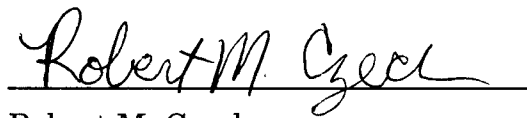


Re: James Miller

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
JULY 15, 2015

A handwritten signature in cursive script that reads "Robert M. Czech". The signature is written in black ink and is positioned above a solid horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 09106-14

AGENCY DKT. NO. n/a

**IN THE MATTER OF JAMES MILLER,
CITY OF HOBOKEN.**

Charles J. Sciarra, Esq., for appellant, (Sciarra and Catrambone, attorneys)

Janet Lucas, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: May 27, 2015

Decided: June 2, 2015

BEFORE **TIFFANY M. WILLIAMS, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, James Miller, appeals his removal from his position as a police officer with the City of Hoboken Police Department (City). By three separate Preliminary Notices of Disciplinary Action (PNDA's), dated April 23, 2014, May 2, 2013, and August 6, 2013, Miller was charged with the following summary offenses: 1) conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); 2) neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7); 3) insubordination, in violation of N.J.A.C. 4A:2-2.3(a)(2); and other sufficient cause for discipline in connection with violations of internal policy, in violation of N.J.A.C. 4A:2-2.3(a)(11). After departmental hearings

were conducted on all three PNDA's on June 26, 2014, Final Notices of Disciplinary Action (FNDA's) were issued on July 11, 2014, sustaining all three sets of charges and removing Miller from his position.

PROCEDURAL HISTORY

The matter was filed in the Office of Administrative Law (OAL) on July 17, 2014, pursuant to N.J.S.A 40A:14-202(d), and assigned to the undersigned on July 28, 2014. On August 1, 2014, Mark Tabakin, Esq. of the Weiner Lesniak law firm substituted his appearance as counsel of record on behalf of the City. On August 7, 2014, a notice was sent to the parties to appear for a prehearing conference on August 21, 2014. A prehearing conference was conducted on August 21, 2014, and a prehearing Order was entered dated August 22, 2014, setting a discovery deadline of September 20, 2014, and hearing dates of October 16, 2014, and October 20, 2014, based on the availability of counsel. On September 16, 2014, the City filed a Motion for Summary Decision. On September 23, 2014, the Court reserved on the pending motion and denied leave to file the motion for summary decision, in accordance with the August 22, 2014, prehearing Order, paragraph 11. The Court also extended discovery deadlines to October 3, 2014, in light of the parties' separate complaints regarding one another's failure to furnish discovery.

After an adjournment, the matter was rescheduled to October 27, 2014, and November 7, 2014. On October 15, 2014, the petitioner's counsel requested an adjournment of those dates in light of the City's failure to provide discovery and a personal scheduling conflict, and also indicated a waiver and tolling of the so-called 180-day rule. On October 22, 2014, the adjournment was granted and discovery was extended to November 21, 2014. On October 28, 2014, the parties mutually agreed on a December 17, 2014, first date of hearing. Subsequently, on October 31, 2014, the parties mutually agreed upon a second date of hearing on January 21, 2015.

A hearing was conducted on December 17, 2014, January 21, 2015, and February 17, 2015. On February 26, 2015, the parties requested leave to submit

written summation within forty-five days after receipt of the transcripts in this matter, with replies due fifteen days from the receipt of the closing briefs. The petitioner again agreed to toll the so-called 180-day requirement during this time period. The record closed on May 27, 2015, after the receipt of closing summation and replies.

FACTUAL DISCUSSION

The following testimony and documentary evidence was presented in connection with the three separate FNDA's which are the subject of the instant appeal:

FNDA's Alleging Aril 18, 2013 Incidents

The City presented several witnesses in connection with its allegations. Mary Jo Capezzuto testified that on April 18, 2013, she went out on a date with Officer Miller, whom she had been dating for a few months. On April 18, 2013, they met at a bar in Jersey City and proceeded to a second bar in Hoboken, called 1 Republick. After leaving the Hoboken bar, at approximately 9:00 p.m., Ms. Capezzuto went to retrieve her car, which she had parked earlier, and moved it to the BP gas station on 14th Street in Hoboken. Officer Miller followed her to the BP gas station and proceeded to get gas. As she stepped out of her car on her cell phone, Officer Miller became upset with the caller on Ms. Capezzuto's phone, and began yelling and screaming at her. He then grabbed her phone and smashed it on the ground. As she tried to pick up the phone, Officer Miller grabbed her wrist and threw her to the ground, causing her to land on her back. While Ms. Capezzuto was on the ground, Officer Miller slammed her head on the ground numerous times. She began kicking him with her heels, injuring him in his face. After she got up from the ground, Ms. Capezzuto repeatedly kicked Officer Miller's car. Ms. Capezzuto recalled having consumed approximately six drinks that evening between both bars. Ms. Capezzuto testified that she received medical treatment, including a CT scan on her head because it had been slammed to the ground.

Lt. John Orrico testified that he was on duty on April 18, 2013, as the midnight shift commander. Upon responding to a call from the BP gas station of a man and

woman fighting, he discovered Officer Miller and Ms. Capezzuto. He was familiar with Officer Miller because he had worked with and supervised him. Ms. Capezzuto advised him that she and Officer Miller had an argument that escalated to an altercation where he had broken her cell phone and assaulted her. Lieutenant Orrico observed debris covering the back of Ms. Capezzuto's shirt and pants which stuck to her clothing, causing him to believe that she had been lying on her back. Ms. Capezzuto told him that she had consumed alcohol and she appeared as such based on his observation. He also observed that Officer Miller was bleeding and had some injuries. While on the scene, Lieutenant Orrico observed an officer take photographs of Ms. Capezzuto's injuries. (R-1(a-f).) According to Lieutenant Orrico, Officer Miller acknowledged that he had consumed several drinks of alcohol at dinner. A field-sobriety test was conducted by the Port Authority Police. Lieutenant Orrico was not present for the test but became aware that based on officers' findings at the scene there was no probable cause for a DWI arrest. The petitioner was subsequently arrested for simple assault, domestic violence, and criminal mischief. On August 18, 2013, Lieutenant Orrico authored a report detailing his observations. (R-3.) On April 30, 2013, he supplemented that report to reflect Officer Miller's admission that he had consumed wine with dinner. (R-2.)

Detective Michael Miranda, a twenty-year veteran of the Hoboken Police Department, also responded to the BP gas station on April 18, 2013. Upon arriving, he saw Officer Miller and observed bleeding from his face, along with a laceration. He also observed Ms. Capezzuto yelling and screaming that she knew the police were "on his side" and that "he did this to me." Detective Miranda spoke to Officer Miller who said that he had taken the phone out of Ms. Capezzuto's hand and spoke with the caller who said that she owed the caller money for cocaine sales. Officer Miller told Detective Miranda something to effect of, "what was I supposed to do when some guy was saying that my girl was unloading cocaine for him?" Officer Miller also acknowledged that he had consumed wine with dinner earlier that evening. Detective Miranda did not speak with Ms. Capezzuto but observed that she appeared intoxicated. Detective Miranda acknowledged that he had been partners and best friends with Officer Miller prior to the incident, but had not spoken to him since separating as partners.

Lt. Daniel LoBue, a twenty-seven-year veteran of the Hoboken Police Department, testified that he spoke with Ms. Capezzuto at the station after becoming aware of her claims of disparate treatment due to Officer Miller's status as a department officer. He advised Ms Capezzuto that she would be treated fairly and should report any concerns to him. He also saw Officer Miller and spoke with him to ask about his well-being. Officer Miller appeared to be bleeding but was very calm. Lieutenant LoBue believed that both Miller and Capezzuto appeared to have been drinking alcohol. He did not conduct an interview with either party about the underlying incident.

Christina Russo was a patron at the BP gas station on August 18, 2014, and observed a man and a woman engaged in an altercation. Standing approximately twenty-five feet away, she observed the woman erratically hitting the man as an argument ensued. She then observed the woman on the ground with the man on top of her. Ms. Russo acknowledged that she did not see the initiation of the altercation, but viewed the woman as acting aggressively. She could not identify either the man or the woman. Ms. Russo's boyfriend, Michael Ettore, was also present and observed a verbal argument between the man and woman, where the male smashed the woman's cell phone. He then saw the woman kick the man's car and a physical altercation ensued. Mr. Ettore believed at that point, his girlfriend, Ms. Russo, called the police.

FNDA Alleging August 2, 2013 Incident

Officer Francisco Rosa, a seven-year veteran of the Hoboken Police Department, testified that on August 2, 2013, he was patrolling near the intersection of 7th and Adams streets during the 12 a.m.-8 a.m. tour. During his patrol, he observed a white male looking into a manhole and discovered that it was Officer Miller. Officer Rosa asked Officer Miller whether he needed assistance. Officer Miller responded that he had been searching for his girlfriend's necklace because she had ripped it off her neck and tossed it in the sewer. Officer Rosa's partner, Officer Cuevas, illuminated the manhole with his flashlight to assist Officer Miller's search. Officer Miller asked for a ride home, which was six to seven blocks away, and Officer Rosa complied. Officer

Rosa testified that Officer Miller appeared physically normal and did not appear intoxicated.

Later, during his shift, Officer Rosa learned from another officer of an ongoing investigation concerning Officer Miller. Officer Rosa contacted Lieutenant Orrico and advised him of his contact with Officer Miller that evening – specifically that he had observed Officer Miller looking in a manhole and that he had driven Officer Miller to his residence. Officer Rosa authored a report and a supplemental report summarizing his observations. Officer Cuevas, Officer Rosa's partner, corroborated the identical version of events during his testimony.

Officer David Montanez, a twenty-year veteran of the Hoboken Police Department, was patrolling on August 2, 2013, when he was stopped by a female who flagged him down. The female, who he later learned was Jodi Allen, told him that she had been in an argument with Officer Miller and that he took her keys and locked her out. Officer Montanez advised Lieutenant Orrico of Ms. Allen's complaint. Ms. Allen then told him that Miller had thrown her to the ground into a puddle and taken her necklace. Officer Montanez observed that Ms. Allen appeared wet, her hair was mussed and she looked like she had been in a scuffle. Lieutenant Orrico arrived on the scene shortly afterwards and took over the investigation. Officer Montanez assisted in looking for Ms. Allen's necklace. Upon taking Ms. Allen home, the Hoboken Fire Department provided entry to her unit. Ms. Allen noted that several items were still missing in her apartment, such as her necklace, pendant, and ring.

Lt. John Orrico testified that once he arrived on the scene, he observed that Ms. Allen was wet and disheveled and had bruising on her face and neck. Ms. Allen had advised that Officer Miller was her boyfriend and that after an argument; he had thrown her to the ground and ripped the chain and pendant from her neck. She also said that her hair had been pulled. As she fanned through her hair, pieces fell to the ground. Based on his knowledge of the domestic violence guidelines, Lieutenant Orrico signed a complaint against Officer Miller. Ms. Allen was offered a restraining order but she declined and said that she was afraid of Officer Miller because he was a police officer.

Lieutenant Orrico accompanied Ms. Allen to her apartment where the Hoboken Fire Department provided entry. Lieutenant Orrico inspected that apartment first prior to allowing Ms. Allen entry and he noticed a picture of Ms. Allen and Officer Miller inside her unit. Ms. Allen specifically identified Officer Miller as being a Hoboken police officer and gave his address. Lieutenant Orrico observed that Ms. Allen appeared to have consumed alcohol but did not observe her to be impaired in articulating the sequence of events.

Detective William Collins, a twelve-year veteran of the Hoboken Police Department, testified that on August 2, 2013, he responded to a call from Lieutenant Orrico regarding an assault with a possible robbery at 619 Adams Street. He arrived on the scene, accompanied by Detective Anthony Caruso, and was further briefed by Lieutenant Orrico. Lieutenant Orrico advised him that a female named Jodi Allen had been assaulted by Officer Miller and possibly robbed. Detective Collins approached Ms. Allen and observed that she was visibly upset and indicated that she perceived that the department would not respond because Officer Miller was a police officer. However, Ms. Allen agreed to come to police headquarters to make a statement. At headquarters, Ms. Allen told Detective Caruso and Detective Collins that she had an argument with her boyfriend, Officer James Miller. During the argument, Officer Miller had smacked her in the face and thrown her to the ground. According to Detective Caruso and Detective Collins, Ms. Allen described that Officer Miller had ripped off her grandmother's chain from around her neck and pulled her ring from her finger. Ms. Allen described that the argument had ensued after a group of people had passed by on the street and argued with her and she felt that Officer Miller had not supported her.

Detectives Collins and Caruso observed physical injuries to Ms. Allen on her eye, neck, face, and hands. After the interview, the detectives recorded a video statement from Ms. Allen and took photographs of her injuries. The detectives testified that they could smell alcohol on Ms. Allen but that she was able to clearly stand and give details of the events, despite crying and apparent nervousness that Officer Miller would not be brought to justice because he was a police officer.

Sgt. John Rodriguez, a twenty-six-year veteran of the Hoboken Police Department, interviewed Officer Miller in connection with an Internal Affairs (IA) investigation. Sergeant Rodriguez drafted a report of his findings based on an interview with Officer Miller and his observations of the surveillance video provided by a neighboring building owner in the area where the altercation occurred. According to Officer Miller, Ms. Allen had gotten into an altercation with a group of people who passed by on the street. Officer Miller said that Ms. Allen went after the group and started throwing punches at them and they in turn started pulling her hair, at which point Officer Miller intervened. Officer Miller also indicated that later in the evening Ms. Allen fell and tripped over a tree root and fell between a car.

The video obtained by Sergeant Rodriguez displayed Officer Miller and Ms. Allen entering the camera view with their backs to the camera. Both Ms. Allen and Officer Miller walked along the sidewalk, with Ms. Allen slightly in front of Officer Miller. Shortly thereafter, Ms. Allen shrugged her shoulders and threw up both her hands while she walked. Officer Miller followed with a similar shoulder shrug and elevated one of his hands. Ms. Allen turned to face Officer Miller with her hands out to her side, leaned in, and swung her right hand at him. Officer Miller stepped back and the two continued to walk down the street. After a few steps, Officer Miller and Ms. Allen stopped walking and continued to speak to each other for a few minutes before Ms. Allen walked in the opposite direction. Officer Miller followed Ms. Allen, grabbed her with his right hand, pushed her to the ground and remained on top of her. After Ms. Allen rose from the ground and began walking, Officer Miller shoved her to ground between two cars, near the curb. Officer Miller remained on top of Ms. Allen for several minutes. (R-8)

Jodi Allen testified on behalf of the City. Ms. Allen indicated that she was Officer Miller's girlfriend and had been living with him up until a few months ago. She confirmed that she was in a dating relationship with Miller on August 2, 2013. Allen presented no further testimony.

The parties agreed that the prior discipline for Officer Miller included a six month suspension in 2011, in connection with an incident of driving while under the influence of alcohol.

STIPULATED ADMISSIONS

In addition to the testimony and documentary evidence, the parties jointly stipulated to the City's responses to the first set of requests for admission (J-8), including the following admissions:

1. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, never read any document the indicated Officer Miller was to submit documentation to Internal Affairs regarding alcohol counseling.
2. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, never read any documentation that indicated to whom Officer Miller was to report his attendance at alcohol counseling.
3. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, never spoke to Officer Miller's supervisors that were in a supervisory position of Officer Miller between the period of August 2013 to April 2013, about whether he reported his alcohol counseling.
4. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, had no personal knowledge of any instructions given to Officer Miller as to whom he was supposed to report to regarding his alcohol counseling.
5. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, never spoke to anyone who said they instructed Officer Miller to report alcohol counseling to them.

6. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, had no personal knowledge of any instruction given to Officer Miller that he was required to report alcohol counseling to Internal Affairs.
7. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, was told by the City of Hoboken to stop investigating the alleged incident detailed in the August 6, 2013, Preliminary Notice of Disciplinary Action.
8. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, during his investigation did not go to the scene of the alleged incident detailed in the August 6, 2013, Preliminary Notice of Disciplinary Action to determine if there were tree limbs coming out of the ground.
9. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, during his investigation was never informed Officer Miller was subjected to a urine test for alcohol consumption on April 18, 2013,
10. Sgt. John Rodriguez, of Internal Affairs for the City of Hoboken, never spoke to the officer that were on the scene of the alleged incident referenced in the Preliminary Notice of Disciplinary Action dated April 23, 2014, and May 2, 2013.
11. At the request of the City of Hoboken, Officer Miller was the subject of a field-sobriety test on April 18, 2013, and was not found to be intoxicated.
12. The City of Hoboken never prepared a Last Chance Agreement to be executed by Officer James Miller and the City of Hoboken.
13. The City of Hoboken never advised Officer James Miller to whom he should report his alcohol/drug counseling attendance.
14. The City of Hoboken never advised Officer James Miller to whom he should report his progress with regard to his alcohol/drug counseling.

15. From August 20, 2012, to August 20, 2013, the City of Hoboken never performed monthly drug and alcohol testing on Officer Miller, but for the alcohol and drug testing on April 18, 2013, as related to the incident alleged in the Preliminary Notices of Disciplinary Action dated April 23, 2013, and May 2, 2013.
16. From August 20, 2013, to Officer Miller's termination, the City of Hoboken never performed monthly or bi-monthly drug and alcohol testing on Officer Miller.
17. Officer James Miller's supervisors never made an inquiry of Officer Miller regarding his alcohol and drug counseling and attendance. (J-8.) .

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act recognizes that the public policy of this State is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline and termination of public employees. A public employee who is protected by the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a), and include the present charges of conduct unbecoming a public employee, neglect of duties, insubordination and other sufficient cause for discipline.

The burden of proof in this matter is on the City to demonstrate by a preponderance of the competent, relevant and credible evidence that Officer Miller is guilty as charged. 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). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis in a de novo hearing to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super.

143 (App. Div. 1987). The overriding concern in assessing the propriety of an appropriate penalty is the public good and several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. In re Stallworth, Camden Cty. Mun. Util. Auth., 208 N.J. 182, 195-96 (2011); George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

However, progressive discipline can be bypassed in an instance of severe misconduct, especially when the employee's position involves public safety. Ibid. For example, the New Jersey Supreme Court upheld the removal of a Division of Youth and Family Services Worker (DYFS) who waved a lighter in the face of a five-year-old client during an investigation, because her conduct was so egregious and violated the agency's trust in her ability to perform abuse investigations. In re Herrmann, 192 N.J. 19 (2007). In so holding, the Court recognized DYFS's concern with the breach of trust that the employee's conduct warranted, despite her lack of prior infractions. Id. at 38. Similarly, a senior correction officer was removed from his position, when he misrepresented his marital status and thus received health benefits for his girlfriend, to which she was not otherwise entitled. Sheffield v. Dep't of Corr., CSV 12006-96, Initial Decision (January 29, 1998), <http://njlaw.rutgers.edu/collections/oal/>. Despite a nine-year history without a disciplinary record, his deception violated the confidence and public trust necessary for law enforcement officers. Ibid.

Ultimately, the obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official who is considered a special kind of public employee whose primary duty is to enforce and uphold the law. Nor can a police officer complain that he or she is being held to an unfairly high standard of conduct. Rather, "it is one of the obligations he undertakes upon voluntary entry into the public service." In re Emmons, 63 N.J. Super. 136, 142 (App. Div. 1960); In re Phillips, 117 N.J. 567, 576-77 (1990) (citing Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)).

Hearsay evidence is evidence of statements made out of court which is offered in court to prove the truth of the matter(s) asserted therein. Generally, such evidence is

not admissible in proceedings held in the Judicial Branch. However, the New Jersey Rules of Evidence incorporate numerous exceptions to this general rule excluding hearsay. In administrative hearings the rule governing the admissibility of hearsay evidence is different. Hearsay may be admitted in evidence subject to limitations on its use as a means of establishing ultimate findings of fact. The rule is codified at N.J.A.C. 1:1-15.5.

(a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

[N.J.A.C. 1:1-15.5.]

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis's foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision,

which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

Based on the preponderance of the evidence, I **CONCLUDE** that the City demonstrated that Officer Miller engaged in conduct unbecoming of a public employee, neglected his duty and violated standards of the Department's rules and regulations when he engaged in two separate public physical altercations with Ms. Capezzuto and Ms. Allen, on April 18, 2013, and August 2, 2013, respectively.

Specifically, the preponderance of the credible evidence demonstrated that on April 18, 2013, Officer Miller and Ms. Capezzuto were in a dating relationship and he proceeded to destroy her phone and aggressively assaulted her at a public gas station in the town in which he served as a police officer. Ms. Capezzuto was a credible, compelling and competent witness who never wavered in her version of the events, including acknowledging that she had kicked Miller in the face injuring him in an attempt to stop him from pinning her to the ground. She also acknowledged having kicked his car as well. She did not attempt to paint a one-sided story. Despite the emotion that the incident arose in her during her testimony, Ms. Capezzuto presented a cogent and consistent version of the events, which was further corroborated by her documented physical injuries and the consistent statements recorded by experienced law enforcement officers. Moreover, her version of the incident was observed and corroborated by several members of the public who made the complaining call to summon the police.

Similarly, the preponderance of the credible evidence demonstrated that Officer Miller engaged in yet another physical altercation with a different girlfriend, four months later, on August 2, 2013. While Ms. Allen did not personally present her version of the events at the hearing, the surveillance videotape documenting the incident and the corroborating testimony of experienced law enforcement officers compel the veracity of the fact that Officer Miller assaulted Ms. Allen. Officer Miller cannot deny the clear picture of him throwing Ms. Allen to the ground and remaining on top of her on two separate occasions. Like the last incident, this altercation occurred on a public street

where Miller served as a law enforcement officer. The existence of the video, courtesy of a local homeowner, demonstrated that the events were witnessed by members of the public.¹

However, I also **CONCLUDE** that the City failed to demonstrate by a preponderance of the evidence, any of the allegations in the FNDA dated July 11, 2014, in connection with his "report requirement." Although the City alleged that Miller violated terms of an oral agreement articulated at a prior court discipline proceeding on August 13, 2012, the City's own admissions demonstrated that credible evidence was not present to substantiate this charge. No witness testified as to the alleged reporting requirement and the record was devoid of substantial evidence to support the allegations.

PENALTY

The violation and encroachment on the personal safety of one's intimate partner demonstrates a poor example of leadership by a sworn law enforcement officer. In our state, law enforcement officers are held to a higher standard of leadership and accountability in examining their conduct. Off-duty conduct can implicate fitness to serve in such a critical first-responder role. Particularly, engagement in physical violence off-duty is highly probative of whether an officer is fit to continue to serve in his official capacity. Moreover, where a prior disciplinary offence in 2011 resulted in a six-month suspension, it is appropriate to resort to the most severe discipline in light of these infractions.

Accordingly, I **CONCLUDE** that removal is the appropriate penalty because of Officer Miller's engagement in physical confrontations with intimate partners, in public areas where he simultaneously served as a police officer. Whether the altercations occurred in public or private, they are equally as egregious, but the fact that they occurred in public in the same town where Miller serves in a law enforcement capacity underscores the manner in which his actions undermine his credibility in that role. The

¹ In fact, the video displayed at least one member of the public who observed a portion of the altercation.

undisputed evidence demonstrated that he engaged in physical altercations on two distinct occasions with two different girlfriends. Miller did not refute those allegations.² Accordingly, an adverse inference is warranted here that Miller could not truthfully refute the testimony by the City's witnesses. Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 188 (2005).

Moreover, the lack of contrition by Officer Miller also compels the most severe penalty of removal. Both incidents occurred within a four-month span of one another, and close in proximity to his 2011 six-month suspension. In his statement to Internal Affairs regarding Ms. Allen's assault, he relays a story that she fell on a tree root after engaging in a fight with a crowd of passers-by, but this not corroborated by the videotape evidence. His actions demonstrated that he was not contrite but rather attempted to conceal the truth.

Additionally, it cannot be ignored that in at least one incident, he acknowledged his consumption of alcohol, despite a prior discipline involving a charge of driving while intoxicated. The record is devoid of any contrite attempts by Miller to demonstrate a new direction for his life or in the discharge of his professional responsibility. In light of the shattered public trust created by his conduct, and absent any mitigation or expressed contrition, Miller's employment as a law enforcement officer should be terminated.

Accordingly, I **CONCLUDE** that the preponderance of the credible evidence demonstrated that the FNDA dated July 11, 2014, referencing PNDA dated April 23, 2014, and the FNDA dated July 11, 2014, referencing PNDA dated August 6, 2013, are **AFFIRMED**. I further **CONCLUDE** that the FNDA dated July 11, 2014, referencing PNDA dated May 2, 2013, is **REVERSED** and **VACATED**.

² To be clear, Officer Miller warrants removal based on each separate incident, not based on each separate on an accumulation of his conduct in both incidents

ORDER

It is hereby **ORDERED** that James Miller be hereby removed immediately from employment as a police officer for the City of Hoboken.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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.

June 2, 2015
DATE

Tiffany M. Williams

TIFFANY M. WILLIAMS, ALJ

Date Received at Agency:

June 2, 2015

Laura Sanders

Date Mailed to Parties:

JUN - 4 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

APPENDIX

LIST OF WITNESSES

For Petitioner:

Christina Russo
Michael Ettore
Michael Miranda
Lt. Daniel LoBue

For Respondent:

Lt. John Orrico
Officer Francisco Rosa
Robert Cuevas
William Collins
David Montanez
Anthony Caruso
Jodi B. Allen
Mary Jo Capezzuto
John Rodriguez

LIST OF EXHIBITS

Joint Exhibits:

- J-1 Preliminary Notice of Disciplinary Action dated April 23, 2013
- J-2 Preliminary Notice of Disciplinary Action dated May 2, 2013
- J-3 Preliminary Notice of Disciplinary Action dated August 6, 2013
- J-4 Final Notice of Disciplinary Action dated July 11, 2013
- J-5 Jersey City Municipal Court Action dated January 7, 2014
- J-6 Hoboken Court Action dated February 6, 2014
- J-7 Jersey City Municipal Court Action dated October 15, 2013

- J-8 Response to petitioner's Request for Admissions
- J-9 Final Notice of Disciplinary Action dated March 6, 2013
- J-10 Transcript of court proceedings on August 13, 2012

For Petitioner:

- P-1(a) Hoboken Police Department photo 4/22/13
- P-1(b) Hoboken Police Department photo 4/22/13
- P-2 Investigation Report
- P-3 Toxicology Report

For Respondent:

- R-1(a) Hoboken Police Department photo April 22, 2013
- R-1(b) Hoboken Police Department photo April 22, 2013
- R-1(c) Hoboken Police Department photo April 22, 2013
- R-1(d) Hoboken Police Department photo April 22, 2013
- R-1(e) Hoboken Police Department photo April 22, 2013
- R-1(f) Hoboken Police Department photo April 22, 2013
- R-2 Interoffice memo from Orrico to LoBue dated April 30, 2013
- R-3 Investigation Report dated April 18, 2013
- R-4 Complaint – Warrant
- R-5 Investigation Report dated August 2, 2013
- R-6 Investigation Report dated February 16, 2014
- R-7 Investigation Report dated February 13, 014
- R-8 DVD – Adams Street video
- R-9 Subject Sheet