or the work performed for his parent's business. Therefore, the Borough has not sustained its burden of proof to demonstrate that Montella failed to make reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4v

With regard to the back pay dates, the Borough and Montella propose different dates as to when the 120 working day suspension ended and the period for which back pay would start. The Commission notes that *N.J.S.A.* 11A:2-20 provides, in pertinent part, that an appointing authority may not impose a suspension or fine greater than six months. Therefore, regardless of the schedule Montella worked, his suspension cannot exceed six months.[1] Thus, as Montella's suspension started on September 10, 2014, the end date is March 9, 2015. As such, the period of back is from March 10, 2015 through October 16, 2015. Regarding the back pay amount, the record indicates that Montella would have received $3,586.23 ($3,415.46 base + $170.77 shift differential) per pay period. Based on the 26 pay periods utilized by the Borough, he would have earned $93,241.98 in 2015. In 2015 there were 261 working days.[2] Accordingly, Montella's daily rate of pay was $357.25 ($93,241.98 / 261). From March 10, 2015 through October 16, 2015 there are 159 working days. Therefore, the petitioner would have earned $56,802.75 during the period after his suspension concluded and his return to the payroll, minus the mitigated amount of $21,940.54 for a total of $34,862.21. Based on the foregoing, the Commission finds that the petitioner is entitled to an award of back pay of $34,862.21.

With regard to the reimbursement of medical expenses, *N.J.A.C.* 4A:2-2.10(d), provides, in pertinent part, benefits shall include additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal. In the instant matter, Montella claims that he is entitled to all of his out-of-pocket medical expenses, COBRA and private medical insurance costs, and the cost of the medical insurance obtained through his wife's employment. The Commission does not agree. Montella is not entitled to any costs incurred during the period of the 120 working day suspension. However, he would be entitled to $2,400.15 in private insurance premiums paid for

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[1] In this regard, when the Commission imposes a working day suspension, it is presumed that those days will be calculated based on an ordinary five day a week work schedule, regardless of the actual schedule worked by the employee. Thus, a 120 working day suspension, which is in essence, equivalent to six months, is the maximum allowable suspension.

[2] Information provided in Department of the Treasury Circular No. 15-09-OMB.

March 2015 and April 2015, and $425.67 ($304.05 [$60.81 x 5 months] + $121.62) for COBRA dental coverage for a total of $2,825.82. However, *N.J.A.C.* 4A:2-2.10(d) only provides for reimbursement of payments made to *maintain* health insurance coverage. Montella's entitlement to reimbursement for maintaining health insurance coverage does not apply to any medical expenses incurred during the period of his separation from employment from the appointing authority. *See e.g., In the Matter of Shannon Stoneham-Gaetano and Maria Ciufo* (MSB, decided April 24, 2001). Thus, Montella is not entitled to reimbursement for the monies he paid to doctors, hospitals, or for other services. With regard to Montella's request to be reimbursed for premiums paid to subscribe to and maintain his health coverage through his wife's health insurance, the Commission has previously determined that reimbursement of premiums paid to an employee's spouse's health insurance plan to maintain his or her health insurance is not authorized under *N.J.A.C.* 4A:2-2.10(d). *See In the Matter of Frank Taylor* (CSC, decided April 17, 2013). Therefore, the petitioner would not be entitled to reimbursement for any monies that were paid to maintain his health insurance from his wife's coverage. Accordingly, Montella is entitled to $2,825.82 for maintaining his health insurance.

ORDER

Therefore, it is ordered that the appointing authority pay Fortunato Montella $34,862.21 in gross back pay and $2,825.82 for maintaining his health insurance within 30 days of issuance of this decision.

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 22ND DAY OF MARCH, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachments

c: Robert J. Merryman, Esq.
Peter B. Paris, Esq.
Fortunato Montella
Records Center

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STATE OF NEW JERSEY

In the Matter of Fortunato Montella,
Borough of Stanhope

CSC Docket No. 2015-2541
OAL Docket No. CSR 3598-15

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCT 22 2015 (EG)

The appeal of Fortunato Montella, a Police Officer with the Borough of Stanhope, of his removal effective February 25, 2015, on charges, was heard by Administrative Law Judge Gail M. Cookson, (ALJ), who rendered her initial decision on September 11, 2015. Exceptions were filed by the parties and a reply to exceptions was filed on behalf of the appellant.

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 October 7, 2015, did not adopt the ALJ's recommendation to modify the removal to a 60 working day suspension and award 80% counsel fees. Rather, the Commission imposed a 120 working day suspension and denied counsel fees.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant filed a false police report. 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 the following findings in her initial decision. On September 24, 2014 between approximately 1:00 p.m. and 2:00 p.m., the appellant had been on a routine traffic stop in Stanhope. During that period of time, the

appellant noticed that he had missed some calls from his sister. Upon calling her back, the appellant learned that she had been in a car accident near Muldoon's Bar in Roxbury, a town within close proximity to Stanhope. Thereafter, the appellant traveled to Roxbury and while doing so activated his vehicle's emergency lights on three occasions. As he was traveling, the appellant reported to Stanhope dispatch that he was taking his vehicle to the car wash. The car wash was located next to Muldoon's Bar. When he arrived at the accident scene, the appellant called dispatch for Morris County and advised that he was at the scene of his sister's accident. After the incident, the appellant filed his report which indicated:

> I, Ofc F. Montella was near the Roxbury car wash when I was notified that there was a motor vehicle accident with the vehicles parked at Muldoon's Bar. Both parties were out of their vehicles and stated that they were okay. I called Roxbury Police via cell phone and waited on the scene until Roxbury Patrol arrived. Upon their arrival I cleared. No further action taken.

The ALJ found that based on the preponderance of the credible evidence and testimony, the appellant did not try or intend to deceive anyone in his or any other police department with his report. The ALJ indicated that prior to writing the report, the appellant had indicated to his Police Chief and the Netcong Police Chief that he had been at the scene of a minor accident in Roxbury involving his sister. Therefore, the ALJ found that the appellant did not falsify his report. Additionally, the ALJ found that the appellant made the decision to stop at the accident only after he saw that Roxbury Police had not yet arrived at the scene. Further, the ALJ found that the appellant's use of emergency lights on his patrol car on three occasions was contrary to departmental policy and proper police protocol. Based on the foregoing, the ALJ recommended that the charges be dismissed except with respect to the appellant's minor violations of departmental policies regarding use of his vehicle's emergency lights. Accordingly, the ALJ recommended modifying the removal to a 60 working day suspension. The ALJ also indicated that the appellant was entitled to 80% of reasonable counsel fees.

In his exceptions, the appellant contends that the 60 working day suspension is excessive and inconsistent with the principles of progressive discipline. The appellant contends that his disciplinary record consists of three suspensions over the course of 12 years, which does not make him a discipline problem or chronic offender.

In its exceptions, the appointing authority argues that the ALJ's findings are contradicted by the evidence in this matter. It contends that the ALJ ignored testimony that the appellant admittedly lied on three occasions in his communications with dispatch when he stated that he was stepping out at the car

wash, that he was clear at the car wash and that his sister's accident occurred right next to where he was at the car wash. Further, the appointing authority asserts that the ALJ completely ignored the appellant's history of dishonesty as indicated in his disciplinary record. In this regard, it states that the appellant was suspended for seven days for falsely indicating he was sick while he was actually on vacation and for four days for providing false information to other officers with respect to a domestic violence incident he witnessed. Finally, it contends that there was no basis for the ALJ to award counsel fees.

In his reply to the appointing authority's exceptions, the appellant argues that if the transcripts of the administrative hearing are reviewed, it would clearly show that the he was confused by which call the appointing authority was referencing during the cross examination. He adds that this confusion does not alter the facts as stated multiple times nor does it alter the ALJ's findings.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ's determination regarding the charges or with the ALJ's recommendation to modify the removal to a 60 working day suspension and award counsel fees. Rather, the Commission imposes a 120 working day suspension. Regarding the charges, the Commission finds that the appellant did falsify the report in question. The appellant's own testimony clearly contradicted the information the appellant indicated in his report. Further, the ALJ's findings of fact indicate the same. Specifically, the appellant indicated in his report that he was near the Roxbury car wash when he was notified that there was a motor vehicle accident with the vehicles parked at Muldoon's Bar. The evidence in the record shows that this statement was not accurate. The testimony and evidence presented clearly indicate that the appellant knew of the accident when he was still in Stanhope, well prior to his arrival at the Roxbury car wash. Falsification of a record by a Civil Service employee is a very serious offense. Employees of the State and local government have access to information and documents which must be properly maintained and kept as accurate as possible. When a public employee falsifies a record, he or she erodes the trust that the general public places on the government to maintain accurate records. *See In the Matter of Frank Gilfone* (MSB, decided September 7, 2005). Moreover, the importance of providing full, accurate and detailed reports in a public safety setting cannot be overstated. *See e.g., In the Matters of Kenneth Bolton, Robert Knoblock and Michael Lubrano, Mercer County,* Docket No. A1457-10 (App. Div. February 4, 2013) *affirming* (CSC, decided September 15, 2010); *In the Matter of Quadir Lewis* (CSC, decided February 8, 2012) and *In the Matter of Ronald Jamison* (CSC, decided December 19, 2012) (Although appellant may not have intentionally falsified his report, he inappropriately documented the incident which warranted a suspension, but not removal).

In determining the proper penalty, the Commission's review is *de novo,* and the Commission, in addition to its consideration of the seriousness of the underlying

incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, 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 principle 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 (2007). Further, even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. *See Henry v. Rahway State Prison, supra*, 81 *N.J.* at 579-80. In this regard, the Commission emphasizes that a Police Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). In the instant matter, the appellant's disciplinary record evidences two major disciplinary actions that involved dishonesty in the false reporting of sick time and falsely reporting an incident to other law enforcement officers. The record also reveals minor disciplinary actions including a four day suspension and four reprimands. Moreover, the Commission finds the appellant's falsification of the report to be a serious matter. The appellant, as a Police Officer, is required to submit accurate reports. His failure to do so serves to undermine the public trust in this highly visible law enforcement position. Further, the appellant's inappropriate use of the safety lights in his patrol vehicle was an easily observable act by the public. However, given the actual incident in question, which involved a family member, the Commission does not find removal to be appropriate under these circumstances. Accordingly, the Commission imposes a 120 working day suspension, which will serve as an indication that any further infractions committed by the appellant will potentially subject him to removal from employment.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the 120 working day suspension up to his date of reinstatement. With regard to counsel fees, the ALJ improperly awarded such fees in this matter. Since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. *See N.J.A.C.* 4A:2-2.12. 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 the case at hand, while the penalty was modified, charges

were upheld and major discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

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. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was not justified. Therefore, the Commission modifies the removal to a 120 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the 120 working day suspension through the date of his actual reinstatement. 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 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. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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 7TH DAY OF OCTOBER, 2015

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 03598-15
AGENCY REF. NO. N/A

IN THE MATTER OF FORTUNATO MONTELLA,
BOROUGH OF STANHOPE.

Peter P. Paris, Esq., for appellant Fortunato Montella (Apruzzese McDermott Mastro & Murphy, attorney)

Robert J. Merryman, Esq., for respondent Borough of Stanhope (Mets Schiro & McGovern, attorney)

Record Closed: September 1, 2015 Decided: September 11, 2015

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Fortunato Montella (appellant) appeals from the decision of the Borough of Stanhope (Stanhope) to remove him from his position as a Police Officer on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient causes relating to allegations of filing a false police report, N.J.A.C. 4A:2-2.3(a)(11), thus violating the rules governing safety and security. Appellant denies the charges and also asserts that Stanhope has failed to meet its burden of proving those charges.

On September 15, 2014, a Preliminary Notice of Disciplinary Action was filed seeking appellant's removal. The appellant requested a departmental hearing which was held on January 12, 2015. Thereafter, a Final Notice of Disciplinary Action was issued on February 25, 2015, sustaining the disciplinary charges and removing appellant from his position effective that same date. Appellant appealed that removal action under cover letter also dated February 25, 2015. The matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was stamped received on March 3, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was assigned to me on March 23, 2015. On March 26, 2015, I convened a telephonic case management conference to discuss discovery requirements and schedule the evidentiary hearing. The hearing was scheduled for May 7 and 12, 2015. When the matter did not conclude on those dates, additional hearing dates were added on May 21 and June 11, 2015. At the close of the plenary hearings, I permitted counsel to present concise written closing statements. After requests for adjournments for those written submissions, the record closed on September 1, 2015, with their receipt. The entire period of time requested by counsel for written submissions rather than oral closing statements on the last date of the hearing is considered to have tolled the return to salary provision pursuant to N.J.S.A. 40A:14-200 et seq.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

While the respondent Stanhope carries the burden of proof herein and put its case on first, I discuss some of the appellant's testimony initially by way of background to the incident which forms the focus of this disciplinary appeal. Up until his removal on

these disciplinary charges, appellant had been a Police Officer with Stanhope since July 2003, at the age of 27. Prior to becoming an officer, he had been a Juvenile Detention Officer in Essex County for approximately one and a half years but he voluntarily left because of both the commute and the fact that the jail atmosphere was not the work environment he sought. Appellant sat for the civil service exam to become a police officer in his home area of Stanhope and Netcong but it took several years to get selected off that list, during which interim period he was involved in his family's landscaping business.

The central allegation in this disciplinary appeal surrounds a one-hour period – approximately from 1:00 p.m. to 2:00 p.m. -- on September 2, 2014, while appellant was on duty in Stanhope. In broad terms, to be discussed in greater detail below, Officer Montella conducted a routine traffic stop in Stanhope, during which period of time, his younger sister reached out to him on his cell phone. When he saw that he had missed a couple of her calls, he called her back because she tends to overreact and relies upon her "big brother" on a regular basis. She indicated that she had been in an automobile accident but that she was okay. Either then or later, she told him that she had been the victim of some road rage harassment just prior to her accident, which had caused her to maneuver her vehicle in a less than safe manner in order to get away from the harassers and led to the ultimate accident. He told her to call the police. He learned either then or soon thereafter that her location was near Muldoon's Bar in Roxbury, a town within close proximity to Stanhope. In fact, only Netcong lies between Stanhope and Roxbury and all three towns provide mutual aid to each other's police departments on a regular basis. Appellant actually lives in Netcong.

After appellant had completed his routine traffic stop, he headed through Netcong to Roxbury. At various points, also discussed in more detail below, he contacted the Sparta Regional dispatcher, which covers Stanhope, consistent with standard practices to keep them informed of his location and activities. As also discussed below, appellant stated that he was heading to Roxbury to take his patrol car through the car wash, an acceptable use of his time, but he kept mulling over in his head whether he needed to check up on his sister. He claimed that at first he had no intention of doing so because she was overly-dependent on his aid, but he was also

worried because she tends to hyperventilate over problems and was due to be married in a couple of weeks. As appellant drove from Stanhope, he put on his vehicle's emergency lights once or twice while still in the Borough and then another time as he passed through Netcong in order to gain access to the left lane ramp of Route 46 from the center lane.

As a geographic point of fact, the car wash used by Stanhope is almost next door to Muldoon's Bar. At some point between his routine traffic stop in Stanhope and his arrival into Roxbury, appellant decided he would check on his sister. He found her and the other driver involved in the fender bender standing outside their vehicles parked near Muldoon's but there was no Roxbury police present. Appellant heard from the other driver that he would prefer not to involve the police but appellant advised that he had no choice. Accordingly, appellant returned to his patrol car and contacted his own dispatcher. He not only obtained the phone number for the Morris County Communication Center, the dispatcher with jurisdiction over Roxbury, but also mentioned his sister's accident near Muldoon's to his own dispatcher. Appellant then reported the accident to Roxbury. He remained on the scene but in his patrol car until the Roxbury police came and then left, a period of about 34 minutes. Appellant then went through the car wash and returned to Stanhope for the remainder of his regular shift.

Apparently, appellant was also traveling at a higher speed than the posted limit while on Route 46 and a citizen seems to have complained to Netcong's police department. That complaint generated a call from Netcong Police Chief Blesson to the Sparta regional dispatcher to ask which Stanhope officer was on duty. Chief Blesson then contacted appellant directly to advise him of the speeding complaint. This seems to have occurred while appellant was sitting in his car near Muldoon's. Appellant told him that his sister had been in an accident and the Chief simply advised him to slow it down and not cause any other accidents. After reporting the accident to Roxbury, appellant contacted his Chief Pittigher in order to advise him that he might get a call from Chief Blesson and that he had been scolded for speeding. Appellant at that time, also advised Chief Pittigher about his sister's accident.

As is protocol, appellant completed his portion of a report referred to as a Computer Aided Dispatch (CAD) report. An officer involved in a call that does not turn into an incident or a ticket is required to complete a short description on the time-stamped, electronic report initiated by dispatch. The completion of the comment box on the form is done by the police officer from the in-vehicle laptop. This is the comment appellant drafted on September 2, 2014, after leaving the car wash:

> I, Ofc F. Montella was near the Roxbury car wash when I was notified that there was a motor vehicle accident with the vehicles parked at Muldoon's bar. Both parties were out of their vehicles and stated that they were okay. I called Roxbury Police via cell phone and waited on scene until Roxbury Patrol arrived. Upon their arrival I cleared. No further action taken.
>
> [R-4.]

In essence, this case comes down to the issue of whether appellant's statement quoted above on the CAD constitutes a "false police report." The issues of appellant's use of his emergency lights, potentially excessive rate of speed, or attending to his sister's out-of-town accident are minor or non-existent in this Stanhope disciplinary action. The allegedly false nature of the statement can be parsed into three aspects: (1) whether he was "near" the car wash when he learned of the accident; (2) why he failed to name his sister or the other driver in the statement; and (3) whether he cleared the scene "upon their arrival" or only later after the Roxbury police had themselves cleared.

Respondent presented both technical testimony from Senior Radio Repairer John Liquori of the Sparta Regional Dispatch Center and interpretive or investigative testimony from Sergeant Charles B. Zweigle of Stanhope in order to lay out the details of the relevant period of time. Liguori detailed how the almost forty radio or telephone lines coming into dispatch from the five municipalities[1] serviced by the regional center are electronically captured, maintained and stored on servers. He also explained how those historical voice record call data logs can be exported and downloaded when requested for official use, such as during an investigation or pursuant to a public OPRA

[1] The five towns serviced by the Sparta regional dispatch center are Stanhope, Franklin, Byram, Ogdensburg, and Sparta Township.

request. The process of downloading the data can result in several formats of information being provided. He described that the data can be downloaded without any editing such that long periods of silence are also still present; the data can be transferred with the silences suppressed; or the data can be exported with an electronic time stamp imposed on the audio recording or a written one imposed on a text document.

In this case, Liguori received a telephonic request from Sergeant Zwiegle who then came to the dispatch office during the late morning of September 9, 2014, in order to obtain a downloaded copy of the calls into the Sparta dispatch for September 2, 2014, between 1:00 p.m. and 2:00 p.m. Liguori recalled that the Sergeant was in plain clothes, perhaps even shorts, and seems a little annoyed because it was his day off. The call data was produced initially with the silence still embedded and then later with the silence removed. A log sheet was generated with the relevant communications highlighted (R-10a, R-10b) and a transcription of the audio was also obtained. (R-13) A copy of the CD-ROM is also made part of the record herein and the relevant communications are summarized below.

On cross-examination and further direct examination, Liguori also described the technical initiation of the CAD report as receiving its initial "entry time" when the dispatcher pushes the button for a "new event." The computer generates the time stamps seen on the CAD. The time stamps of both the CAD and the call data logs can be a few seconds off from each other as one synchronizes to an internet standard time and the other has an internal stand-alone clock.

Sergeant Charles B. Zweigle also testified for respondent concerning his involvement with the investigation into the allegations that appellant had made a false statement in a police report. He has served with Stanhope for twenty-three years and was promoted to Sergeant in 2005. Zweigle has been the Internal Affairs (IA) Officer for the department since that time. He did receive a one week IA course at the Morris County Police Academy. He also remarked that Stanhope only has nine police officers, including Chief Pittigher, such that there is only one line officer and one superior officer on active duty at a time on any one shift.

In this instance, Zweigle was advised by the Chief of the need to initiate an investigation. Chief Pittigher was the "complainant." The Chief is also the only other trained IA person in the department, as well as being Zweigle's immediate supervisor on IA. The Chief would ultimately be making the departmental decision on the penalty to be sought in any IA investigation. These overlapping roles are not unusual in small police departments. The process undertaken by Zweigle was a relatively new protocol of forms being used for IA investigations as a result of an accreditation process Stanhope had undertaken. Zweigle stated that it made him uncertain of some of the steps but did not change the substance of the investigatory process. The first step was to create an Internal Affairs Investigation Plan. In this matter, the Chief basically dictated the plan to Zweigle which initially set forth merely that the matter of a false police report would be turned over to the prosecutor's office. [R-1.] In accordance with the Chief's orders, Zweigle prepared only the cover letter to the Captain in the Prosecutor's Office. He never saw what contents were attached to that letter nor did he have any involvement in the mailing or delivery of the correspondence. From there, Zweigle had nothing more to do until after the Prosecutor's review was complete, which turned out to be unusually swift in this case. While sometimes months can pass between referral from the police department to the Prosecutor's Office and a decision on action by the latter office, the appellant's matter was returned within days.

On September 9, 2014, Zweigle was told by Chief Pittigher to report to the department off of his vacation with authorized overtime in order to conduct the IA investigation going forward as a result of the decision of the Prosecutor's Office that it would not be pursuing any criminal claims against appellant. The Prosecutor's letter that returned the matter to Stanhope for internal charges set forth that it was in large part premised upon Chief Pittigher's assertion to that Office that he would seek termination against appellant if the charges of falsifying a police report were ultimately upheld. [R-11.] Zweigle also stated at the hearing that the Chief dictated whom he should interview and what records he should gather. He was told to do as much as he could that day and submit his findings before he left that evening to go back out on vacation as he and his family would be leaving the State the next day.

One of the first tasks that Zweigle undertook was to obtain from the Sparta dispatch center and to review the video and audio recordings from the patrol car used by Montella on September 2, 2014. The recordings were played at the hearing and are part of the record. The Sergeant explained that the video camera is triggered on every time the emergency lights are initiated in the car. Audio also comes on when the lights come on. Each officer also has an audio device that remains on their person while on duty and is required to be activated when they interact with a stopped vehicle, etc. From the recordings made from appellant's patrol car on the day of the incident, Zweigle could discern that the time of the officer's car stop of a motorist took place at 13:00:11. Appellant then returned to his patrol car with the motorist's credentials when he apparently calls his sister. The body microphone picked up the sound of that call. Appellant then completes the motorist stop without issuing a ticket but the body microphone was not one at that point, for unknown reasons.

Zweigle describes what is displayed next on the video recordings. Appellant activated his emergency lights as he was driving on Brooklyn Road westbound toward the center of Stanhope. This occurs at 13:07:57. There was no call into dispatch associated with this activity by appellant. Appellant turns the car's lights on again as he is heading south into Netcong near the intersection of Routes 183 and 46 in order to proceed onto the Route 46 entrance ramp from the center lane rather than the left turn lane. This occurs at 13:09:19. From this point, Zweigle estimated that appellant was about 1.5 to 2 miles from Muldoon's Bar. Appellant had not contacted dispatch since he cleared from the motorist stop.

From the call data logs, Zweigle could discern that appellant called dispatch approximately two minutes later, reporting that he was going to the car wash. Zweigle interpreted the evidence to indicate that appellant was actually at Muldoon's, which is almost next door to the car wash. A few minutes later, appellant contacted Sparta dispatch again, this time asking for the phone number to the Morris communication center so he could report the accident his sister had been in. At each point of collecting evidence on this investigation, Zweigle would advise Chief Pittigher about what he had done and the Chief would direct the next piece. That afternoon, the Chief told Zweigle

to bring appellant into the department and interview him with the appropriate advisement of rights in light of the potential consequences of this IA investigation.

The IA interview by Zweigle of appellant took place at a little after 6:00 p.m. on September 9, 2014, with a union representative present and his attorney hooked in by telephone. The Chief authorized overtime but would not agree to delay the interview even a few days until appellant's attorney could be present in person. During the interview, appellant stated that he was in the vicinity of the intersection of Routes 183 and 46 when he finally learned of his sister's accident, having initially been hearing only her hyperventilation on the call that took place while he was still conducting the traffic stop on Sparta Road. In other words, appellant was en route to the car wash when he finally got the details from his sister about her accident in Roxbury. He did not recall that he had advised his sister to call the police when he spoke to her from his traffic stop, nor was he permitted to review the videotape.

According to the IA interview of September 9, appellant then turned on his emergency lights to make the left onto Route 46 from the center lane. Appellant admitted to Zweigle that he also put on his emergency lights earlier to pass a truck on his way to the car wash while still in Stanhope. When appellant arrived at Muldoon's, he first was confused as to which car was his sister's because she happened to be using a loaner that day. He then determined that no one was hurt. He further determined that neither his sister nor the other motorist had called the local police because the other motorist had wanted to leave them out of it. That was when appellant called his dispatch for the Morris County Communication Center phone number. He then contacted that dispatch so they could have a Roxbury patrol car come to the scene. In response to questioning by Zweigle as to why he had not called Morris County sooner, appellant explained that he assumed that Roxbury knew of the accident already.

At some point while appellant was at Muldoon's, he also had a conversation with Chief Blesson who yelled at him about speeding on Route 46 but then, upon hearing of appellant's sister's accident, reminded him to just not speed or cause other accidents and to take care of his sister. Also while waiting for the Roxbury patrol car to arrive,

appellant stated during the interview that he contacted his own Chief Pittigher to advise him that Chief Blesson might contact him to complain of appellant's speeding. Appellant advised Chief Pittigher that his sister had been in an accident, that there were no injuries, and that he was waiting a few minutes for Roxbury Police to show up, to which Chief Pittigher said "okay."

Also during the IA interview, appellant confirmed that he never spoke to any Roxbury officer but stayed out of their way in his patrol car. He left Muldoon's and his sister and proceeded to the car wash only after the Roxbury patrol cleared the scene, apparently to go to another accident. When Zweigle asked appellant why he did not put more detail into his CAD report and why he stated that he learned of accident when he was at the car wash, appellant explained:

> SERGEANT ZWEIGLE: . . . .Why didn't you just put in your report that you were on a car stop when you got notified of the motor vehicle accident, and that you were going there?
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> OFFICER MONTELLA: I didn't even – I didn't even – I – it's a narrative. So I just didn't even think about it. It was just a simple narrative, and I didn't – I didn't purposely not do it. I – I mean, I – I write all my reports the – the same way. I don't lie on my – reports.
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> I was going to go to the car wash previously before I even saw the missed calls from my sister. I went on the stop. I was going to clear from the stop. I was going to go to the car wash. But that's not how it happened.
>
> I was going to the car wash, but my sister called me in between my – my – in between the – scenario of my going on the stop and me going to the car wash. So – and it just so happened she was there.
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> [R-25 at 29:12-31:20.]

Zweigle also received an undated letter addressed from Chief Blesson that the latter advised he was asked to write. [R-5.] Zweigle had not himself requested the letter and only knew from Chief Pittigher that the Netcong Chief was involved but he had

no idea in what way he was involved. Based on all the information he had as of the evening of September 9, 2014, Zweigle prepared his IA Investigation Allegations and Conclusions.

Zweigle's summary and conclusions focus on the fact that appellant was not near the car wash when he learned of the accident but rather learned of it when he was still at the routine traffic stop on Sparta Road. Zweigle noted that appellant was truthful about turning on his emergency lights and about going to the car wash, although he admittedly went there only after he checked on his sister's accident. Zweigle also noted that appellant had not called the Roxbury police even though he was concerned about his sister's panic attacks. Zweigle concludes: "Ptl. Montella never gives a clear response to why he wrote his narrative that way. He stated that 'its [sic] just a report narrative.' Clearly he did not file his report truthfully." [R-6.]

On cross-examination, Zweigle admitted that the OIC review conducted by the superior officer, Sergeant Hickman in this case, does not preclude a request that the officer edit or supplement the report. It merely indicates that it has been reviewed. Zweigle said that he never had time on September 9 to interview Hickman or find out why he did not simply ask for clarification from appellant of his CAD narrative. Zweigle also stated that he had himself been appellant's supervisor at an earlier point in both of their careers and that he had found appellant's writing skills to be somewhat lacking and requiring more oversight, clarification or edits than some officers.

Zweigle was sure that Chief Pittigher had looked at the patrol car video logs on the evening of September 2 because he received the call that same evening to come in the next morning to start the IA investigation. He also was adamant that his only role in conveying the allegations to the Prosecutor's Office on September 3 was to draft the cover letter. He had no idea what went into the envelope. On September 9, when the investigation cranked back up, Zweigle was advised by Chief Pittigher to get as much done as he could and report back before he left. He agreed that this investigation was dictated by the Chief in a manner that was not normal for IA. Zweigle had very little discretion on this investigation except to decide where to drive first for the pieces of evidence that the Chief wanted. He also was told that Montella needed to be

interviewed but no one else was on that part of the task list. At that point, Zweigle knew that Chief Pittigher was seeking to have appellant terminated. Zweigle was of the opinion that appellant's actions raised an issue of violations of the departmental procedures but he had no idea how they could constitute criminal behavior.

Zweigle confirmed that the departmental hearing went forward prior to the IA investigation completing some of the task items, which only took place in November, including, but not limited to, interviewing Roxbury Police Officer Beck and Hennion, the other motorist involved with appellant's sister. The interview with Officer Beck was brief and there was no video or written notes taken as Beck had been in a rush. Hennion also did not stay long for an interview, did not recall much detail, and seemed to feel the department had mishandled the accident from the beginning. Hennion did recall that appellant's mother was on the accident scene at some point. There were a few other pieces of the investigation that Zweigle finished up, checking off the boxes essentially as he went along. However, there was no supplemental IA report as a result of the November investigation. Zweigle probably conveyed the overview orally to Chief Pittigher. This follow-up investigation concluded on or about November 18, 2014. Once again, Zweigle did not take the time to interview Hickman or appellant's sister even during that week in November because it was not on Chief Pittigher's list of things to do.

With respect to the question of any protocols for coming to the aid of a family member when a police officer, Zweigle confirmed that there was no formal guidance in place but that the officer is supposed to let a senior officer know. On re-direct examination, Zweigle remarked that Hickman's role in reviewing the CAD would be to see if it makes internal sense. The Sergeant would never know from its face if it was an accurate recitation of an incident. In response to some final questioning, including my own, Zweigle agreed that it was better that appellant stayed out of the way of the Roxbury officers who were there to investigate his sister's accident. As to why Zweigle had never interviewed appellant's sister, he stated that Chief Pittigher had not asked for her to be interviewed and because it was clear to Zweigle that he had no investigatory discretion on this particular matter, she was not interviewed.

Chief Pittigher was called next to testify for Stanhope. He has been a police officer since June 1988 and became Stanhope's Chief in September 2001. He reviewed the training he received, especially on IA procedures. Unless the Sergeant were himself a target of an investigation, the Chief does not plan the investigation. The IA officer – Sergeant Zweigle in Stanhope – has the discretion to design the investigation plan, to which he can add. The question of whether minor or major discipline will be sought resides with the Chief.

Chief Pittigher recalled that appellant called him while he was on duty on September 2, 2104, at approximately 1:24 p.m. Appellant advised him that his sister had been in an accident and also that Chief Blesson had yelled at him. Chief Pittigher did not ask any follow-up questions. Chief Pittigher knew that appellant, who lived in Netcong, and its Chief had had some off-duty issues in the past and he assumed the same type of thing on this instance. However, as he was driving to his own home after 5:00 p.m., it occurred to Chief Pittigher that this instance might have been different than he was assuming because it took place while appellant was on duty. He also was well aware of the fact that Netcong lies between Stanhope and Roxbury. Accordingly, he placed a call to Sergeant Hickman, who was the supervisor on duty in Stanhope and also appellant's supervisor, to have him review appellant's patrol car video camera logs for the day so that he would not be blind-sided by something out of the ordinary.

Chief Pittigher received a call back from Sergeant Hickman around 8:00 p.m. that evening and advised that there was a problem in the sense that appellant's CAD report did not match the video of the routine stop and other actions appellant took that afternoon. Chief Pittigher stated to Sergeant Hickman that he would give the matter to IA in the morning. On the morning of September 3, the Chief reviewed appellant's CAD and saw the traffic stop portion of the patrol car video. He also then immediately met with Sergeant Zweigle in order to initiate the IA complaint process. Later that afternoon, he reviewed the video of appellant's use of the overhead emergency lights with Sergeant Zweigle.

After he assigned his IA complaint to Sergeant Zweigle, Chief Pittigher met with him again later that morning to discuss the Sergeant's IA action plan. Sergeant Zweigle

planned on interviewing appellant and Chief Blesson. Chief Pittigher testified that the decision was made to contact the Prosecutor's Office jointly and that the Chief would telephone Captain Peters of that office while Sergeant Zweigle continued to pursue documentation. The Chief drove the envelope, prepared by Sergeant Zweigle, to the Prosecutor's Office himself. He did not review the contents and the envelope was sealed when he received it. He there met with Investigator Doug Porter during which conversation the Chief questioned the rationale behind piling on criminal charges when the matter of appellant's removal could be handled administratively. Later, apparently by telephone, Chief Pittigher clarified that Sergeant Zweigle could finish receiving documentary evidence that was in progress but should not interview anyone until the Prosecutor's Office came to a decision on the criminal issue.

Chief Pittigher received the return of the matter from the Prosecutor's Office first thing on the morning of September 9, 2014. He immediately contacted Sergeant Zweigle to report on overtime from off-duty in order to re-commence the investigation into appellant's actions. Zweigle was due to leave for an out-of-state vacation the next day for the remainder of September so Chief Pittigher asked him to complete the reports and to interview appellant before he went back out off duty. He denied that he required the Sergeant to complete his conclusions before he left that day although he wanted conclusions before appellant would return to duty in the normal schedule rotation because the Chief was concerned about the latter's credibility on any prospective police work.

Chief Pittigher also was of the opinion that there was no basis for appellant to have utilized his emergency lights or to have sped through Stanhope and Netcong to Roxbury. Appellant also did not inform dispatch that he was responding to an urgent call. Chief Pittigher considered the CAD statement that appellant was at the car wash when he learned of the accident to be a false police report because appellant appeared to already be on the scene of the accident by that time. On the basis of the IA investigation, he suspended appellant on September 10 and initiated the departmental disciplinary procedures about one week later.

Chief Pittigher also set forth in his testimony the disciplinary record of appellant, which he considered to be longer than some of the other officers in the department. In January 2009, appellant received an eight-day suspension for reporting to the scene of a domestic violence incident with injuries but not making an arrest. In June 2009, appellant served a seven-day suspension for an incident in March 2008 wherein he called out "sick" but admitted was actually in Aruba on a vacation leave that had been denied. Previously in December 2004, appellant received a four-day suspension for failing to file promptly a report of a verbal confrontation that took place while he was off-duty at a restaurant. In addition, there have been four reprimands and one counseling letter between 2005 and 2013, none of which were for behavior similar to that which is at issue herein, either on the issue of report writing or credibility (two for sleeping while on duty, two for vulgar language, and one for call-out procedure). Chief Pittigher justified the current removal penalty on the basis that appellant has undermined his official credibility for the rest of his career with this false report.

On cross-examination, Chief Pittigher commented that the new accreditation process had little impact on this particular IA investigation with the exception of adding some forms. He also was queried on the Attorney General guidelines and whether this investigation was handled in a consistent manner. In response to questioning about the speed with which this was concluded, Chief Pittigher denied that it was a "one-day" investigation because the interview of appellant did not take place on September 3. He had, however, already decided to suspend him and seek termination prior to that interview. He was also asked about the long delays for IA investigations on the prior disciplinary actions taken against appellant and presumably others in comparison to the speed of this one, but the Chief considered this one warranted such handling. Chief Pittigher admitted that circumstances are considered with respect to minor incidents like falling asleep on duty, such as working a double or late shift.

Chief Pittigher made the decision to suspend appellant on September 9, after he had reviewed the transcribed dispatch audio recordings and appellant's interview. He had not suspended him on September 3 because the Prosecutor did not advise that he do so. He admitted that he did not have the benefit of the statements of Officer Beck of Roxbury, appellant's sister, Hennion, or Chief Blesson when he did suspend appellant.

Chief Pittigher would have considered it inappropriate to obtain a supplemental or amended CAD from appellant once the allegations were referred to IA. He also apparently did not consider it necessary to get any statements from Sergeant Hickman, who had orally described his own viewing of the routine motor vehicle stop video and audio recordings to the Chief on the evening of September 2. Chief Pittigher also never considered asking Sergeant Hickman to get a clarification from appellant on the evening of the incident. While every officer knows that the patrol car recordings are being made, they also know they are rarely viewed so appellant could have thought he was getting away with his lie.

Chief Pittigher acknowledged that if appellant had not told him about being yelled at by Chief Blesson, this incident would never have resulted in an investigation. While he would have preferred being asked about responding to his sister's accident ahead of time, that was just a matter of proper courtesy and the Chief did not consider that a transgression on appellant's part.

Respondent's last witness was Chief James Blesson, who has been in that position in the Borough of Netcong for five years. He has been a law enforcement officer since 1988. With a department that also consists of only nine officers, Chief Blesson agreed that there is a significant amount of mutual aid engaged in between Netcog and Stanhope, as well as Roxbury and Mt. Olive. He has known appellant, who lives in Netcong, for over twenty years. He also knows all of the other Stanhope officers.

Chief Blesson explained his own position on Route 46 the afternoon of September 2. He stated that he had a long line of sight from the westbound side of Route 46 when he viewed the Stanhope police vehicle approaching at a high rate of speed, which he estimated to be approximately 70 mph. When he verified that it was not a mutual aid call response, Chief Blesson called the Sparta dispatch to find out which officer was on duty. He then contacted appellant on his cell during which appellant explained about his sister's accident. Chief Blesson knew that the accident had not yet been called into the Morris County dispatch. He agreed that appellant later called him back and apologized a second time for the incident.

On cross-examination, Chief Blesson explained that his written statement had been solicited by Chief Pittigher in person when they were both present at the September 4, 2014, statewide police chiefs' association monthly meeting. He also admitted that he could only estimate the speed of appellant's car because of the distance and the fact that it was oncoming travel. He described in greater detail where specifically on the hill he saw appellant's vehicle. He described appellant as respectful and professional during his call. Chief Blesson saw no need to call Chief Pittigher that day because he considered it to be just a conversation between two cops, and that they all have been yelled out for stuff over their careers.

Appellant testified in his own defense and also presented his wife as a brief witness. Kristen Montella presented only brief testimony to the effect that in the Montella family dynamic, appellant is the "go to" person for everybody, including her own parents and friends, albeit a broken pipe or a car accident. It is not unusual for him to just go to the aid of a family member or friend even in the middle of the night. Appellant is twelve years older than his sister and has served as a quasi-father to her. K. Montella described her sister-in-law, who was twenty-five years old at the time of this incident, as overly-dramatic and subject to hyperventilating.

As stated above, appellant reviewed his education, employment background and training at the Police Academy. With respect to his supervision, appellant stated that Sergeant Hickman often returns accident or arrest reports to him for editing but had never to his recollection done so with a CAD. Appellant has in the past received calls while on the road from Hickman about reports. While their shifts often overlap, there are days when they do not cross paths. He had been advised that CAD reports were now supposed to include names and whether emergent. Appellant could not explain why he did not do so here except that he forgot.

Appellant also reiterated that his sister is pretty dependent upon him as her "protector." Their parents immigrated forty years ago and she has been raised in a bit of a "bubble." He feels that he has had to guide her with multiple telephone calls every day and not just of an emergent nature. That day, as described above, he was on a

routine traffic stop when he saw that she had tried to call him twice. While she said she was okay, he could hear a little panic in her voice. He told her to call the local police. He neither promised to go up there nor did he see the need to call the police for her. However, he seemed to keep an internal debate about that going on in his head.

After he completed this traffic stop, although he did not clear through dispatch at that point, appellant headed toward the car wash in Roxbury. He had always intended on going there after this thirty-minute radar shift was completed. With traffic backed up near some construction on Sparta Road and his internal dialogue still running about his sister, he turned on his emergency lights to get around that sluggish traffic. Appellant did not call dispatch because his intention was to go to the car wash and not to the scene of his sister's accident. He took Route 46 eastbound toward the vicinity of the car wash and not having heard further from his sister, he figured she was still okay. Appellant described his speed on that road to be basically with the flow of traffic at 60-65 mph, which would be above the speed limit. After he crested the hill, appellant could see that there was no long line at the car wash. He called dispatch stating that he was going to car wash but the radio had poor connection so he called them again from cell phone.

Appellant approached the turn-around jughandle and then could see his sister standing outside Muldoon's with an older gentleman but there was no Roxbury patrol car present. Appellant went through the jughandle and pulled up to a vehicle which he thought was his sister's. Walking around its perimeter, he could not find any damage and was confused. She then shouted to him from a bit away that the car was not hers and that she was driving a loaner. Appellant walked over to both drivers and introduced himself to the other driver, whose name he never obtained, as his sister's brother. A discussion ensued over why the Roxbury police had not been called. Appellant listened and advised the other driver that the police needed to be contacted in any such accident. He also advised his sister that she was at fault and needed to tell Roxbury police that when they arrived. His sister also told him that the accident had been preceded by a road rage incident that had shook her up, causing her to make the dangerous or careless maneuver that caused the accident.

After appellant returned to his patrol vehicle, he received the call from Chief Blesson yelling at him for speeding on Route 46, as relayed from a citizen who had complained. Appellant mentioned his sister's accident and the Chief told him to take care of his end and that he would take care of his own. He contacted his dispatch to obtain the Morris Communication Center phone number because he could not get the information off of his smart phone, possibly due to poor connectivity. He also knew that just dialing 9-1-1 was not the surest way to report the accident location. He also spoke with Chief Pittigher about Chief Blesson's call and he waited for a Roxbury patrol to arrive. When that department arrived, the Roxbury officer -- Officer Beck -- never got out of his car. Rather, both appellant's sister and the other driver walked over to the patrol car with their documents. Soon thereafter, two unmarked Roxbury police cars rushed by with emergency lights on and made an emergency u-turn rather than utilizing the jughandle. Then Officer Beck left the accident scene without issuing any tickets and followed in the westerly direction on Route 46 of the prior unmarked cars.

At this point in time, appellant waved to his sister and drove on a side street to get to the car wash. Appellant then drove back to Stanhope, went into a local deli, ordered lunch, and returned to his patrol car to wait for his lunch. He called Chief Blesson back and apologized again, who said he was glad his sister was okay. Appellant used this time to write up the CAD. He said he did some editing but did not really proofread the narrative. He picked up his lunch and proceeded to complete his shift without incident. He would have overlapped with Sergeant Hickman that day by a couple of hours but appellant was never asked to fill in more details into the CAD, although sometimes he has been told to do so.

Appellant was called by Zweigle at home on September 9, 2014, at approximately 4:30 p.m. while off-duty and advised he needed to report to the police station within a half hour with a lawyer and a union representative for an interview about a "false police report." He was told it involved an accident report involving his sister but he still felt clueless about the specific allegations. Appellant advised Zweigle that he

had taken a pain killer earlier in the day[2] and was not sure he felt comfortable driving. Zweigle said he would pick him up. Appellant had no idea at that point in time what report was being referenced. He also had difficulty at that hour finding a union representative or his lawyer to be available. He asked for an additional day or two in order to accommodate his attorney's schedule and that request was denied. Appellant managed to find a State PBA representative who lived in the area to accompany him to the Stanhope department and his attorney would be available by telephone conference.

Appellant felt rushed with the scheduling of the interview and said his mind felt cluttered. The summary of that interview is set forth above and the transcript of it is part of this record. Appellant really did not understand that his job was on the line until the interview was over. Nor was he presented with any of the videos or audio from September 2, 2104, during this IA investigatory interview. In preparation for these disciplinary proceedings, appellant was able to recall what his state of mind was at the time, a subject not queried by Zweigle during the interview. Appellant described again how he was ambivalent about rushing to his sister's aid. She was an adult, she said she was okay, and he advised her to call the police. Nevertheless, she was the "little sister" who sometimes panics and he thought he could be a calming presence on the accident scene. He feels that he only made the decision to stop at the accident scene, which happened to be near the car wash he was going to anyway, when he visually confirmed while driving on Route 46 eastbound into the jughandle that no Roxbury police were present on the accident scene. Appellant was adamant that there was never any intention to deceive anyone about any aspect of this incident in his CAD, as evidenced by the fact that he spoke to both Chiefs and both dispatch centers about it.

On cross-examination, appellant admitted that he usually included names in the CAD narratives he wrote, although it was fairly new to the accreditation process that the Chief wanted it mentioned as to whether the officer traveled in emergency or non-emergency mode. He had done so in a CAD as recently as just three weeks prior to

[2] Appellant had been injured in the line of duty in 2007 and had undergone two back surgeries, the result of which was that he tended to have back pain. He testified that he never takes pain killers while on duty but that it was not unusual for him to do so on his days off. On this occasion, he ended up telling Zweigle when he arrived at his house that he was okay to drive because it was only a half pill taken six hours earlier.

this incident but appellant only explained that this one was no big deal and done in the middle of his lunch hour without any proofreading.

During replay of the audio and video record of appellant's actions during that one hour period on September 2, the conversations between him and his sister were very brief, and we cannot hear her end of either conversation. At 13:02:52, after noticing the two missed calls from her, appellant calls her and asks: "Are you ok?" followed by "Hello? Hello?" and an obvious dropped call. At 13:03:13, appellant reaches her back and comments: "What happened? Are you okay? Who's fault? Where are you? Call the cops. Bye."

Appellant clarified that his sister had never told him about the "road rage" background to the accident until he arrived at the scene. Because he advised her to tell Roxbury police about it all, he felt no need to report that aspect as an emergency. The persons involved were no longer anywhere near the area and any "threat" was gone. It would never have occurred to him to mention that in the CAD as it was up to Roxbury to pursue any line on such investigation. He also carefully avoided giving any appearance to the other driver of being the official responder to the accident, introducing himself albeit in uniform as "her brother."

Appellant admitted that he put on his emergency lights to get to Muldoon's a little faster in case his sister did need him. He also admitted that it was probably not an appropriate use of his lights but also noted that there was no requirement that he notify dispatch just because he initiated the vehicle's lights. However, appellant denied that he was traveling at a much higher rate of speed than the normal flow of traffic on Route 46, especially when taking into account the stopped traffic at intersections and jughandles governed by traffic lights. Cross-examination focused on pinning down appellant on exactly where he was when during each minute of the timeline. He repeated that he called to dispatch while he traveled on Route 46 in the vicinity of Polite Plumbing that he was going to the car wash, although the garbled radio required him to then call back on his cell phone. When he called dispatch, he could see that the car wash line was not long or backing up onto Route 46, as it sometimes can.

Appellant then stated that as he traveled far enough on Route 46 eastbound, he was able to see that there was no Roxbury patrol car yet at Muldoon's at which point he made the final decision to stop and check up on his sister. Appellant stated that he went through the jughandle to proceed on Route 46 westbound and pulled into the vacant Suzuki dealership between Muldoon's and the car wash. Appellant repeated in detail the location of both drivers and vehicles, and the conversations and actions he took while parked at the accident scene. Respondent confronted him with the audio of his call into the Morris Communications Center at approximately 13:25 but in it, he professionally and succinctly stated who he was and that his sister was in an accident near Muldoon's, and then reported the vehicles involved, the location and that everybody was okay.

With respect to the IA interview, appellant was cross-examined on the fact that he had known since September 3, 2014, that an IA complaint had been initiated against him concerning the filing of a false police report. Appellant maintained that he did not and could not figure out what the reference was to and that he was clueless for that week before his interview. It never occurred to him that a CAD would be referred to as a "police report." Moreover, once he was notified of the IA investigation, neither Zweigle nor anyone else would speak to him about any details anyway. He recalled that Zweigle hand-delivered the IA Complaint Notification to him at his house on his day off while stating, "Better get your attorney because the big guy is sending it up north." Appellant understood that to mean that Chief Pittigher was referring the matter to the Prosecutor's Office. Appellant was concerned and did contact his attorney but was never advised of the actual allegations until the evening of his interview.

At the conclusion of cross-examination, I gave appellant the opportunity to explain if he felt there was any "bad blood" between the Chief and himself. He remarked that he felt there was and that it dated back a few years ago to a period when the department's offices were being renovated. The officers were still using their lockers in the building even though a trailer had been set up for temporary offices. The contractor was scrapping up the old floor tiles from the 1970s and grinding the mastic glue from underneath them. Appellant observed dust everywhere, including inside the locker, which he described as looking like 9-1-1. Concerned about the possibility of

asbestos in the dust, appellant did some internet research and felt there was a strong possibility that asbestos was present in the dust. He contacted the Chief by phone at his home and described the situation. The Chief remarked, "You better be fucking right and 100% sure because this is a career decision." Thereafter, the Chief and Administrator inspected the area. A decision was made to restrict the officers from being in the vicinity until the dust could be tested. Appellant was not sure but believed that the test might have come back negative.

Soon thereafter, while the contractor was still working in the building, drilling holes into the concrete in order to secure the benches with lag bolts, Chief Pittigher made what appellant felt was an outrageous comment. Within earshot of the contractor, the Chief suggested that appellant bend over the table and see how far up his butt the bolts would go and then he would get some vacation time. Appellant was appalled but had to act as if it did not bother him and walked out onto patrol. He chose not to file any complaint because it would only serve to embarrass the Chief.

On this last line of testimony, Chief Pittigher was called as a rebuttal witness. He was not asked any questions about the bolt comments but agreed that he probably did say with respect to the asbestos that appellant had "better be fucking right." He denied any job threat or that he harbored any animosity toward appellant as a result of the short-term shutdown and testing of the dust.

The record was developed with special emphasis on the timeline of certain events and certain communications. Accordingly, I **FIND** that on September 2, 2014, the following timeline is supported by the preponderance of the objective video, audio, documentary, and testimonial evidence --

12:59:04	Montella is in parking lot of Lake Lenape High School
13:00:11	Montella pulls over vehicle for routine stop
13:02:52	Montella is on his cell phone with his sister
13:03:13	Montella on second call with sister after first got dropped
13:04:27	Montella done with routine stop. Does not "clear" with dispatch.
13:07:23	Montella emergency lights are activated near Brooklyn Road

13:08:20	Montella emergency lights are activated in Stanhope near Route 183
13:09:15	Montella emergency lights are activated as he pauses and then proceeds through the intersection of Route 183 and Route 46 and takes Route 46 ramp from center lane
13:11	Montella reports to Stanhope dispatch that he is "going to be clear" at the car wash before he reaches the jughandle
13:13	Chief Blesson calls dispatch and then Montella
13:19	Montella calls Sparta dispatch for Morris County dispatch phone number and advises that he is at Muldoon's at sister's accident scene
13:24	Montella calls Chief Pittigher re Chief Blesson's conversation
13:25	Montella calls Morris Communications Center dispatch
13:51	Roxbury P.D. clear the scene of his sister's accident
13:57	Montella clears the scene of his sister's accident
16:41:32	Sergeant Hickman approves Montella's CAD
17:00 +	Chief Pittigher develops concern about Montella actions that day
17:00 +	Chief Pittigher calls Sergeant Hickman and orders him to pull video from Montella's vehicle
20:00 +	Sergeant Hickman advises Chief Pittigher that video does not match CAD report

I **FIND** that the following timeline of the IA investigation and disciplinary procedures is supported by the preponderance of the objective video, audio, documentary and testimonial evidence --

9/2/14	Montella spoke to Chief Blesson, Chief Pittigher and dispatch
9/2/14	Chief Pittigher speaks to Sergeant Hickman
9/3/14	Chief Pittigher reviewed Montella's vehicle video log
9/3/14	Chief Pittigher speaks to Sergeant Zweigle and advises him to return to department even though on leave
9/3/14	Chief Pittigher assigns Sergeant Zweigle to IA on Montella; Sergeant Zweigle prepares cover letter only to Prosecutor's Office

9/3/14	Chief Pittigher calls Captain Peters in Prosecutor's Office that afternoon and describes allegations against Montella
9/4/14	Chief Pittigher personally drives envelope to Prosecutor's Office and delivers to Investigator Porter
9/4/14	Chief Pittigher speaks informally with Chief Blesson at monthly meeting of the New Jersey State Association of Chiefs of Police and asks for a statement from him
9/9/14	Prosecutor returns case to Stanhope on basis that Chief has already indicated he will seek termination administratively
9/9/14	Chief Pittigher calls Sergeant Zweigle that morning from off-duty to conduct as much investigation as he can that day before he leaves to go out of state on vacation
9/9/14	Sergeant Zweigle conducts as much of Chief Pittigher's list of IA tasks as he can that day, approximately 11 a.m. – 10 p.m.
9/9/14	Sergeant Zweigle interviews Montella (18:07) and informs him that termination might be sought
9/10/14	Montella is immediately suspended
9/10/14	Chief Blesson mailed his summary statement to Stanhope
11/12/14	Sergeant Zweigle, back on-duty after extended vacation, picks back up the IA investigation of Montella, on authorized extension
11/13/14	Sergeant Zweigle interviews Roxbury Officer Beck
11/13/14	Chief Pittigher takes two DVDs to be transcribed
11/18/14	Sergeant Zweigle interviews citizen Henion

There are several aspects of this incident, brought out during the hearings, that pose fact-based or credibility-based determinations by the undersigned but which also are intertwined with a hint of legal color. Did appellant intentionally misstate the summary of the event on the CAD or was it just a cryptic but unintentionally mistake in his narrative? Is the CAD the type of cryptic report form which would not be scrutinized to the same degree as a formal statement or full incident report? Why did Sergeant Zweigle never interview Sergeant Hickman or appellant's sister? Appellant raises the issue that the former should have been interviewed concerning why he never asked

appellant to amend or clarify his CAD narrative. He raises the latter as an example of how simply the timeline could have been verified by taking the sister's statement.

I **FIND** as a matter of fact based upon the preponderance of the credible evidence and testimony that appellant did not try or intend to deceive anyone in his or any other police department with his CAD statement. Most important to my fact-finding is the undisputed fact that prior to writing it, Chief Blesson, Chief Pittigher, and two dispatch centers had all been informed by him directly and professionally that he was heading to or had been at the scene of a minor accident in Roxbury involving his younger sister. It strains logic to believe that he intended to make a false police statement when he wrote the cryptic CAD report on the non-incident. I **FIND** that appellant did not falsify the CAD report but did engage in drafting a sloppy, short narrative, under circumstances that included being on his lunch hour and paying insufficient attention to the details of this non-incident event.

Further, I **FIND** that appellant made the decision to stop at the accident scene only after he was approaching Roxbury and could see that no Roxbury police vehicle was on the scene. This took place after he called dispatch to advise that he was stepping out at the car wash, which he could then see was not overcrowded. I **FIND** as a matter of fact that appellant was traveling with some sense of personal urgency to the vicinity of Muldoon's and the car wash in case his sister needed him.

I do **FIND** as admitted to by appellant that his use of the patrol car's emergency lights on three short stretches of road as he traveled from Stanhope to Roxbury was contrary to departmental policy and proper police protocol. While there is no proof that appellant was speeding through any of those sections, I would **FIND** that appellant's failure to clear from his routine vehicle stop was also a minor transgression of procedures.

In addition, there were certain contradictions between Chief Pittigher and Sergeant Zweigle with respect to some of the details of the IA investigations which must be addressed herein. The important point of disagreement was on who truly directed this particular IA investigation. On that point, I **FIND** Sergeant Zweigle more credible.

He was testifying in front of the Chief and under oath which I find made it more likely for him to be careful but truthful while the Chief would have had no reason to believe anyone would contradict him. Given the timing and strong direction Chief Pittigher gave in every other sense of this investigation, I **FIND** it more likely than not that he gave Sergeant Zweigle no discretion in this matter. I also **FIND** that it is more likely than not that Chief Pittigher decided as early as the evening of September 2 to use this incident as a means of terminating appellant, whether out of malice from prior run-ins or not[3]; and it is more likely than not that he had conversations with the Prosecutor, to which this record is not privy, encouraging a perfunctory and quick criminal review with return as soon as possible to the Chief.

In fact, I **FIND** that Chief Pittigher approached this charge against appellant, in which he felt it more important to characterize a sloppy non-incident narrative sentence as a "false police report," with a dedication that can only be characterized as a rush to judgment and then presented his testimony in a manner as to justify that investigative and disciplinary action.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex DOC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-

[3] I concur with appellant that the prior asbestos tiles and lag bolt incidents, as well as the Chief's minimizations of appellant's commendation history, demonstrates an animus on his part toward appellant.

Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, Stanhope bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

In this case, Stanhope primarily relies upon its charge that appellant falsified a police report and has irreparably damaged, therefore, his credibility to be a police officer whose duties include being able to testify in court. Stanhope did not premise its termination decision upon the actions of appellant in either speeding through Netcong and Roxbury or utilizing the emergency vehicle lights in traveling to the scene of his sister's accident, although they were pursued herein.

As set forth in my findings above, I **CONCLUDE** that there can be no genuine dispute that appellant was not trying to hide the fact that he went to the scene of his sister's accident. Before 2:00 on September 2, 2014, which is before he wrote up his CAD comment, he had already advised his dispatch, Morris County dispatch, Chief Blesson, and Chief Pittigher that he was attending to his sister's accident at Muldoon's near the Roxbury car wash. Appellant clearly did not lie about where he was or try to hide the fact that he went to his sister's side. It is splitting hairs to say that even if his department knew that he eventually was at the accident scene, appellant nevertheless lied about when exactly he learned of the accident or decided to go to the accident scene.

Experience of human nature teaches us that a person who is trying to fabricate his whereabouts or throw whitewash on a problem would have done more to dissemble or hide the truth than appellant's use of the word "near" or lack of disclosure of his sister's or anyone else's name. The only conclusion, therefore, that one can draw from his sixty-five word CAD comment was that he was sloppy in his writing up of this non-incident stop, a flaw in his police skills that had been previously acknowledged. Yet, sloppy or poor report writing does not equate to a falsified statement such as to permanently undermine a police officer's credibility and therefore his ability to perform his official duties, and to ruin his career.

What may never be clear is why Chief Pittigher took such a harsh approach to this narrative. Even Chief Blesson gave appellant just a "warning" on his driving too fast on Route 46. The public has a right to expect its law enforcement officers to be safe drivers and to abide traffic laws themselves when a genuine emergency does not necessitate otherwise. Appellant's misuse of his vehicle's emergency lights to get around traffic was inappropriate and indicative of a big brother's mindset and not that of an on-duty law enforcement officer. For all the reasons set forth above and on the basis of the preponderance of the credible and competent proofs, I **CONCLUDE** that respondent has not met its burden on the charges supporting termination and that the disciplinary charges against appellant must be over-turned except with respect to the minor violations of departmental policies.

Insofar as Stanhope has supported its case of establishing only some grounds for the disciplinary action against appellant, the next question is the appropriate level of that discipline. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

On balance and based upon the entirety of the factual record including his record of good service and commendations, I **CONCLUDE** that removal is not the appropriate discipline for the charges of misuse of equipment brought against appellant and poor report writing. Appellant has never been subject to even a thirty-day suspension period in his tenure as a Stanhope officer. This one-sentence CAD statement, for which there was insufficient proof of an intentional misstatement, does not permanently and irreparably damage appellant's credibility as a police officer. While he did over-react to his sister's accident, appellant clearly was not hiding the events that transpired that day. He was forthright and professional with both Chief Blesson and Chief Pittigher. Moreover, it would have been fairly standard operating procedures to ask an officer submitting an ambiguous CAD or one lacking in sufficient detail to simply elaborate and amend the CAD.

In sum, I **CONCLUDE** that the appropriate penalty, consistent with the policy of progressive discipline, for the lesser charges of misuse of equipment and violation of departmental policies is a sixty (60) day suspension.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the Borough of Stanhope against appellant Fortunato Montella is hereby **REVERSED** in part and **MODIFIED** in part as set forth above. It is further **ORDERED** that Officer Montella shall be reinstated to his position as a Police Officer in the Borough of Stanhope Police Department and that all back pay, other than the sixty (60) days of unpaid suspension, shall be reinstated to Officer Montella, along with any other accompanying employment benefits.

It is further **ORDERED** that eighty (80%) per cent of reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 11, 2015

DATE

Gail M Cookson

GAIL M. COOKSON, ALJ

Date Received at Agency:

Mailed to Parties: SEP 14 2015

id

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Kristen Montella

Fortunato Montella

For Respondent:

John Liguori

Charles B. Zweigle

Steve Pittigher

James Blesson

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-1 Preliminary Notice of Disciplinary Action, dated September 11, 2012

J-2 Final Notice of Disciplinary Action, dated October 9, 2012

For Appellant:

A-1 Reportable Incident Form of Chief Pittigher, dated September 3, 2014

A-2 Internal Affairs Investigation Attachment Form, dated September 9, 2014

A-3 Large scale Google map of Stanhope/Netcong/Roxbury area

A-4 Google Map of Route 46 in the area of Muldoon's and Roxbury Car Wash

A-5 Google Map Showing Route from Traffic Stop to Muldoon's

A-6 Photo of Roxbury Car Wash and Muldoons, taken from jug handle

A-7 Internal Affairs Investigation Attachment Log, dated September 9, 2014

A-8 Memo from Chief Pittigher to Zweigle, dated September 3, 2014

A-9 Internal Affairs Investigation Plan, dated September 3, 2014

A-10 Internal Affairs Investigation Review Sheet, dated September 3, 2014

A-11 Request for Extension of an Internal Affairs Investigation, dated September 3, 2014

A-12 Internal Affairs Investigation Report of Sgt. Zweigle, dated September 4, 2014

A-13 CAD report for Montella Traffic Stop on September 2, 2014

A-14 Internal Affairs Investigation Plan (page 3), dated September 9, 2014

A-15 Internal Affairs Investigation Plan (page 4), dated September 9, 2014

A-16 [not in evidence]

A-17 Internal Affairs Investigation Report Continuation Page, dated September 9, 2014

A-18 Immediate Suspension Letter, dated September 10, 2014

A-19 Request for Extension of an Internal Affairs Investigation, dated November 13, 2014

A-20 Emails dated November 12, 2014 between Chief Pittigher, Roxbury Chief Simonetti, and Sgt. Zweigle

A-21 Incident List Report for Officer Montella, dated November 12, 2014

A-22 Internal Affairs Investigation Report Continuation Page signed by Chief Pittigher, dated November 17, 2014

A-23 Internal Affairs Investigation Report Continuation Page, dated November 17, 2014

A-24 Internal Affairs Investigation Report Continuation Page signed by Chief Pittigher, dated November 18, 2014

A-25 Internal Affairs Complaint Notification signed by Officer Montella, dated September 3, 2014

A-26 Legends Car Wash sign-in sheet

A-27 List of NCIC Requests by Montella on September 2, 2014

A-28 List of "private chats" of Montella dated September 2, 2014

A-29 List of "public chats" of Montella dated September 2, 2014

A-30 Attorney General Internal Affairs Guidelines, Revised July 2014

A-31 January 8, 2013 Stanhope Council Minutes

A-32 November 26, 2013 Stanhope Council Minutes

A-33 April 15, 2015 Stanhope Council Minutes

A-34 Letter of Commendation Dated July 15, 2014 by Captain Allison Bookspan, American Legion Ambulance Corps

A-35 Letter of Commendation Dated May 10, 2012 by Lt. Michael Meehan, State Police

A-36 Letter of Commendation by Stanhope Mayor Rosemarie Maio

A-37 Google map of Route between Motion Auto Body (last video frame) and Muldoon's

A-38 Google map street view of Rt 46 approaching Motion Auto Body (near last video frame)

A-39 Google map street view of Rt 46 at Motion Auto Body

For Respondent:

R-1 Stanhope Police Department Internal Affairs Investigation Plan, dated September 3, 2014

R-2 Correspondence to Captain Don Peters, Sussex County Prosecutor's Office, from Sgt. Charles Zweigle, dated September 3, 2014

R-3 Stanhope Police Department, Internal Affairs Administrative Advisement Form to Officer Fortunato Montella, dated September 9, 2014

R-4 Stanhope Police Department, Operations Report completed by Fortunato Montella, dated September 2, 2014

R-5 Letter to Sgt. Charles Zweigle from Chief James Blesson, Netcong Chief of Police

R-6 Stanhope Police Department, Internal Affairs Investigation Allegations and Conclusions, dated September 9, 2014

R-7 Roxbury Police Department – Reports Concerning Motor Vehicle Accident, dated September 2, 2014

R-8 DVDs (3) of Patrol Car Camera Activated from 13:00 to 13:08, dated September 2, 2014:

A. 13:00:11

B. 13:07

C. 13:08:19

R-9 Audio Recording of Sparta Dispatch Communications for the Period from 13:00 to 13:57, On September 2, 2014

R-10a Call Data Reflecting Communications Activity for Sparta Police Dispatch for the Period from 13:00 to 13:57, On September 2, 2014

R-10b Call Data, Color-Coded Highlighting the Pertinent Calls

R-11 Letter to Chief Pittigher from Gregory Mueller, First Assistant Prosecutor, Re Officer Montella, dated September 6, 2014

R-12 Transcript of Officer Recording for Motor Vehicle Stop on September 2, 2014 at 13:00 Hours

R-13 Transcript of Audio Recording of Sparta Dispatch Communications for the Period From 13:00 to 13:57 on September 2, 2014

R-14 Disciplinary Action Form and Supporting Documentation for Suspension Imposed on January 3, 2011

R-15 Disciplinary Action Form and Supporting Documentation for Suspension Imposed on June 15, 2009

R-16 Disciplinary Action Form and Supporting Documentation for Suspension Imposed on January 18, 2010

R-17 Letter of Reprimand to Fortunato Montella, dated December 10, 2013

R-18 Letter of Reprimand to Fortunato Montella, dated June 5, 2006

R-19 Letter of Reprimand to Fortunato Montella, dated July 11, 2007

R-20 Letter of Reprimand to Fortunato Montella, dated June 1, 2005

R-21 Reprimand/Verbal Counselling to Officer Montella, dated February 20, 2011

R-22 Stanhope Police Department, Vehicle Operation and Response Guidelines

R-23 Stanhope Police Department, Rules and Regulations

R-24 [not in evidence]

R-25 Transcript of Internal Affairs Interview of Fortunato Montella, dated September 9, 2014

R-26 Internal Affairs Report, dated March 22, 2010, Regarding Interviews of Ashley Ann Gregory and Kyle Ligon

R-27 [not in evidence]

R-28 March 27, 2008 Letter to Chief Pittigher from Officer Fortunato Montella, with Not Guilty Plea

R-29 Letter to Merrick Limsky from RJM, dated May 15, 2009

R-30 Settlement Agreement, dated March 24, 2008

R-31 [not in evidence]

R-32 Stanhope P.D. Operations Report by Fortunato Montella, dated August 13, 2014

R-33 Aerial View, Google Map of Route 46 Near Roxbury Car Wash

R-34 Photo of view from Towne Toyota looking towards Roxbury Car Wash on Route 46 Eastbound

R-35 Google Maps with Distance from the BP Gas Station to the Roxbury Car Wash

R-36 Google Maps Earth Image of the Roxbury Car Wash

R-37 Audio Recording of Call to the Morris County Communications Center from Fortunato Montella on September 2, 2014