



STATE OF NEW JERSEY

In the Matter of Alejandro Perez
Kean University

CSC DKT. NO. 2020-615
OAL DKT. NO. CSR 13244-19

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

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ISSUED: MAY 22, 2020 — **BW**

The appeal of Alejandro Perez, Campus Police Officer, Kean University, removal effective August 23, 2019, on charges, was heard by Administrative Law Judge Nanci G. Stokes, who rendered her initial decision on April 2, 2020. 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 May 20, 2020, 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 affirms the granting of the appointing authority's motion for summary decision and affirms the removal of Alejandro Perez.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF MAY, 2020

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION

SUMMARY DECISION

OAL DKT.NO. CSR 13244-19

AGENCY DKT. NO. N/A

**IN THE MATTER OF ALEJANDRO PEREZ,
KEAN UNIVERSITY,**

Arthur J. Murray, Esq. for appellant Alejandro Perez (Alterman & Associates,
attorneys)

Achchana Ranasinghe, Esq., Deputy Attorney General for respondent,
(Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: March 17, 2020

Decided: April 2, 2020

BEFORE Nanci G. Stokes, ALJ:

STATEMENT OF THE CASE

On February 6, 2019, Kean University (Kean) police officer Alejandro Perez (Perez) left his service weapon and radio unattended in an unsecured public location and he was untruthful about the manner he resumed patrol duties following the firearm incident. Also, Perez spoke offensively about a student on a police-recorded line. Should Perez be removed from his employment? Yes. When the job involves public safety, and the misconduct causes a risk of harm to the public or when the misconduct impedes the

officer's ability to be trusted to function appropriately, progressive discipline is contrary to the public interest. In re Herrmann, 192 N.J. 19 (2007).

PROCEDURAL HISTORY

On June 13, 2019, Kean served Perez with a Preliminary Notice of Disciplinary Action (PNDA). In its notice, Kean charged Perez with incompetency, inefficiency or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); misuse of public property, including motor vehicles in violation of N.J.A.C. 4A:2-2.3(a)(8); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

Kean also charged Perez with violations of Kean University Police Department Rules and Regulations regarding obedience to the departmental rules, regulations and written directives (3.1.3, 4.1.3, and 6.1.1); ethical conduct, on and off duty (3.1.6); performance of duty (3.1.9, 4.1.1 and 6.1.1); engaging in prohibited activities on duty (4.6.3), handling of firearms (4.8.3 and 4.8.1); proper care of departmental property, equipment and vehicles (4.8.4 and 4.8.9); truthfulness (4.12.6); courtesy (4.10.1); and repeated violations (6.1.2). Kean also relies upon sections of the Police Policy Manual prepared by the Department of Public Safety as to firearms, physical fitness, patrol scheduling and staffing, and portable radios (1.3.9, 22.3.1, and 81.3.1). The PNDA advised that Kean sought Perez's removal.

In its specifications, Kean specified that on February 6, 2019, Kean dispatched Perez to a medical call for a student. Following the call, Kean's designated police telephone line recorded Perez using derogatory, threatening, and profane language about the student.

Kean further specified that at approximately 3:30 a.m., on that same date, Perez requested to be placed on a meal break and notified his superior officer that he would be working out in the fieldhouse gymnasium. Perez did not complete the required facility release form before the use of Kean's gymnasium facilities. At the gymnasium, Perez removed his jacket, and duty belt, including his duty weapon and police-issued radio,

leaving them in an unsecured public location and entered the restroom. Perez was unable to exit the bathroom and was unable to call for assistance without his police-issued radio or his cell phone. Officers arriving approximately an hour later freed Perez from the restroom, a process that damaged the restroom door.

Kean also specified that Perez socialized for the duration of his shift on February 6, 2019, or approximately three hours of non-patrol functions.

Finally, Kean specified that on March 28, 2019, during an internal affairs interview, Perez untruthfully stated he drove off and resumed patrol duties after being extricated from the fieldhouse restroom.

On June 17, 2019, following a Loudermill proceeding, the departmental hearing officer suspended Perez without pay.

Following a hearing on July 3, 2019, Kean sustained all charges and specifications relative to the incidents occurring on February 6, 2019, and during the internal affairs interview on March 28, 2019.

A Final Notice of Preliminary Disciplinary Action (FNDA) dated August 21, 2019, sustained all the charges against Perez, except the charge misuse of property under N.J.A.C. 4A:2-2.3(a)(8), and removed Perez from Kean's employment effective August 23, 2019.

On August 27, 2019, Perez mailed an appeal of the FNDA to the Civil Service Commission (Commission), enclosing the \$20 appeal fee and the FNDA.

On August 30, 2019, Perez appealed to both the Commission and the to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. The appeal included the required removal appeal form and the PNDA.

On September 5, 2019, the OAL received Perez's appeal, but the appeal did not include an FNDA as required by N.J.A.C. 1:4B-3.1(b). The Commission forwarded a copy of the FNDA via e-mail on September 12, 2019, perfecting the appeal, and the case was assigned to me for hearing.

On October 9, 2019, I held a prehearing conference under N.J.A.C. 1:1-13.1 to discuss when the parties and their witnesses would be available for the hearing, the nature of the proceeding, and the issues to be resolved, including any special evidentiary problems. In a prehearing order dated October 10, 2019, I scheduled hearings for December 17, and 20, 2019, and January 8, 2020.

After the prehearing conference, Kean advised it wished to file a summary decision motion over the objection of Perez and agreed to return Perez to pay status at the expiration of the 180-day period required by N.J.S.A. 40A:14-201.

I adjourned the hearing dates to accommodate the motion, but the parties were unable to resolve the correct date for Perez's return to the active payroll.

On January 23, 2020, the OAL received Kean's motion for summary decision.

On February 10, 2020, Perez filed his motion to be restored to the active payroll effective January 3, 2020. On March 5, 2020, I issued an Order denying Perez's motion.

Later on February 10, 2020, counsel for Perez advised that he was no longer able to represent Perez because of conflict as to the subject matter of the disciplinary charges, and new counsel was imminent. Further, counsel requested additional time to submit a response to the summary decision motion by new counsel. The time requirements under N.J.A.C. 1:1-12.5(b) compelled a submission by February 13, 2020. I permitted an extension until March 6, 2020.

On March 4, 2020, Perez filed his opposition to the summary decision motion with a substitution of attorney, and Kean submitted its reply on March 17, 2020.

FINDINGS OF FACT

Based on the documents submitted in support of and opposition to the motion for summary decision, and when viewed in the light most favorable to the non-moving party, Perez, I **FIND** the following as **FACT** for purposes of this motion only:

On March 28, 2019, Perez was interviewed by Kean internal affairs investigator Lt. Thomas Hargrove about the fieldhouse incident on February 6, 2019. Perez stated he responded to a medical call for a student with a sinus infection. Following the call, he requested a lunch break and notified his superiors that he would be working out at Kean's fieldhouse gymnasium. Around 4:00 a.m., Perez entered the fieldhouse and removed his jacket and duty belt that held his service weapon and police radio, placing them on a chair. Specifically, his service weapon was in a double retention holder. Perez intended to use the treadmill, which was close to his duty belt, radio, and personal belongings. Perez then went to the restroom but was unable to exit the door or communicate with dispatch, having left his radio and cell phone outside the bathroom.

The gymnasium is locked at night, and when Perez entered the building, he was alone.

A custodian found Perez in the locked bathroom and tried to free Perez but was unable, so he contacted police headquarters for assistance. Lieutenant Keith Graham and another officer arrived 10 to 15 minutes later and gained entry to the restroom. During the extrication process, the restroom door suffered damage and did not close.¹

Perez stated he was in the restroom for approximately 45 minutes. Following Perez's removal, he spoke with the responding officers for about 20 to 30 minutes inside and outside the fieldhouse. Perez stated that it was at least 5:00 a.m. when he drove off to resume patrol. Perez's patrol shift concluded at 8:00 a.m. Perez explained that patrol duties include checking buildings and parking lots for security.

¹ Door replacement and labor estimates total \$1,573.

Although Perez did not complete a department liability form to use the gym facilities as required by Kean General Order 22.13.1.4A, he was unaware of the requirement, had used the facility previously, and Graham approved his request to use the gym that evening.

Regarding the student medical call on February 6, 2019, a recorded police telephone line identifies Perez speaking with the dispatcher about the student. During the recording, Perez advises the dispatcher "not to call me for this shit again" and that "I will run his ass over with this fucking car." Perez explains that the student stated he was unable to breathe and "I'm like, I don't really care," and " Yeah, it's called a fucking sinus infection, you fucking loser." Perez continues to mock the student, use profanity, and suggested that the student "tie the knot around [his] head." No evidence indicates that Perez directed the statements to or in the vicinity of the student. Kean does not assert that Perez mishandled the medical call, that he failed to obtain medical assistance for the student, or that he did not follow the rules and regulations while dealing with the student. Therefore, Perez did, in fact, handle the call correctly and follow Kean's rules and regulations during the call. No genuine issue of material fact exists that he did not.

Fieldhouse camera footage on February 6, 2019, shows Perez first walking into the fieldhouse at 3:11 a.m. At 3:12 a.m., Perez walks back to his vehicle following the medical call dispatch. Perez then returns and enters the fieldhouse at 3:30 a.m., where he heads towards the second-floor restroom at 3:32 a.m. Graham's vehicle arrived at the fieldhouse at 3:33 a.m.

The cameras further reveal that the custodian arrived at the fieldhouse at 3:50 a.m. The custodian then contacted police dispatch by cellular phone at 4:29 a.m. The police dispatcher created a Computer-Aided Dispatch (CAD) entry for the incident, and Graham responded to the call at 4:32 a.m. Officer Sage Kaneshige arrived at the fieldhouse at 4:34 a.m. to assist with the extraction of Perez. Kaneshige activated his body-worn camera (BWC) at 4:42 a.m., revealing that he freed Perez at 4:51 a.m. The footage recorded Perez stating that "I went in and luckily he came because I don't have anything. I left," and showed Perez pointing in the direction of the chair and desk.

Fieldhouse cameras further show Perez, Kaneshige, and Graham exiting the building at 5:31 a.m., and Kaneshige leaving in his vehicle a few minutes later. Graham and Perez, however, remained in their cars at the fieldhouse from 5:34 a.m. until 7:25 a.m. Thus, Perez did not check the security of any other building or parking lot for nearly two hours.

The police dispatcher created a separate CAD entry for notification to the university facilities about the fieldhouse incident, and a work order request for the fieldhouse's second-floor bathroom.

Neither Perez nor Graham logged CAD entries of patrol or building checks after Perez's extrication from the restroom. No evidence is presented demonstrating that Perez received a service call following his extrication from the bathroom or that he failed to respond to a request for service.

On February 7, 2019, Kean assigned the internal affairs investigation to Sergeant. Michael Fong, but Fong vacated his internal affairs position soon after. Fong provided Perez with notification that he was under investigation.

On February 13, 2019, Kean reassigned the case to investigator Lieutenant Hargrove. In particular, Hargrove was to investigate how Perez was trapped, Perez's purpose in being at the building, the whereabouts of Perez and Graham before and after the bathroom incident, and determine the reason that the officers filed no incident report.

Hargrove's internal investigation report details a timeline of his investigative actions. His investigation included witness interviews of the police dispatcher, the responding custodian, Kaneshige, and target subject interviews of Perez and Graham. Hargrove repeated the interview of the police dispatcher because the audio recording of her initial interview was not reproducible. Hargrove also obtained and reviewed interior and exterior fieldhouse camera footage, police radio and telephonic logs, CAD entry information, e-mails, BWC footage, photographs, evidence.com data, and the Kean University Employee Handbook.

On April 10, 2019, in reviewing the video of his interview with Perez, Hargrove observed Perez pressing a BWC unit in a way that activates or deactivates the camera. Lt. Hargrove neither authorized its use during the internal affairs interview nor issued Perez a BWC as the shift commander on duty.

This observation led Hargrove to perform additional investigation and to provide an addendum to his report. Specifically, Hargrove discovered that BWC footage took place during the March 28, 2019, internal affairs interview and that Perez requested and received a copy of the video burned to a DVD against departmental procedures.

On April 11, 2019, Hargrove contacted the Union County Prosecutor's Office (UCPO) professional standards liaison to ascertain whether Perez's possible misuse of department evidence was a criminal offense.

On May 10, 2019, after multiple requests, Hargrove received the labor estimate for repairs to the bathroom door.

On May 28, 2019, Hargrove received the UCPO's determination that Perez's request for and receipt of the DVD was not a criminal offense, and he revised and completed his report on May 29, 2019.

On June 13, 2019, Kean issued the PNDA.

At the departmental hearing on July 3, 2019, Perez apologized for his inappropriate discussion about the student. Perez also requested to have witnesses produced for the hearing, but Kean declined his request.

In his certification in opposition to this motion, Perez states that following the incident in the bathroom, he felt frightened and desired to be in the presence of other people. Following the bathroom incident, Perez spoke with Graham and Kaneshige about staffing issues, and Graham reprimanded Perez for leaving his gun and radio unattended.

DISCUSSION AND CONCLUSIONS OF LAW

I.

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion shall be served with briefs, with or without affidavits, and the motion may be granted if the papers and discovery that have been filed, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When such a motion is made and supported, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even where a statute calls for a “hearing,” where a motion for summary decision is made and supported by documentary evidence, and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

To avoid entry of summary judgment, the non-moving party must come forward with legally competent facts essential to proving an element of its cause of action. Ibid. at 536-537. If non-movant fails to do so, the moving party is entitled to summary judgment. Ibid. Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is “so one-sided that [movant] must prevail as a matter of law.” Ibid. at 536. If the non-moving party’s evidence is merely

colorable or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In this case, no genuine issue as to the material facts exists, and the only question presented is whether Kean sustained its charges, and if sustained, the appropriate discipline. More pointedly, no genuine issue exists that Perez used profanity and made derogatory comments about a student on a recorded police-designated phone line and that he left his service weapon and radio unattended in a public location. Further, Perez did not resume vehicle patrol duties away from the fieldhouse following extrication for the conclusion of his shift on February 6, 2019, and was untruthful about "driving off" to resume patrol duties during an internal affairs interview. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

II.

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. Indeed, "[t]here 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).

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing as to both guilt and the penalty is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500 (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). One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

"Conduct unbecoming a public employee" is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit, or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). The complained-of conduct and its attending circumstances need only "be such as to offend publicly accepted standards of decency." Ibid. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Conduct unbecoming a police officer need not "be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit standard of good behavior." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Police officers and correction officers are held to a higher standard of conduct than other citizens due to their roles in the community. In re Phillips, 117 N.J. 567 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

The Appellate Division has noted the importance of maintaining discipline within paramilitary organizations:

Many New Jersey cases indicate the importance of maintaining discipline within the paramilitary organization to a police department. Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department.

[Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div. 1971), certif. denied, 50 N.J. 269 (1951) (internal citations omitted).]

Further, the retention of a police officer with a record of untruthfulness in official matters endangers the effective and efficient direction of public services. Brady v. Maryland 373 U.S. 83 (1963). An officer's dishonesty in an internal affairs investigation is significant because "inconsistent statements during the course of the internal affairs investigation, [call] into question [the officer's] honesty, integrity, and truthfulness,

essential traits for a law enforcement officer." Ruroede v. Boro. of Hasbrouck Heights, 214 N.J. 338, 362-63 (2013).

Under N.J.A.C. 4A:2-2.3(a)(1), an incompetent employee unable to execute his job responsibility is subject to termination. See Klusaritz v. Cape May Cnty., 387 N.J. Super. (App. Div. 2006) (upholding removal of an accountant who was incapable of preparing a bank reconciliation and unsuitable for the job). Absence of judgment alone can be sufficient to terminate an employee in a sensitive position that requires the public trust in that judgment. See In re Hermann, 192 N.J. 19, 32 (2007) (DYFS worker without prior discipline terminated for waving a lit cigarette in the face of a five-year-old).

Generally, "neglect of duty" means that an employee has failed to perform and act as required by the description of their job title. Briggs v. Dept. of Civil Service, 64 N.J. Super. 351, 356 (1980); In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" intends conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (internal citation omitted). Also, neglect of duty can arise from an omission or failure to perform a task imposed upon a public employee that indicates a deviation from usual standards of conduct. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Kean's Police Department promulgated Rules and Regulations (Rules) as well as departmental policies and procedures that employees must follow. Rule 3.1.3 and 4.1.3. In particular, Rule 4.8.3 requires employees to follow all policies and procedures in the care and handling of firearms, and "an officer shall not leave his or her firearms and ammunition unattended accessible to others at work, home, or elsewhere." See also Rule 4.8.1 (employee shall carry all equipment while on duty); General Order 81.3.1.2B (portable radio to be in employee's possession and operational); and Rule 4.8.4 (employee responsible for proper care of equipment assigned to them).

Kean's police officers are to "conduct themselves in accordance with high ethical standards, on and off duty" and "be courteous and orderly in their dealings with the public ... avoiding profane language." Rules 3.1.6 and 4.10.1.

Also, Kean police officers are required "to be truthful at all times," and "perform their duties promptly, faithfully and diligently." Rules 3.1.9, 4.1.1, and 4.12.6. Repeated violations of the rules are "indicative of employees' disregard for the duty and may be cause for dismissal" irrespective of the "type or severity of the offense." Rule 6.1.2.

The material evidence against Perez is his admissions supported by inherently credible sources of surveillance video footage, BWC footage, a dispatch audio recording, and internal affairs interview video of Perez. Indeed, Perez does not question the credibility of this evidence.

Perez engaged in a series of acts that are incompatible with a high degree of integrity expected of all law enforcement officials. Initially, even if patrol duties permit an officer to remain in his vehicle and speak with another officer for an extended period, Perez did not "drive off" and resume patrol duties, as he stated during his internal investigation interview. The dispute is not what does or does not encompass patrol duties, but that Perez did not do what he said he did during his interview. In other words, he lied.

Also, Perez became separated from and did not secure his service weapon or police radio before entering the restroom. The safety risk to the public may diminish with a holstered gun in a locked and empty public building. Yet, an unattended service weapon still poses a public safety risk and violates Kean's rules and regulations. Undeniably, the rules do not provide exceptions for weapons left in holsters or temporarily empty public buildings. Further, Perez was required to have his radio in his possession, turned on, and tuned to the proper frequency while on duty; instead, he did not. Without his radio, Perez was unable to call for aid.

Regardless of the student's absence during Perez's statements about him and Perez's correct handling of the medical call, Perez showed significant disrespect and disregard for a student whom he must serve and protect. Perez's conduct is not consistent with high ethical standards required of officers, on or off-duty, under Rule 3.16, even when not a violation of conduct towards the public under Rule 4.10.1

Therefore, I **CONCLUDE** a preponderance of the legally competent evidence exists that Perez displayed incompetency, inefficiency or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7).

Further, I **CONCLUDE** that a preponderance of the evidence exists that Perez failed to follow Kean's rules regarding adherence to rules and directives (3.1.3, 4.1.3, and 6.1.1), ethical conduct (3.1.6), performance of duty (3.1.9 and 4.1.1), service weapons and equipment (4.8.1, 4.8.3, 4.8.4), truthfulness (4.12.6), and departmental policies aimed at firearm safety and portable radio use (1.3.9 and 81.3.1).

Since Perez did not direct his inappropriate comments to the student, I **CONCLUDE** that Perez did not violate Rule 4.10.1, which requires him to avoid profanity and be courteous in his "dealings with the public."

Kean's General Order 22.13.1.4A requires Perez to complete a release before the use of "university work out" facilities. Perez, however, was unaware of this requirement, had used the facility previously, and received approval from his superior officer to utilize the facilities on February 6, 2019. Therefore, I **CONCLUDE** a preponderance of the legally competent evidence does not exist that Perez knowingly violated the Order.

III.

Once a determination is made that an employee has violated a statute, regulation, or rule concerning his employment, the concept of progressive discipline requires consideration. W. New York v. Bock, 38 N.J. 500 (1962). Where the underlying conduct is egregious, however, the imposition of a penalty up to an including removal is appropriate, regardless of an individual's disciplinary record. In re Herrmann, 192 N.J. 19 (2007).

Indeed, the Civil Service Commission may increase or decrease the penalty under the concept of progressive discipline. N.J.S.A. 11A:2-19; In re Carter, 191 N.J. 474, 483-86 (2007). Thus, an employee's prior disciplinary record is relevant to determining an

appropriate penalty for a subsequent offense, and the question upon appellate review is whether such punishment is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness,” Ibid. at 483-84 (quoting In re Polk, 90 N.J. 550, 578, (1982) (internal quotes omitted)).

Misconduct is severe when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest—such as when the job involves public safety and the misconduct causes a risk of harm to persons or property. In re Herrmann, 192 N.J. at 33

In particular, courts “have upheld the dismissal of employees, without regard to whether the employees have had substantial past disciplinary records, for engaging in conduct that is unbecoming to the position.” Ibid. at 34. For example, “the Appellate Division affirmed the dismissal of a police officer for infractions that went to the heart of the officer’s ability to be trusted to function appropriately in his position.” Ibid. at 35 (citing Cosme v. E. Newark Twp. Comm., 304 N.J. Super. 191, 206 (App. Div. 1997), certif. denied, 156 N.J. 381 (1998) (municipal police officer dismissed, and application of progressive discipline unnecessary, because “charges of basic misconduct that included willful disobedience of orders, neglect of duty, and placing personal interests ahead of police duties . . . go to the heart of the plaintiff’s capacity to function appropriately as an officer in the East Newark Police Department”)).

Kean argues that Perez’s misconduct was so severe that it falls outside of progressive discipline, and that removal is the only appropriate remedy. Alternatively, Kean asserts that the principle of progressive discipline establishes the need for Perez’s removal.

Here, Perez received prior discipline that included a written reprimand for discourteous conduct towards a Kean student on May 28, 2009, a two-day suspension for Perez’s refusal to submit an operational report on January 11, 2010, and a six-day suspension for insubordinate and disrespectful conduct unbecoming a police officer on October 24, 2013. Though not discipline, Kean also issued Perez with corrective memoranda to address issues concerning patrol duties in 2007, following orders in 2009,

and abuse of sick time in 2010. Nonetheless, Perez's most recent disciplinary action before the incidents on February 6, 2019, and March 28, 2019, involved events nearly six years ago. Perez was an employee of the Kean police department for nearly twenty years before his removal, and much of his prior discipline did not involve similar conduct.

Yet, Perez was not truthful during his internal affairs interview so that the integrity of legitimate law-enforcement work is compromised, and the public trust in law enforcement suffers. Perez demonstrated a significant lapse in judgment by failing to secure his service weapon or carry his radio that created an unnecessary safety risk for the public. Perez's conversation about the student on a police-recorded line is admittedly offensive, and when considered with the other events on February 6, 2019, and March 28, 2019, it further justifies removal.

Given this discussion, I **CONCLUDE** that the egregious nature of Perez's conduct on February 6, 2019, and during his internal affairs interview on March 28, 2019, warrant termination of Perez from his position as a police officer with Kean.

Indeed, the application of progressive discipline would be contrary to the public interest regardless of Perez's apology for his behavior or minor disciplinary record.

VI.

A.

Perez maintains that procedural irregularities during the internal investigation, with the filing of disciplinary charges, and at the departmental hearing warrant dismissal, or at least the denial of summary decision. I disagree.

Initially, Perez asserts he did not receive notice of the charges concerning untruthfulness or that the investigator reviewed the recorded police dispatch tape, and that this failure violates the Attorney General guidelines for internal investigations. Perez also asserts he was entitled to a "target letter" regarding the police dispatch conversation. Perez further suggests he did not have an opportunity to analyze all irregularities with the internal affairs investigation adequately.

The Kean Internal Affairs Policy & Procedures, based upon the Attorney General's directives, sets forth guidelines for administrative complaints against a law enforcement officer:

Internal affairs shall notify the suspect officer in writing that an internal investigation has been started, unless the nature of the investigation requires secrecy. The internal affairs investigator should interview the complainant, all witnesses and the subject officer review relevant reports and documents, and obtain necessary information and materials.

[ibid.]

Perez relies upon O'Rourke v City of Lambertville, 405 N.J. Super. 8, (App. Div. 2008), to support his position that irregularities of Attorney General guidelines during an internal investigation require dismissal of the charges. O'Rourke, however, involved a municipality's significant failure in not referring the investigation to the internal affairs unit as required by its rules. Unlike O'Rourke, Kean did refer the investigation to the internal affairs unit, and the investigator issued a report that "recounted all of the facts of the case" and a "summary of the case along with conclusions for each allegation" that is "without personal opinions." Ibid at 16, 20. A deviation from the [Attorney General's] Guidelines warrants reinstatement only when the employee demonstrates prejudice in his or her ability to challenge the removal. Ibid at 23; Ensslin v. Township of N. Bergen. 275 N.J. Super. 352, 361 (App. Div. 1994), cert. denied, 142 N.J. 446 (1995).

In this case, Hargrove discovered Perez's lack of truthfulness during the internal affairs interview and how Perez ended up in the gymnasium on February 6, 2019, was part of the interview and investigation. Perez received notification that he under investigation. A review of the dispatch tapes for Perez's shift on February 6, 2019, revealed the inappropriate conversation about the student. Perez cites to no provision of the Attorney General guidelines requiring Kean to provide him with a separate "target letter" as to the conversation recorded on the police dispatch line discovered in the course of a noticed investigation for the same night. Significantly, Perez proffers no other purported internal affairs irregularities. The PNDA also advises Perez of all charges against him. Therefore, I **CONCLUDE** that a preponderance of the evidence does not

support a violation of the Attorney General guidelines or Kean's Internal Affairs Policy & Procedures.

B.

Next, Perez argues that Kean's charges were untimely filed and should be dismissed. Under N.J.S.A. 40A:14-147, a police officer can be removed for just cause, including "incapacity, misconduct, or disobedience of [police department] rules and regulations upon a written complaint. However, N.J.S.A. 40A:14-147 also provides a forty-five-day time limit for complaints concerning charges for violations of rules and regulations:

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. ... A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

[ibid.]

Significantly, the forty-five-day period would not begin until the person authorized to file charges obtains adequate information necessary to determine whether charges are appropriate. State Police v. Trooper Plunkett, 2002 N.J. AGEN LEXIS 848 (October 30, 2002). Moreover, the forty-five-day rule only addresses charges related to violations of departmental rules and regulations, not complaints based upon misconduct where no time constraints apply. McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 394 (App. Div. 2008).

Regardless, the forty-five-day rule is inapplicable to charges against university police officers. See Farella v Rutgers Univ. Police Dep't, 2010 U.S. Dist. LEXIS 104471, (D.N.J. September 30, 2010) (where the court reviewed the legislative history of N.J.S.A.

40A:14-147, and concluded that the legislature intended the provision to be limited to only "members of municipal and county police departments").

The Kean Internal Affairs Policy & Procedures also address the discovery of suspected criminal acts during an investigation:

Where preliminary investigation indicates the possibility of a criminal act on the part of the subject officer or the investigation involves the use of force by the officer which results in serious bodily injury or death, the county prosecutor must be notified immediately. In either case, no further action should be taken, including the filing of charges against the officer, until directed by the county prosecutor.

[bid.]

Perez asserts that Hargrove did not schedule his interview promptly and that Hargrove did nothing from April 10, 2019, until he issued the investigation report on May 29, 2019, thereby making the PNDA untimely. However, the investigation report details numerous events and actions by Hargrove during this period. Further, Hargrove conducted multiple interviews and reviewed voluminous materials in preparation for Perez's interview. Additionally, Hargrove discovered facts on April 10, 2019, that warranted further investigation involving Perez's actions during his interview that Hargrove believed presented criminal implications. Besides, Hargrove was awaiting information concerning the repair to the damaged bathroom door that he received on May 10, 2019. On May 28, 2019, Hargrove received verification from the UCPO that Perez's actions regarding the BWC video did not constitute a crime, and on May 29, 2019, Hargrove issued his investigation report.

Even if the time limits under N.J.S.A. 40A:14-147 applied to Perez, less than forty-five days passed since the completion of Hargrove's comprehensive investigation and the issuance of the PNDA by the director of human resources. Further, Kean's charges involved misconduct, which is not limited by N.J.S.A. 40A:14-147. Therefore, I **CONCLUDE** that Kean timely issued the PNDA which involves charges of misconduct, and that this case does not warrant dismissal under N.J.S.A. 40A:14-147.

C.

Lastly, Perez further that he was not permitted to present witnesses at the departmental hearing, that the hearing officer was biased, and that this deprived him of a fair hearing. Procedural irregularities at the departmental level, however, are cured by a later hearing at the OAL. Ensslin v. Township of N. Bergen, 275 N.J. Super. 352, 361 (App. Div. 1994), cert. denied, 142 N.J. 446 (1995); See also In re Morrison, 216 N.J. Super. 143, 151 (App. Div. 1987)(holding that police officer alleging hearing officer bias was not prejudiced because an unbiased administrative law judge conducted a de novo hearing). Indeed, this case is determined as if no prior hearing occurred and as if no decision had issued. Housing Auth. of Newark v. Norfolk Realty Co., 71 N.J. 314, 326 (1976.)

Moreover, Perez supplies no certification or affidavit from any witness setting forth facts bearing on this disciplinary decision or needing consideration at a hearing. Indeed, Perez fails to identify the witnesses he wishes to present. Perez also submits no evidence to support his allegation of hearing officer bias. Therefore, I **CONCLUDE** that this case remains appropriate for summary decision.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the motion for summary decision is **GRANTED** and that Perez be removed from his position as a police officer with Kean.

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, 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.



April 1, 2020

DATE

NANCI G. STOKES, ALJ

Date Received at Agency:

April 2, 2020

Date Mailed to Parties:

April 2, 2020

ljb

APPENDIX

Exhibits

Appellant:

P-1 Letter Brief in reply to Motion for Summary Decision with Certifications

Respondent:

R-1 Final Notice of Disciplinary Action dated August 21, 2019

R-2 DVD of March 28, 2019 Internal Affairs Interview

R-3 Internal Affairs Findings and Disposition report dated May 29, 2019.

R-4 Daily Roster for February 6, 2019

R-5 Kean University Rules and Regulations

R-6 Kean University Department of Public Safety/Police Policy Manual chapters

R-7 Email dated July 31, 2015

R-6 Medical dispatch CAD entry and CAD entry log for February 6, 2019

R-7 Dispatch audio for February 6, 2019

R-8 Photocopies of picture depicting the movie character "Gomer Pyle"

R-9 Fieldhouse CAD entry for February 6, 2019

R-10 BWC footage from Officer Kaneshige for February 6, 2019

R-11 Fieldhouse camera footage for February 6, 2019

R-12 Preliminary Notice of Disciplinary Action dated June 12, 2019

R-13 Prior disciplinary records

R-14 Kean University Internal Affairs Policy and Procedures

R-15 Notice of Motion for Summary Decision

R-16 Reply Brief to Opposition