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**STATE OF NEW JERSEY**

In the Matter of Lyndon Johnson  
City of Long Branch,  
Department of Public Safety

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**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2014-373  
OAL DKT. NO. CSV 11668-13

**ISSUED: OCTOBER 19, 2017**      **BW**

The appeal of Lyndon Johnson, Police Lieutenant, City of Long Branch, Department of Public Safety, demotion to Police Officer and 180 calendar day suspension, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on August 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

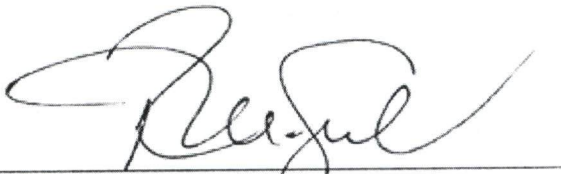
**ORDER**

The Civil Service Commission finds that the actions of the appointing authority in demoting and suspending the appellant was justified. The Commission therefore affirms those actions and dismisses the appeal of Lyndon Johnson.

Re: Lyndon Johnson

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
OCTOBER 18, 2017



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Robert M. Czedh, Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Christopher S. Myers  
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. CSV 11668-13

AGENCY DKT. NO. 2014-373

**IN THE MATTER OF LYNDON  
JOHNSON, CITY OF LONG BRANCH  
POLICE DEPARTMENT.**

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**Stuart J. Alterman**, Esq., for appellant (Alterman & Associates, attorneys)

**James L. Plosia, Jr.**, Esq., for respondent (Plosia & Cohen, LLC, attorneys)

Record Closed: July 10, 2017

Decided: August 23, 2017

BEFORE **DEAN J. BUONO**, ALJ:

**STATEMENT OF THE CASE**

The City of Long Branch (respondent) suspended Lieutenant Lyndon Johnson (appellant) for 180 days and demoted him from Lieutenant to Patrol Officer. The discipline stemmed from an alleged violation of N.J.A.C. 4A:2-2.3(a)1 Incompetency; N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)7 Neglect of duty. Specifically, respondent alleges appellant 1. Failed to call out the detective bureau; 2. Failed to videotape an accused statement; 3. Failed to charge an accused with all offenses; 4. Ignored facts given by subordinates; and 5. Misled assistant prosecutor in conversation on how matter should be handled. Appellant

contends he acted appropriately in his position as Watch Commander and did not violate any regulation, rule, policy or procedure.

### PROCEDURAL HISTORY

On January 23, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions on September 25, 2011, while serving as Watch Commander. Following a local hearing before the City Administrator a Final Notice of Disciplinary Action was issued on August 6, 2013, sustaining the charges and penalty. An appeal was filed timely and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL) as a contested case on August 14, 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings<sup>i</sup> were held on June 12, 2014, September 10, 2014, September 30, 2014, October 20, 2014, October 21, 2014, November 13, 2014, November 25, 2014, and December 9, 2014. After post-hearing briefs were received the record closed on April 24, 2015.

On March 31, 2017, the originally assigned Judge (Shuster) retired from the bench. On April 21, 2017, the OAL sent a correspondence all parties notifying them of the retirement and requesting a telephone conference. A telephone conference was held on April 25, 2017, with the parties and Assignment ALJ Delanoy to discuss how the parties wished to proceed. This matter was re-assigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein the court requested that the record be re-opened so that the court may acquire all the closing submissions and documents that were missing from the record at OAL. The parties graciously agreed and submitted the requested records. The record closed on July 10, 2017.

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<sup>i</sup> Respondent brought four separate disciplinary actions against appellant. This was the second case to be heard.

### FINDINGS OF FACT

Based upon the documents in evidence and review of the testimony, I **FIND** the following facts undisputed:

This case concerns the way appellant handled the charging of a suspect in his capacity as the shift Watch Commander. The general protocol in the City of Long Branch was for the arresting officer to bring an accused to police headquarters for processing and the Watch Commander is to determine the charges to be filed and prepare the summons or warrant in accordance with those charges.

This matter started at a Section 8 public housing project (Seaview Manor) on the early morning hours of Sunday, September 25, 2011. A disturbance occurred at the home of Juan Suarez (Suarez) who was hosting a party. There is ample proof in the record that the participants had been drinking alcoholic beverages that evening. Prior to the events that give rise to this matter, Troyshon Phillips (Phillips) was involved in an altercation during the Suarez party and was injured. Later that evening Phillips learned of the injury and went to the Suarez residence to investigate. A verbal altercation took place between Phillips and Suarez and someone called the police. Officer Robert Bell (Bell) answered the call by going to the Suarez residence and Officer Thomas Hueston (Hueston) arrested Phillips after performing a Terry-Stop on the Phillips vehicle similar in description to one being driven by an individual involved in the Suarez altercation. All three police officers, Bell, Hueston and appellant were working the 11:00 p.m. to 7:00 a.m. shift with Hueston doing overtime.

When Officer Bell responded to the Suarez residence he spoke with Suarez and his companion, Ms. Precious Best (Best) at 12:42 a.m. Bell was told they were about to escort an intoxicated partygoer home and when they opened the side door Phillips was there holding a knife. Suarez told Officer Bell, Phillips asked what happened in the earlier altercation. Suarez said he slammed the side door closed and went to the front door and started yelling at Phillips. Suarez continued by saying Phillips responded by

going toward him and threatening to cut him. Suarez then retreated into the house. Bell radioed into headquarters a description of Phillips and the Phillips's vehicle.

Officer Hueston was also responding to the same call as Bell when he observed a vehicle matching the description of the one Bell had called in and he proceeded to make a stop. Hueston had his service weapon drawn and after some initial discussion Phillips identified himself and gave Hueston his three-inch blade pocket knife. When originally asked, Phillips said he was coming from a convenience store but when advised the store was closed he admitted coming from the housing project where the Suarez incident occurred. Hueston then arrested Phillips, handcuffed him but did not Mirandize him and brought him to the police station. When coming into the station, Phillips said to appellant something to the effect "I only pulled the knife on him because he had a sword." Officer Hueston then made the statement that Phillips said something different during the road stop to the effect that the person went to get a sword, not that he had it. As there were multiple disturbances going on that morning and Johnson sent Hueston back on the street to deal with those events.

Bell and Hueston returned to the station between 3:00 a.m. and 3:30 a.m. and met with appellant. The officers wanted Phillips charged with several indictable offenses but Lieutenant Johnson was inclined to go with a lesser charge. Johnson then directed they do a joint interview of Phillips. The officers asked if the detective bureau be called out to do a video interview pursuant to Attorney General guidelines for first, second and third degree charges. Johnson declined.

The interview took place after Phillips was Mirandized shortly after 4:00 a.m. He said he went to the Seaview housing complex and was at the Suarez unit trying to speak with someone but the door was closed in his face. He then walked back to the parking area to speak with others there. Then Suarez came out the front door with his sword challenging him with, "you want some of me M\_ \_ \_ \_ F\_ \_ \_ ER." Phillips said he returned to the side door with his knife out but then left the scene. The officers still could not agree on charges because of conflicting statements. As a result, Assistant Monmouth County Prosecutor James Jones (Jones) was called regarding the charges

to be filed. The telephone receiver was held up by appellant as if on speaker mode and the call took place in a small closed room. Jones could hear everyone and everyone could hear Jones. Johnson was corrected by the patrol officers if they felt he misspoke and the officers spoke freely during the conversation. Officer Bell stated that appellant stressed his position but gave all the facts to Assistant Prosecutor Jones. Johnson advised Jones there were conflicting stories as to who pulled a weapon first. Assistant Monmouth County Prosecutor Jones said if there are questions go with the lesser charge.

Johnson directed the patrolmen to continue their investigation by interviewing Latoya Bland (Bland) who was with Phillips during the event. Also at the direction of Johnson, they also spoke with Suarez and Best again to get more information. Bland told the officers she and Phillips went to Seaview Manor so Phillips could find out what happened to his friend. Phillips had something in his hand when he approached the side door of the Suarez residence. Bland did not know what the object was. Suarez also had a long object in his hand but she could not identify it but she did say both Suarez and Phillips were yelling at each other. When Suarez came out of the residence with the sword and yelling, Ms. Bland said she left in a hurry. In the second interview with Suarez and Best they admitted Suarez had a sword but claimed it was only at the front door and was produced after being threatened by Phillips at the side door. Officers Bell and Hueston attempted to interview other witnesses but due to substantial intoxication they could not. Officers Bell and Hueston then returned to the police station and spoke with Johnson. Officer Hueston wanted Phillips charged with indictable offenses for two reasons. First, he felt Suarez and Best were more credible and Phillips was the aggressor. Second, Officer Hueston did not want to be named in a false arrest lawsuit.

I also make the following findings of fact:

1. Officer Hueston wanted Phillips charged with aggravated assault and various weapons charges all indicatable offenses.

2. Johnson ordered the non-indicatable offense of criminal trespass was the appropriate charge.
3. When doing the Phillips interview at police headquarters there was no one present who could operate the video recording equipment. Recording the interview of an accused is only required for persons charged with indictable offenses.
4. There were two incidents that took place on the morning hours in question. Suarez and Best reported Phillips had a three-inch blade pocket knife and was threatening at the side door of Suarez's unit. Phillips reported Suarez had a fourteen-inch machete-type weapon at the side door and brandished same and threatened Phillips at the front door. Bland confirmed Suarez had something long in his hand but didn't stay long enough to observe the details.
5. After the initial investigation is done and charges are filed a case goes to the detective bureau where the file is reviewed. Additional investigation may or may not occur. The bureau makes the final decision on whether the initial charges will be downgraded, up charged or remain the same. In this case the Phillips's charge was upgraded to an indicatable offense.
6. The indictable charge on Phillips was presented to the Monmouth County Grand Jury and was "no billed" by that body.
7. At 6:30 a.m. Lieutenant Roebuck arrived at headquarters to relieve Johnson as Watch Commander. Johnson, Bell and Hueston were continuing the debate on charging Phillips. Lieutenant Roebuck heard from both sides and agreed with Johnson's conclusion. He also suggested to let the detective bureau continue the investigation if they so chose.



8. Lieutenant Roebuck was not charged with a disciplinary action for not up charging Phillips's offense. He has now been promoted to the civilian position of Director of Public Safety.
9. The investigating and charging IA (IA) officer, Lieutenant Thomas Shea, did not believe the witnesses intoxication had any bearing on the accounts of events they gave to Officers Bell and Hueston.
10. In the past, the detective bureau has upgraded charges filed by Shift Commanders on numerous times and none of those Commanders have ever received disciplinary charges as in this case.
11. IA Officer Shea did not interview anyone involved in the Phillips case, either police officers or civilians. All information was gathered by reading reports, memos and written statements.
12. This case is the only time the IA officer is aware a Watch Commander was disciplined for failing to call out the detective bureau or failing to upcharge a suspect.
13. The IA officer believes Lieutenant Johnson acted with nefarious motives but can not explain why or what those motives are.
14. The IA officer did not speak with anyone in the detective bureau to find out why the Phillips charge was upgraded to an indictable offense.
15. The Long Branch Police Department does not have a Standard Operating Procedure (SOP) regarding charging criminal suspects. Watch Commanders have discretion.
16. The Long Branch Detective Bureau is ultimately responsible for handling all criminal investigations. The protocol is for the patrol division to be the

first responders and gather the information relative to the event. The Watch Commander charges the individual and turns over the reports and charges to the detective bureau. Every morning the bureau reviews the files and then it is decided if additional investigation is needed and if charges should be modified.

17. Johnson stated that he believed Officer Hueston, who was the officer pushing hard for indictable charges, was acting prematurely as he made up his mind prior to assembling all the facts. Additionally, he believed Officer Hueston arrested Phillips without probable cause. He therefore believed that Officer Hueston was therefore exposing himself and the City to false arrest litigation.

18. Johnson stated that he did not charge Phillips with indictable offenses because he did not believe they could be substantiated.

19. Johnson stated that he believed there was no reason to call out the detective bureau because Phillips's statement to the officers did not have to be video recorded as he was not going to be charged with an indictable offense. Additionally, he thought the entire matter was going to be turned over to the detective bureau.

## TESTIMONY

### Respondent

#### Officer Robert Bell

Officer Bell (Bell) had been employed as a Police Officer in the City of Long Branch since 2005. TR23:7. After graduating high school, he attended Stockton College for a time, then joined the Marine Corps from 1998 to 2003. TR23:18. He was

hired as a dispatcher by the City in 2004, and then as a Police Officer in 2005. TR23:22.

Bell's involvement in this matter began shortly after 12:42 a.m. on September 25, 2011, when a call was received from the residence of Precious Best and Juan Suarez. TR28:2. The two lived in an apartment at Seaview Manor, which is Section 8 housing located in Long Branch. TR29. When Bell responded to the call and arrived at the scene, he began speaking with two persons, who were later identified to him as Precious Best (Best) and Juan Suarez (Suarez). Best told him that they were about to walk out of the side door of their apartment in order to escort a family member home when they saw a male standing there, known to her as Troy, and he had a knife. R30:21. Suarez told him that he went to the side door to walk his uncle home, and then when he opened the door a male was standing at the side door holding a knife. TR40-41. As Suarez told Officer Bell these facts, Best was far enough away from their conversation so she could not hear what was being said. TR42:11. Bell arranged this purposely "[s]o that I could get their two stories without each one hearing what the other said." TR42:16.

Phillips began asking Suarez "[w]hat happened to my friend" and that "there was an altercation". Suarez told Bell that he shut the side door on Phillips because he was holding a knife. TR42:20. Suarez then went to the front door of the apartment, and began yelling at Phillips to get him away from the side door where his family was located. TR43:18 and TR44:5. Phillips then appears at the front door, holding the knife, and tells Suarez he was going to cut him in the face. TR44:15. Best then pulls Suarez back into the apartment. TR44:19. In his initial discussion with Officer Bell, Suarez did not mention that he had a weapon of any kind at the front door after the initial side door incident. TR44:24.

Bell testified that Best separately gave him "pretty much the same account" that Suarez had provided to him. TR45:6. Best stated that she knew that Troy was – Troyshon Phillips. TR45:24.

Bell then radioed a description of Phillips and the vehicle he occupied. TR47:8. He also radioed that Phillips may possibly be in possession of a knife. TR48:4. Bell then heard Officer Hueston (Hueston) and Officer Brown (Brown) on the radio that they had a vehicle matching Bell's description. TR48:8. As Bell heading back to Police Headquarters, he was informed on the radio that there "multiple large fights" in the City, so broke off headed to the fights. TR49:11.

At around 3:30 a.m., Bell arrived a Headquarters where he and Hueston briefed Johnson as to what happened at Seaview. TR50:12. Bell explained that it was the practice for any patrol officers who are going to institute criminal charges to explain those potential charges to the Watch Commander, who would be the one to type up the criminal complaint. TR51:3. Johnson "thought we needed to speak to more people because the charges that we had, he didn't feel that we had enough of that". TR52:4. Bell said that he expressed his opinion to Johnson during this conversation that there was enough evidence to charge Phillips with a criminal offense. TR53:10. At that time, Bell also learned from Hueston that Phillips had a weapon matching the Suarez/Best description in his car when stopped. TR54:9.

Officer Bell described the telephone conversation that Johnson had with Monmouth County Assistant Prosecutor Jones (Jones), and stated that, Jones wanted the Officers to obtain more information about the Suarez/Best incident. TR55:19. Bell explained that, during the telephone conversation Johnson had with Jones, there were a couple of times when he and Hueston corrected statements made by Johnson. TR56:16.

Bell, Hueston and Johnson all spoke with Phillips but before the interview, Bell asked Johnson if the Detective Bureau needed to be called to videotape Phillips's statement. TR58:16. Bell understood that a video interview had to be done for certain charges. TR58:22. Johnson, did not call the Detective Bureau. During the interview of Phillips at the station, Phillips claimed that he pulled a knife out only because "they pulled the sword" on me. TR 62:18. Hueston questioned the statement, pointing out to Phillips that this is not what he had stated to Hueston when first pulled him over. TR

67-68. Phillips also told the three officers he had been accompanied by a female companion – Latoya Bland – who was with him at the Seaview Apartments but left “when the whole thing started”. TR 69:5. Based upon this information, Johnson told Hueston and Bell to go find Bland and interview her. TR 69:21.

Subsequently, Hueston and Bell spoke again to Suarez and Best, as well as speaking to Bland at her home. TR 71. Initially, Bland told Hueston and Bell that she did not know who they were talking about when they mentioned Troy, (TR 72:11), but then acknowledged that she knew who Troy was when her sister said “[y]ou know Troy, you were just out with him tonight.” TR 72:12. Bland then explained to the officers that she and Phillips had been at a bowling alley earlier that night, TR 72:25, and that she and Phillips had dropped off a friend, Simon Puryear (Puryear), at the Seaview Avenue party. Puryear was a friend of Best and Phillips who had gotten into the incident at the Seaview Avenue apartment. TR 73. Bland told the officers that Phillips received a phone call that Puryear had gotten “jumped or beat up” at the party. TR 74:1. Phillips wanted to leave the bowling alley to go back to the party, and Bland argued with him to try and convince him to stay at the alleys. TR 74:5. Eventually the two left the bowling alley and drove to the Seaview Apartments. TR 74:7. She remembered that Phillips threw his keys in the car and went to the side door of the apartment with something in his hands, although she could not say what it was. TR 74:9. Bland was with him at the side door, but left when an argument began at the door, she walked away. TR 74:15. Bland stated that she had seen something in Suarez’s hand but did not know what it was. TR74:20.

Bell recalled that when he and Hueston then went back to speak with Suarez and Best and they learned that, after the side door was closed in Phillip’s face and Suarez went to the front door, he went to get a sword in his apartment and brought it to the front door. TR 78:4. Hueston and Bell collected the sword and brought it back to headquarters. TR 78:24.

Hueston and Bell related to Johnson what they found out in speaking with Bland, Best and Suarez. TR 92:7. Bell recalls that Hueston began to argue with Johnson that

there is certainly sufficient evidence to charge Phillips with several criminal offenses, and Johnson was adamant that there was not enough evidence to justify the charges. TR93:13.

On cross-examination, Bell testified that there was a "discussion" between himself, Hueston and Johnson (TR51:23) and he disagreed with what Johnson told him. TR52:6. Bell heard the "Johnson" side of the conversation that Johnson had with AP Jones, and, on occasion, were able to hear AP Jones because Johnson held the phone up for them. TR52:17. Bell and Hueston corrected Johnson about the information he was conveying to Jones during the phone call and Johnson did not always relay the corrected information to Jones after Hueston and Bell had pointed it out. TR:53. Johnson did not always accurately convey information to Jones even after they corrected him. TR54:6.

Bell explained the difference between the information he got from Suarez in his first interview and the second interview: "Well, the facts did change, because Lt. Johnson was stating as a fact that Suarez came to the side door with the sword which is what Phillips was saying and that he [Phillips] produced the knife only because Suarez had the sword. Suarez didn't produce the sword at the second door until after Phillips was already at the side door with the knife." TR68-69. Johnson told Jones during the telephone conversation that Suarez opened the door to his apartment and confronted Phillips with the sword. Bell explained again that Johnson continued to convey incorrect information to Jones during the phone conversation about Suarez brandishing a sword, despite he and Hueston correcting him. TR77:23.

Bell explained that Bland essentially corroborated Suarez's story that Phillips went to the side door of the apartment with something in his hand and Suarez pushed Phillips away from the side door proceeding to the front door thereby confronting Suarez. TR83:4.

Bell and Hueston wanted Phillips to be charged with aggravated assault, possession of a weapon, possession of a weapon for an unlawful purpose, and second

degree burglary. TR90:20. Johnson disagreed, and only justified a charge of criminal trespass. TR92:1. Bell testified that he could not understand that, and Johnson still would not budge off his "no charge greater than criminal trespassing" position. TR93:7.

Bell testified that he advised Johnson that the Detective Bureau should be called out for the Phillips matter and (TR117:22) that he was not conveying accurate information to Jones because Johnson was stressing Phillip's side of the "story" more than the actual facts. TR149:25.

### **Officer Thomas Hueston**

Hueston has worked with as a Police Officer with the City of Long Branch Police Department for fifteen years. TR165:24. He recalled being dispatched to the Suarez residence earlier on the night of September 24 for Puryear. TR167. Around 10:30 p.m., (TR168:6) Hueston was dispatched to the scene, and found that Simon Puryear had been involved in a fight at Seaview Manor. TR168:11. An ambulance was at the scene, but Puryear did not go in the ambulance (TR168:23) and noted an "RMA", which means that Puryear refused medical assistance. TR169:4.

Hueston described responding to the dispatch call at 0:42 on September 25 (TR176:18) with lights and sirens on. In route, Hueston observed a small blue car coming in his direction. TR178:3. Based upon this description he received, Hueston stopped it (TR178:14) and asked the driver if his name was Troy, but Phillips did not respond. TR178-179. Hueston had his weapon drawn during this stop, because it was a "hot call" and Phillips had been described as a subject with a knife leaving the scene of a crime. TR179:9.

Phillips eventually confirmed that his name was Troy, and that he was in possession of a knife. TR179:20. Phillips handed him the knife (TR180:15) and told the officer that he was coming from a convenience store on North Broadway. TR181:18. Hueston was able to ascertain that the convenience store was not open (TR182:8) and asked Phillips if he had been over at Seaview Manor, and Phillips

replied yes. TR182:19. Phillips was placed under arrest (TR182:24), but not Mirandized, and was brought to the Long Branch Police Department. TR184:22.

As Phillips was being escorted in the Police Department, he blurted out "Johnson, I only pulled the knife on him because he pulled – pulled the sword out on me". TR186:3. Hueston said to Phillips after he made his "guy pulled a sword" statement something to the effect that, "That's not what you said on the road", and pointed out that Phillips had said during the stop that Suarez had gone to get the sword, not that he actually pulled a sword. TR187:22. Johnson told Hueston that he would take charge of Phillips, because there were numerous fights going on and he needed police officers on the road. TR186:9.

At the scene of the stop, Phillips told Hueston that he had gone over to Seaview Avenue because "his friend had gotten jumped" (TR188:16) and that he had pulled his knife out at the Seaview Avenue apartment "because the guy was getting a sword. . .". TR189:3. This is why Hueston pointed out in the Police Department that Phillips was "changing his story" – from "Suarez getting a sword" at the scene to "guy pulled a sword on me" to Johnson in Headquarters. TR189:23. Hueston testified that he said to Johnson and Phillips in Headquarters, after Phillips made the "guy pulled a sword" statement: ". . . now you're changing the story to the guy getting it to now he has it." TR190:4.

Hueston returned to Headquarters sometime around 3:00 or 3:30 a.m. (TR191:8) and he and Bell spoke to Johnson about how Phillips should be charged. Hueston stated that the conversation eventually evolved into a dispute. TR192:6. Johnson told he and Bell that the evidence was "a little on the weak side". TR195:3. Hueston wanted to charge Phillips with aggravated assault, terroristic threats, possession of a weapon, and possession of a weapon for an unlawful purpose. TR195:5. The discussion about how to charge Phillips became heated at times (TR195:11) with Hueston explaining that if the suspect is to be charged with an indictable third degree offense or above, the interview must be recorded. TR196:11. Hueston could not work the videotape machine because he does not know how, (TR198:3) and he did not know



if Johnson or Bell know how to work it. TR198. He said that Bell was adamant in with Johnson that they should not be interviewing without videotaping his statement (TR205:14) and Bell insisted that the Detective Bureau be called in order to run the videotape machine. TR206:8.

A statement was taken from Phillips and Hueston, which is identified as R-20, the Miranda form with Phillips' signature thereon. TR207:12. It was signed at 4:04 a.m. TR207:17. No record was made of statements Phillips made during the interview (TR207:20) but it took less than an hour. TR208:3.

When the interview concluded, the Officers went to the Watch Commander's area to further discuss charges against Phillips. TR232:3. Hueston testified that he "was just very adamant that he [Phillips] had broken the law by going there with a knife and produced it." TR232:14. Hueston was "100% positive that he [Phillips] had broken the law", he wanted to charge him and not let him go. TR232:17.

Hueston identified R-6, which is the transcript of the telephone conversation Johnson had with AP Jones. TR235:3. Hueston testified that the telephone portion of the call had a speaker phone capacity, but it was not used. TR236. Hueston was not able to hear what AP Jones was saying (TR238:11; 13) but said "[w]e were all talking." TR239:7.

Johnson never told AP Jones the prior statement of Phillips made when he was first pulled over by Hueston – "I pulled my knife out because the Spanish guy was going to get a machete." TR243:17. Hueston confirmed that, when he and Bell went back to speak with Suarez at around 5:00 a.m., both of them said that they came to the back door and Phillips was there with a knife out wanting to know what happened to his friend. TR244:17. This was consistent with Best's statement to Bell when he first arrived. Johnson never told this information to Jones. TR245:19; TR246:19. Johnson never conveyed the inconsistent statements Phillips had given and the spontaneous utterance he made to Johnson upon arrival at the station. TR247:18. This was important because it detracted from Phillips credibility (TR248:11) and Johnson knew

about the contradictory statements but failed to relay that critical information. TR252:4.

Hueston explained that Johnson quoted Phillips as saying that Suarez came out of his house swinging a machete and then Johnson confirmed this when Jones repeated it to him. TR270:12. Johnson agreed to both of these statements that Jones made. TR277:21.

Hueston confirmed that Jones asked Johnson "if Phillips went to the Suarez house looking for trouble", Johnson replied, "[h]e went looking for answers." TR274:2. Hueston testified that if Phillips was telling the truth about leaving the Suarez home, then running back to the stoop to confront Suarez, he exacerbated the situation "[i]f in fact that's what happened." TR23:25. Hueston did not agree with Johnson's retort to AP Jones (who had said that Phillips went looking for trouble at the Suarez apartment), and that Phillips merely went looking to the apartment "for an answer". TR26:8. In his opinion, Phillips should have gone to the police, not to the Suarez's apartment with a knife. TR26.

He said he had a "cordial relationship" with Johnson, Hueston and in fact was personally indebted to Johnson – "because of him my brother is clean and sober today." TR172. Hueston testified that he did not believe he was being insubordinate to Johnson that night. TR173:20. In fact, that was the only time he had spoken to a superior officer as he did to Johnson in his entire career. He did so because "I just felt very strong[ly] that Troyshon broke the law and I really wanted to see that it was followed through with, that's all." TR174:2. Phillips was originally charged with criminal trespass, a petty disorderly offense, based on the orders of Johnson. TR174. If he had been charged like Hueston and Bell wanted him to be charged, Phillips would have had to posted bail. TR175:22. This was all based on the action taken by Phillips at the side door of the apartment, which constituted felony offenses, occurred before Suarez ever went to the front door of the apartment. TR190:24. Hueston stated unequivocally that the basis for the felonies that he and Bell wanted to charge Phillips with were Phillips's actions at the side door. TR193. Thus, based on the simple chronology of events,

whatever Phillips had done at the front door was "after" the felony conduct at the side door, and has no impact on how Phillips should have been charged. TR191:8.

### **Lieutenant Thomas Shea**

Lieutenant Thomas Shea (Shea), involvement in the Phillips "knife" case began when he received a memo from Captain Bucciero, about how Johnson handled the Phillips case. TR10:18. Shea began his investigation by contacting Hueston and asked him to write a "to/from memo" about what happened on the night of September 25. TR14;16. Shea made the same request of Bell, and received R-12 in response. TR15.

Shea identified Exhibit R-30 as his IA Report about the Phillips "knife" case (TR16:15) and identified R-18, which notified Johnson that an IA complaint had been made against him. TR18:8. Shea also contacted the Monmouth County Prosecutor's Office, as he is required to do if there is any allegation of any possible criminal offense on behalf of a police officer. TR18:14. The Prosecutor's Office informed Shea on October 18 that they were not going to proceed with their own investigation. TR21:12.

Johnson was interviewed on November 14, 2011 (R-19). At that time, Shea's understanding was that Phillips threatened someone with a knife and both Hueston and Bell believed that Johnson had not given the full version of events to AP Jones. In fact, Hueston and Bell strongly believed that more serious charges should have been lodged against Phillips than the petty disorderly offense of criminal trespass. TR22:13.

During the interview, Johnson repeatedly stated "it was unclear as to what [had] happened and that's why he didn't feel that. . . the charges that Hueston wanted to lodge against Phillips were warranted and that he felt that as a Watch Commander he should be more impartial." TR23:1. Shea did not agree with Johnson's statement that Phillips was entitled to meet "force with force", "[b]ecause Phillips was the one who initiated the confrontation at another person's house." TR25:5. In fact, Shea's investigation revealed that there were two incidents, the first was at the side door in

which Phillips brandished his knife and threatened Suarez and his family, and the second at the front door. TR26:11. Phillips was the only one who alleged that Suarez had produced the sword first. TR27:1. Therefore, Shea explained that there was no possibility of a "force with force" defense because Phillips produced the knife and threatened Suarez and his family at the side door. TR27:14. Shea testified that there was no basis for Johnson to state in his IA interview that the facts were "unclear" to him because the facts strongly supported the conclusion that "Phillips. . . initiated the confrontation at the door. . .". TR28:1.

Shea also explained that the recording device required to be used when suspects are to be charged with a criminal offense of a certain degree is located in the Detective Bureau. It is a mobile unit that is only operated by members of the Detective Bureau. TR28. Shea identified R-28, Attorney General Guidelines regarding videotaping statements (TR30) and quoted from the section on custodial interrogations: "Unless one of the exceptions set forth in paragraph D are present all custodial interrogations conducted in the place of detention must be electronically recorded." TR31:2. Shea explained that the policy originally only applied to first or second degree charges but was later expanded to include crimes in the third degree. TR31:15.

The charges that Hueston and Bell had requested Johnson to charge Phillips was a second-degree offense. TR31:24. Shea further explained that possession of a weapon for unlawful purposes is a third-degree offense. TR32:1. He also said that the Detective Bureau should have been called out that night by Johnson (TR39:24) to provide clarity about what had happened. TR40:1. In fact, after the Phillips matter was reviewed by the Long Branch Police Department Detective Bureau, Phillips was charged with possession of weapon, possession of a weapon for an unlawful purpose, terroristic threats, and aggravated assault. TR46. Shea had "no doubt" that if a detainee is potentially to be charged with an indictable offense any statement that the detainee gives to the police department must be videotaped. TR47:14; 16; 18.

The charges were presented to a Monmouth County Grand Jury, and were "no bill" due to "[l]ack of victim cooperation." TR51:20; 23. But, at the time Phillips gave his

statement to Johnson, Hueston and Bell, he was under arrest, it was a custodial interrogation, and his statement should have been electronically recorded. TR56:10. Failure to memorialize the custodial interrogation constituted a violation of the IA Guidelines. TR58:12. He said that the failure to record made the statement an "illegal interrogation". TR58:17.

Shea said that there was no doubt based upon the investigation conducted in this matter that, other than Phillips's self-serving statement, all of the witness at the scene concluded that Phillips initiated the contact at the Seaview Avenue apartments. TR65:9. He also said all criminal charges are in fact allegations, until they are proved before a jury. TR67. Shea was aware that Hueston told Johnson the same thing on September 25, 2011 and he wasn't the "judge and jury". TR68:5. The standard for instituting criminal charges was whether the probable call existed to believe that the facts supporting the allegation were accurate and correct. TR72:14. Shea clarified that the "beyond a reasonable doubt" standard of proof which applies to a criminal jury trial is not the same as the "probable cause" that must be met to charge a person with a criminal offense. TR73. Shea explained that potential contradictory statements by witnesses do not preclude finding a probable cause for purposes of initiating a criminal charge against a Defendant. TR76L14. This was especially true if a perpetrator gives a statement which is inconsistent or disagrees with statements given by others that would support the criminal charge. TR76:19. Shea also explained that it was indeed "common" for criminal defendants to deny the allegations which were made against them. TR76:22. Denial of certain facts by a perpetrator does not preclude a finding of probable cause a criminal charge against a defendant. TR77:4.

Shea filed the Preliminary Notice of Disciplinary Action against Johnson because "it was my belief that Lt. Johnson purposely downgraded the charges on Phillips." TR81:20. Shea explained that Johnson had only given Phillips's version of events to AP Jones during their phone conversation. TR82:15. He was also charged for failing to call the Detective Bureau and failing to electronically record the statement of an accused while in a custodial interrogation. He was also charged with misinterpreting the statute for self-defense. TR83:7.

On cross-examination, Shea was asked what he meant when he said Johnson “purposely downgraded” charges against Phillips, and he replied “I meant that he had clear facts and probable cause from the investigation at that point that warranted more serious charges and Lieutenant Johnson for some reason chose not to charge Phillips with those charges.” TR86:16. A police officer does not have discretion on whether or not to charge a person with a crime if he witnesses it. TR90:5.

Regarding the videotaping of Phillips’ statement, Shea testified that he recalled that Lieutenant Johnson stated in his IA interview that he did not call the Detective Bureau because they would not have come out for this, and also stated that he did not know how to run the videotape machine. TR148:14. Hueston and Bell likewise said that they did not know how to run the videotape machine. TR149.

Regarding the issue of the drinking at the Seaview Avenue party on the night in question, Lieutenant Shea testified that Johnson never told him that the reason he did not want to charge anyone was because they were drinking at the party. TR152:24.

When asked about whether or not “all the witnesses were drinking”, Shea acknowledged that the fact that the witnesses were drinking alcohol at the crime scene could impact on their ability to recite factual information, but this possibility does not mean that the witnesses should not be interviewed. TR169-170. Shea did not think the alcohol consumption issue was significant because that fact was not an issue to the officers at the scene. TR171:2.

Johnson was “supposed to sign a complaint based on probable cause, not find if it’s true or not.” TR178:2. Shea was asked if this was “a simple matter of you disagreeing with Lt. Johnson”, Shea replied that it was not just himself, but the two Officers on the scene, and the entire Detective Bureau in the Long Branch Police Department who disagreed with Johnson as well. TR181:9.

Shea was asked if he believed Johnson had done something “nefarious” with respect to his refusal to charge Phillips, he replied that he believes that there was

indeed something nefarious, “Based upon the fact pattern we have here, it’s inexplicable to me why Johnson wouldn’t charge this guy with more serious offenses, why he released a man accused of a violent act on a petty disorderly persons charge”. TR37:15.

**Appellant**

**Assistant Prosecutor James Jones**

Jones worked as an Assistant Prosecutor in the Monmouth County Prosecutor’s Office from 2005-2012; previously, he had been with the New Jersey Attorney General’s Office for eighteen years. TR137:17. He said he was “professionally friendly” with Johnson in 2011. TR138:25.

Jones was asked to describe what Johnson had conveyed to him during the phone conversation on September 25, and he recalled that Johnson told him that Suarez had been armed with a “machete”, (TR140:2) and that Phillips was armed with a knife that “he used in his capacity in whatever position he had his job, that he used to open up boxes. . .”. TR140:16.

Jones did not recall whether or not people had been consuming alcohol at the scene. TR144;17. But when asked about whether it was necessary to charge as many charges as possible, Jones replied “I try to charge with the most serious charge when I’m consulted that I think will stand, because I have to take into consideration that there is going to be a bail hearing coming up.” TR145:4. Anybody could be charged with an offense on “any given evening”. TR145:25.

Jones testified that there appeared to be a “conflict” in that there may have been a “spontaneous” drawing of knife and sword (TR156) but criminal trespass charge satisfied “the interests of the State and Mr. Phillips”. TR153:18. Jones also said that he would have spoken to either Hueston or Bell if they had called him that night. TR163:1.

On cross-examination, Jones testified that Johnson did not tell him that Phillips lied to Hueston when he was pulled over. TR174:6; 15. Nor did Johnson tell him about the inconsistent statements Phillips made about Suarez's actions – "going to get his sword" as opposed to "pull the sword". TR175:9.

Jones stated that Johnson told him that the story Phillips gave was that "Phillips approached the Suarez home and Suarez came out or opened the door brandishing a sword." TR176:17. Jones was then shown R-10, which was Officer Hueston's supplemental police report where Hueston wrote Phillips' version of events where Suarez did not open the door holding a sword. TR178:15. Jones agreed that it was not consistent with what Johnson told him. TR179:1. Jones further agreed that Phillips's statement that Suarez did not produce the sword until after the incident at the side door was also inconsistent with what Johnson told him. TR179:13. Jones was then shown Suarez's statement (R-13), and was asked if Johnson had conveyed any additional information during the phone call. Jones replied in the No. TR181:22. In fact, Jones testified that he would have given different advice to Johnson (TR182:1) and it may have been charged as an aggravated assault. TR182:4. Jones had no idea why Johnson did not convey this information to him. TR182:12.

Jones was about Phillips's credibility and he said "From the outset he had less credibility than anyone, because he is the person that had gone to someone else's house. . . in possession of a knife and obviously looking for trouble, in my mind." TR203:1. Based upon the statements given by Suarez and Best, Phillips should have been charged with indictable offenses (TR209:22 and TR208:4). In fact, after looking at page 3 of R-6, Jones said it would have been "natural" for Johnson to have told him that Precious Best corroborated Suarez's statement. TR208:9.

Jones was asked about videotaping Phillips's statement and testified that he was not aware that Johnson and the two Police Officers had actually questioned Phillips prior to calling him. TR221:23. In fact, if he had learned this, he would have been disappointed because the statements should have been videotaped. TR222:1. It also



would not matter if the suspect was under the influence of alcohol “because quite frankly, if they’re drunk, they are what they are.” TR222:23.

Jones reiterated that, the timing of the “production” of weapons would have been important in terms of any conclusion as to who was lying about the incident. TR231:15.

### **Lieutenant Frank Rizzuto**

Lieutenant Frank Rizzuto (Rizzuto), has been a Police Officer in the Long Branch Police Department for eighteen years. TR5:22. He is currently a Lieutenant. TR6:4.

In 2011 he was working in the Detective Bureau and reviewed the “Phillips” case. He assigned Detective Michael Decker to work on the case in order to conduct a follow up investigation. TR8-9. He said Detective Decker expressed “a certain discomfort” in investigating the matter, because he would be investigating the actions of a superior officer. TR11:1. and TR17:5. However, Phillips was eventually charged with possession of a weapon, possession of a weapon for an unlawful purpose, aggravated assault and armed burglary. TR12:18. He said that the New Jersey Criminal statutes should have been the guide post for determining what should be charged. TR20:21.

Rizzuto also testified that the videotape recording of statements of criminal suspects is mandated if the suspect is to be charged with a crime, or even if there is the “potential” of charging with a crime of third degree or higher. TR28:2; 18.

### **Jason Roebuck**

Jason Roebuck (Roebuck), is currently the Director of Public Safety for the City of Long Branch. He is on a leave of absence from his position as Captain. TR34. On September 25, 2011, Roebuck was a Lieutenant (TR35:6) and worked as the Watch Commander for the day shift. TR35:11.

As a Watch Commander, he would determine what charges to bring against any suspect by examining if “there is the facts and you have to go with the facts”. TR36:18. In determining what charge should be levied against a suspect should be based on 2C of the New Jersey statutes. TR36:25.

On September 25, Roebuck reported to work around 6:00 a.m. or 6:15 a.m. and recalled that there was a discussion going on between Johnson, Hueston and perhaps Bell. TR38:18. There was a debate about what Phillips should be charged with and Johnson asked Roebuck what he thought. Johnson gave Roebuck his version of what had happened. TR39:1. After that Roebuck had a discussion with Hueston in the locker room some ten minutes later. TR39:15.

Based on what Johnson told him, Roebuck thought the charge against Phillips “could have gone either way.” TR42:1. Hueston, however, gave Roebuck a very different version of what had happened at the scene (TR42:10) which changed Roebuck’s opinion about what should have happened. TR42:14. He told Hueston that it would make no sense for him to have any further discussion with Johnson but, rather, he should simply memorialize in writing the facts he had just recited to Roebuck, and the Detective Bureau would review the matter. TR43:1.

On cross-examination, the Director denied ever seeing a situation where the Detective Bureau ever “upcharged” a criminal defendant based upon the same facts that had been adduced during the initial investigation. TR48:4 and TR49:5; 8. The only “upcharging” will occur when the Detective Bureau uncovers additional facts, not based upon the same facts discovered by the initial investigating officer. TR49:12.

He explained if a fact pattern justified charging a defendant with aggravated assault, “then you don’t really have any – a discretion on whether or not to charge him”. TR52:13. He also explained that the legal obligation to charge exists even if the victim says one thing and the alleged perpetrator says another, TR53:8, and explained that sworn police officers have no discretion regarding charges based upon credibility judgments which may not be made as to witnesses. TR53:15.

A Watch Commander “doesn’t override the facts. . .” if he does not “agree” with what he was hearing from his police officers. TR54:8. He “would tend to believe the officers on the street” (TR55:12) and has never declined to pursue charges against a criminal suspect “because you doubted the veracity, or credibility or honesty of your officers who actually did the investigation which was the basis for the proposed charge”. TR56:5. “I’ve never had that happen where they went, you know, where they went, no, I want to indict him. . . , and I said, no, I’m going to let him go.” TR59:20. “I just look at the facts that are there” and, if the facts fit into a 2C criminal violation, “then I’m going to charge them.” TR62:1; 6. “I’m going to charge and I’m going to let someone else figure out later whether it should be, you know, downgraded. I would also tend to. . . do the higher thing [charge].” TR62:9.

#### **Lieutenant Lyndon Johnson**

Lieutenant Lyndon Johnson (Johnson) testified that he began his employment in the Long Branch Police Department in 1993 (TR6:1) and served in every unit in the Police Department. TR6:15. After discussing his career and achievements, he described that “at one time, we had 100 police officers, and the highest number we’ve ever had was 5 Black minority officers, and that created a lot of tension in the community.” TR23:5. There are no black officers above a lieutenant. TR23:9.

Johnson testified regarding many of the undisputed facts above including Phillips’s “unsolicited utterance” to Johnson, “Johnson, the only reason I pulled my knife was because the Spanish guy pulled a sword out on me.” TR30:9. He recalled that after Hueston and Bell returned to Headquarters, Hueston “had a whole litany of charges he wanted to charge Phillips with, and as a supervisor, you learn that you have to decipher.” TR30:22. Johnson explained “[a] lot of times, young officers, they will come in and think they have this, and they really don’t, because they don’t meet the elements of the crime, and they’re excited. . . They want to charge as many charges as they can, but sometimes you just have to bring them back down that you just don’t have it.” TR30-31.

Johnson found it "odd" that Hueston had a list of charges even though he had not been at the scene to speak with the victim. Johnson suggested that the officer should speak to Phillips to get his side of the story because he thought that Hueston "just refused to think that Phillips could be telling the truth. . .". TR31-32. Johnson thought that there "wasn't enough to place Phillips under arrest, because Hueston had no probable cause of what took place." Johnson also doubted the existence of probable cause because he did not know if Hueston had ever spoken to Bell. TR33:2.

Johnson testified that he knew Phillips was "under the influence because of his physical appearance, and I could smell it on him", as well as given the fact that he already admitted that he had been at the Suarez party "where alcohol was flowing freely". TR34:15.

Johnson said that the watch commander "is intricately involved for figuring out how to charge someone in Long Branch". TR37:13. Johnson objected to Hueston's opinion on charging because he "hadn't even been at the scene". TR37-38. Johnson then testified that he explained to Hueston that "we represent the State, and we have the burden to prove whether someone committed a crime or not, and at that particular point, I said to him show me what proof do you have that Phillips committed this crime," and he could not do that. TR38:16.

Johnson did not believe that Phillips needed to have his statement videotaped because he had not yet been charged. TR39:7. He also testified that it was not "feasible" to videotape Phillips because "he or we did not have access to the equipment, nor did we have the proper training, and at this particular point, it wasn't an interview and interrogation." TR39:13. Johnson suggested that they call the on-call prosecutor and run the situation by him. TR40:11.

Johnson testified that he did not call out to the Detective Bureau because there was no crime scene (TR42:18) and referred to a memo on overtime which he believes justified him not calling the Detective Bureau. TR45:20. Johnson also referred to three

cases where the Detective Bureau did not investigate. One was a case where a woman lost an engagement ring, and the Detective Bureau refused to “come out”. TR49:11.

“Troyschon Phillips was not a flight risk” (TR54:4) that’s why he was given the petty disorderly persons offense and “it’s kind of confirmed that, you know, Phillips had some truth to what he was saying. . .”. TR55:11. There were “credibility gaps” on both sides (TR56:3) and Hueston wanted to bring charges against Phillips that “did not meet the elements to any of the crimes that he wanted to charge Phillips with, and that’s the most important thing.” TR56:22. “I have to believe that they took place”, and Johnson did not believe that they took place. TR57:2. He concluded this because “there’s a lot of confusion. . .”. TR57:4. Johnson also stated that he would have typed the complaint and swore Officer Hueston to it. TR57:12. Johnson did not want to swear Hueston to the criminal charges Hueston wanted to bring because “I believe we couldn’t prove that what he was saying took place.” TR57:23. Rather, he authorized only a criminal trespass charge. TR58:5; 8.

Sometime later, Johnson received a letter from Shea informing him that an IA investigation was initiated against him based on the Phillips incident. TR67:12. He testified about his interview in the IA investigation and that he was targeted because he had a poor relationship with the Director of Public Safety, Al Muolo. TR69-72.

Johnson again testified about videotaping Phillips’s statements and spoke about the “feasibility” exception to the Attorney General Guidelines and the fact that Phillips “was not charged with anything”, which, in Johnson’s mind, meant that the Guidelines did not apply. TR83:2. Johnson also claimed that Phillips did not give a “statement”. TR84:6.

On cross-examination, Johnson was asked about his testimony on direct how Hueston could know what had happened at the Seaview Avenue scene, when Bell had been there, not Hueston. He was also asked about whether he knew that Hueston and Bell had spoken to each other. TR103-104. Johnson stated “I said that I found it odd that an officer would have a list of charges and he never went to the scene to speak

with the victims.” TR104:6. Johnson was also asked if he believed that Hueston was simply making up the facts, Johnson replied that “It was not presented to me that the two had conversed about why he felt the way he did.” TR105:5. Johnson also did not believe that police officers under his command conferred before they spoke to him about potential charges. TR105:12.

Johnson acknowledged that Hueston told him at 3:00 a.m. that Suarez and Best said Phillips banged on the side door of their Seaview Avenue apartment, and began cursing and threatening Suarez and wielding a knife. TR107:25. Johnson then acknowledged that this is precisely what Suarez and Best told Bell and what was reflected in Bell’s written report. TR108:3. Johnson was asked if that was not what Suarez and Bell said in their formal statements and in fact, the three versions of events they gave were entirely consistent, Johnson replied “[a]bsolutely no”. TR108:13. Johnson said it “just became a who is telling who”. TR109:8. Johnson then claimed that what Bell told him at approximately 12:45 a.m., and what Hueston and Bell told him at 4:00 a.m., was inconsistent because Suarez initially indicated that he did not have a weapon or produce a weapon.” TR115:17.

Johnson acknowledged that Suarez and Best gave the same account to Bell (TR120:11) and there has never been any inconsistency in their story. He said “I wasn’t there. I don’t know what was said at the door. I don’t know what exactly directly what was said to Bell by Suarez. I wasn’t there.” TR123:10. Johnson said that as Watch Commander, he is never present when the incident takes place and information is only relayed to him later. TR123:19. Therefore, he must rely on what his officers say occurred, either as to what they personally observed or what was conveyed to them by witnesses, as the basis for what crimes if any a suspect should be charged with. TR123:24. Johnson said that it was very rare for a violent crime to occur in front of a police officer, and extremely rare to have a videotape of a criminal incident. TR124:12; 15. That was one of the reasons that he did not call the Detective Bureau that night because he knew there was no video to retrieve from the Housing Authority. TR125. Johnson finally acknowledges that the information Hueston conveyed to him at 3:00 a.m. was the same information which Bell had obtained at around 12:45 a.m., and that

the two officers had done no other investigation on the matter between those two timeframes. TR133:16. Johnson believed that Hueston was insubordinate but did not charge him. TR133-134.

Johnson testified that he did have the 2C book in front of him when was having the discussion with Hueston and Bell. TR137:16. The charge of terroristic threats, did not fit with what Phillips had done “[b]ecause there was no evidence which was presented to me that Phillips went there with the purpose to make a terroristic threat on the victim.” TR137-138. Asked if it was not true that at 12:45 a.m. and again at 3:00 a.m., Bell and Hueston informed him twice that Suarez and Best stated that Phillips went to the door of their apartment, knocked on the door, and yelled loudly at Suarez and Best “I’m going to fucking kill you”, Johnson replied that “[t]hey said a lot of things”, (TR138:8; 10) then stated “I can’t recall”, what Hueston and Bell told him at 12:45 and 3:00 a.m. that night. TR138:19.

Johnson denied that the “I’m going to fucking kill you” statement Suarez and Best told Bell about at 12:45 a.m. was not what Hueston and Bell presented to him at 1:00 a.m. and again at 3:00 a.m. on that night. TR139:3; 5. Johnson then denied the insubordinate conversation he allegedly had with Hueston at 3:00 in the morning. TR143:6. He claimed the inconsistency was created by Phillips’ nine-word unsolicited utterance as he walked in the Police Department. TR143:19.

Johnson’s version was that “you had an overzealous police officer that walked in the police department that wanted to overcharge someone for a crime that he had never been to the scene, and the end result showed exactly what it was, that the Long Branch Police Department brought forth a litany of charges which were all finally dismissed and pled out into municipal court for ordinance”. TR152:23.

Johnson disagreed with the testimony by Lieutenant. Rizzuto and Director Roebuck, that, you should ere on the side of caution and charge with more serious offenses, with the possibility of downgrading later. TR160:24.

Johnson testified that Phillips smelled of alcohol and was slurring his words when he was brought into the Police Department, TR202, and that he appeared to be under the influence of alcohol in terms of being potentially impaired at the time he was brought in. TR203:4. Despite that fact, Johnson acknowledged that he interviewed Phillips anyway (TR203:6), but he considered that Phillips might not be telling the truth when interviewed. TR203:14. Johnson was asked if Phillips was required to be given a Miranda caution before he being interviewed and he replied, "I would say no." TR204:7. He justified the answer by stating that it was only an "investigation" at that point. TR204:9. Johnson said that there is a difference between an "interview" and a "statement" (TR205), a statement is only something that is recorded or handwritten. TR206:1. He was asked whether a suspect who has been arrested and is to give any form of statement about the alleged crime to police, must be given a Miranda warning first, Johnson answered "False". TR207:24. Johnson explained that he meant you are allowed to ask name, date of birth, etc., but then eventually agreed that a police officer cannot question an arrestee ". . . about the probable cause or the actions for which the arrest is based. . .". TR208:15. Phillips had to have been given Miranda if he or Hueston or Bell talked to him about anything that happened that night at the Suarez residence after Phillips had been arrested. TR208:22.

### **FINDINGS OF FACT**

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the



credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of respondent's witnesses, as well as James Jones, Assistant Monmouth County Prosecutor, Lieutenant Frank Rizzuto and Director Jason Roebuck, were especially credible and persuasive. Their testimony was clear and concise. It was obvious that they all had concerns regarding their interaction with Johnson and his actions on the date in question. It was also clear from reading the testimony they had no axe to grind. In fact, it was apparent from the testimony that they simply wanted to do their jobs.

Conversely, Johnson's testimony was not credible in the least bit. His own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. He admitted to not being at the scene at the time and a Watch Commander "doesn't override the facts. . ." if he does not "agree" with what he was hearing from his police officers, he "would tend to believe the officers on the street". However, here, he claims that there "wasn't enough to place Phillips under arrest, because Hueston had no probable cause of what took place" was an uneducated opinion based on the facts Johnson had at the time. In fact, Bell and Hueston were the two individuals most aware of all of the facts and Johnson ignored them. The only reasonable explanation for Johnson not listening to the officers and properly charging Phillips was that Johnson knew Phillips and wanted to give him a break. Clearly, Phillips knew Johnson because he addressed him directly upon entering the Department and uttered "Johnson, the only reason I pulled my knife was because the Spanish guy pulled a sword out on me." Johnson believes that he used good judgment and did nothing wrong but unsuccessfully attempted to direct attention away from the

facts of the case and claim that he was targeted because he had a poor relationship with the Director of Public Safety, Al Muolo.

Particularly glaring was the testimony of AP Jones who when confronted with Officer Hueston's supplemental report where Suarez did not open the door holding a sword and Jones agreed that it was not consistent with what Johnson told him. Equally inconsistent with what Johnson told him was the fact that Suarez did not produce the sword until after the incident at the side door. Jones was also shown Suarez's statement and said that Johnson had not shared any of that information during the phone call and would have given different advice to Johnson including charging aggravated assault.

Likewise, his explanation for not videotaping the interview began with that fact that Phillips was "under the influence because of his physical appearance, and I could smell it on him", as well as given the fact that he already admitted that he had been at the Suarez party "where alcohol was flowing freely". However, those facts were not supported by any other facts in the record. In fact, that would bring into question why Officer Bell did not question it when he was stopped while driving his vehicle. Also, Johnson's comment that the fact that a charge of terroristic threats, did not fit "[b]ecause there was no evidence which was presented to me that Phillips went there with the purpose to make a terroristic threat on the victim" is unsupported in fact and law.

It was obvious that Johnson attempted to "sell" his version of the facts to the trier of fact. Particularly, his recitation and demonstration of the contact with the officers and AP Jones not credible, but also not realistic to believe a competent police officer would ignore the facts of the case as presented. Particularly disturbing was Johnson's testimony about whether Phillips was required to be given a Miranda warning before being interviewed. Johnson replied, "I would say no." He justified the answer by stating that it was only an "investigation" at that point and there is a difference between an "interview" and a "statement". He said a statement is only something that is recorded or handwritten. TR206:1. When asked whether a suspect who had been arrested and is

to give any form of statement about the alleged crime to police, must be given a Miranda warning first and Johnson answered "False" was particularly poignant.

Based upon the documents in evidence and testimony I **FIND**, by a preponderance of credible evidence, that on September 25, 2011, Johnson discounted the facts from two officers in charging Phillips. I **FURTHER FIND**, on the same date, Johnson did not properly charge Phillips. I **FURTHER FIND**, Johnson performed a suspect statement without videotaping it even though he was aware that a videotape was required and mandated by the NJAG Guidelines. I **FURTHER FIND** that Johnson relied solely on the suspects version of facts and relayed them to the on-duty AP thereby misleading him. I **FURTHER FIND** Johnson failed to notify the Detective Bureau of the events of September 25, 2011.

#### **LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138,147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in everyty are used in o his or her duties. N.J.S.A. 1 1A:1-2(a). 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, including removal. N.J.S.A.1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof

and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962) Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty.

Initially, Johnson has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties. Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Although progressive discipline is the general rule, sheer incompetency can be the grounds for firing without progressive discipline.

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (Note: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper

remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that '[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest.' The court determined that Klusaritz's prior record is 'of no moment' because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the County.

[In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

Here, Johnson discounted the facts from two officers in charging Phillips, did not properly charge Phillips, Johnson performed a suspect statement without videotaping it even though he was aware that a videotape was required and mandated by the NJAG Guidelines, relied solely on the suspects version of facts and relayed them to the on-duty AP thereby misleading him and failed to notify the Detective Bureau of the events of September 25, 2011. Accordingly, I **CONCLUDE** that the respondent has met its burden in demonstrating support to sustain a charge of Incompetency, Inefficiency, Failure to Perform Duties. Charges of violation of N.J.A.C. 4A:2-2.3(a)(1) are hereby **SUSTAINED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a police lieutenant ignoring his officers' version of the facts, purposefully misleading an on-duty AP, improperly charging a suspect in a violent crime and not recording a suspect's

statement. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of neglect of duty than the image of a police lieutenant as articulated above. I **CONCLUDE** that appellant's actions constitute neglect of duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

### CONCLUSION

I **CONCLUDE** respondent has met its burden of proof by demonstrating that on September 25, 2011, appellant Johnson discounted the facts from two officers in charging Phillips, did not properly charge suspect Phillips, performed a suspect statement without videotaping it even though he was aware that a videotape was required and mandated by the NJAG Guidelines, relied solely on a suspects version of facts and relayed them to the on duty AP thereby misleading him and failed to notify the Detective Bureau of the events of September 25, 2011. I further **CONCLUDE** for the reasons set forth herein respondent has proven by a preponderance of the evidence

that petitioner acted in a manner that constituted violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming and N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty.

### PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, *supra*, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See* Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See* Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has no prior disciplinary history. Despite this unremarkable disciplinary record, it is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. *See* In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).



(NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

“In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change.” Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn’t balance the books, after the auditors tried three times to show him how):

In reversing the MSB’s insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that “[t]he [MSB’s] application of progressive discipline in this context is misplaced and contrary to the public interest.” The court determined that Klusaritz’s prior record is “of no moment” because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

The record in the above case coupled with commonsense reflects inexcusable Incompetency, Inefficiency and Failure to Perform Duties; Conduct Unbecoming and Neglect of Duty. Considering the record in the present matter including the appellant’s disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent’s action suspending appellant for 180 days without pay and a demotion to patrol officer was justified.

### **DECISION AND ORDER**

I **ORDER** petitioner’s appeal be **DENIED** and the charges levied against Lieutenant Johnson be **SUSTAINED**. I **FURTHER ORDER** respondent’s imposition of a 180 days without pay and a demotion to patrol officer is **AFFIRMED**.

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

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

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

August 23, 2017 \_\_\_\_\_

DATE



\_\_\_\_\_  
**DEAN J. BUONO, ALJ**

Date Received at Agency:

8/23/17  
\_\_\_\_\_

Date Mailed to Parties:

8/23/17  
\_\_\_\_\_

/lam

**APPENDIX**

**WITNESSES**

**For appellant:**

James Jones, Assistant Monmouth County Prosecutor  
Lieutenant Frank Rizzuto  
Jason Roebuck, Director of Public Safety  
Lieutenant Lyndon Johnson

**For respondent:**

Officer Robert Bell  
Officer Thomas Hueston  
Lieutenant Thomas Shea

**EXHIBITS**

**For appellant:**

P-1 Withdrawn  
P-2 Attorney General's Office Internal Affairs Guidelines 2000 and 2014  
P-2A Attorney General's Office Internal Affairs Guidelines 2000  
P-2B Attorney General's Office Internal Affairs Guidelines 2011

**For respondent:**

R-1 Preliminary Notice of Disciplinary Action, dated January 23, 2012  
R-2 Dispatch Call list, dated September 25, 2011  
R-3 Monmouth County 911 calls and Long Branch Police Department calls,  
dated September 25, 2011 (on CD)  
R-4 Arrest Report for Troyshon Phillips, dated September 25, 2011  
R-5 Phillips Incident Report, dated September 25, 2011

- R-6 Transcript of Johnson's conversation with Assistant Prosecutor Jones, dated September 25, 2011
- R-7 Memo from Sergeant Gotfredsen to Captain Bucciero, dated September 28, 2011
- R-8 Memo from Captain Bucciero to Director Muolo, dated September 28, 2011
- R-9 Narrative for Patrol Officer Robert Bell, dated September 26, 2011
- R-10 Supplemental narrative for Patrol Officer Thomas Hueston, dated October 2, 2011
- R-11 Memo from Patrol Officer Hueston to Lieutenant Thomas Shea, dated September 30, 2011
- R-12 Memo from Police Officer Bell to Lieutenant Shea, dated October 3, 2011
- R-13 Statement of Juan Suarez, dated September 28, 2011
- R-14 Statement of Precious Best, dated September 28, 2011
- R-15 Statement of Latoya Bland, dated September 30, 2011
- R-16 Statement of Patrol Officer Robert Bell, dated November 22, 2011
- R-17 Statement of Police Officer Thomas Hueston, dated November 18, 2011
- R-18 Internal Affairs notification forms for Lieutenant Lyndon Johnson, dated October 25, 2011
- R-19 Statement of Lyndon Johnson, dated November 14, 2011
- R-20 Miranda warning for Troyshon Phillips
- R-21 Police Officer Thomas Hueston's handwritten notes
- R-22 Photos of Phillips' black knife and Juan Suarez's sword
- R-23 Criminal Background Check for Troyshon Phillips
- R-24 Videotaped recording of interview with Troyshon Phillips (on DVD)
- R-25 Seaview Drive CD
- R-26 Long Branch Police Department Rules and Regulations
- R-27 Attorney General's Police Statement re Electronic Recordation of Stationhouse Confessions
- R-28 Attorney General Directive 2006-4 re Electronic Recordation of Stationhouse Interrogations

- R-29 Monmouth County Uniform Policy – Videotaped Review of Formal Written Statements
- R-30 Investigative Report of Lieutenant Shea, dated May 10, 2013
- R-31 Appeal of the Final Notice of Disciplinary Action, dated August 9, 2013
- R-32 Phillips knife
- R-33 Suarez sword
- R-34 “Emergency Call Out/Notification List” memo, dated September 8, 2010
- R-35 Complaint – Warrant form