STATE OF NEW JERSEY

In the Matter of Monique Smith, Irvington Township, Department of Public Safety CSC DKT. NO. 2018-1878 OAL DKT. NO. CSV 09792-20 and 01123-18 (on remand)	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: FEBRUARY 3, 2021 (NFA)

The appeal of Monique Smith, Police Captain, Irvington Township, Department of Public Safety, six-month suspension, on charges, was heard on remand from the Appellate Division by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on January 6, 2021. Exceptions were filed on behalf of the appellant and on behalf of the appointing authority.

Having considered the record and the exceptions, as well as the ALJ's initial decision modifying the six-month suspension to a 15 working day suspension, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on February 3, 2021, accepted and adopted the Findings of Fact and Conclusions as contained in the attached ALJ's initial decision. However, the Commission did not adopt the recommendation to modify the six-month suspension to a 15 working day suspension. Rather, the Commission imposed a 60 working day suspension.

DISCUSSION

The history and facts of this matter need not be recited as they are thoroughly laid out in the Commission's previous decision *In the Matter of Monique Smith* (CSC, decided March 6, 2019), the remanded determination from the Appellate Division *In the Matter of Monique Smith, Irvington Township, Department of Public Safety*, A-2987-18T2 (App. Div., October 2, 2020) and the ALJ's current initial decision. In the current initial decision, the ALJ recommended upholding one of the charges against the appellant and dismissing the remainder of

the charges. Based on this determination, the ALJ recommended reducing the six-month suspension to a 15 working day suspension.[1] Upon its independent review of this matter, the Commission agrees with the current ALJ's determination regarding the charges but disagrees that the appropriate penalty is a 15 working day suspension. Rather, the Commission finds that a 60 working day suspension is the appropriate penalty.

In her exceptions, the appellant argues that the remaining charge upheld by the ALJ should be dismissed as there was no evidence, other than a newspaper article, presented that her actions were inappropriate. Additionally, the appellant argues that she is entitled to counsel fees in this matter as she prevailed on all or substantially all of the issues in this matter.

In its exceptions, the appointing authority argues that the ALJ erred in dismissing the other charges as she inappropriately failed to admit certain evidence as exceptions to hearsay. Further, it argues that the appellant is not entitled to counsel fees.

The Commission rejects the appellant's contention regarding the charges. It is clear that the credible evidence in the record supports the ALJ's upholding of that charge. Indeed, the appellant's actions in this matter were well documented. Moreover, the Commission rejects the appointing authority's contentions regarding the dismissed charges. In this regard, the Commission concurs with the ALJ's determinations regarding the inadmissibility of certain reports as hearsay. Moreover, the Commission notes that the appointing authority had an opportunity to cure this potential issue had it determined upon remand to call any of the witnesses referenced in those reports. However, it did not do. As indicated by the ALJ: "[h]aving conferenced with counsel on the issue on remand, and *they are having determined that they did not seek to supplement the factual record* but that I should rely on the original hearing record, this remanded matter is ripe for redetermination" (emphasis added).

Regarding the penalty, while the Commission agrees with the ALJ that a reduction is warranted, it finds that a 60 working day suspension is appropriate. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the

[1] In the ALJ's original initial decision, she recommended modifying the penalty to a "90 day suspension." The ALJ did not specify whether it was a 90 calendar day or working day suspension. In its March 6, 2019 decision, the Commission sustained a 90 working day suspension.

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).

In this case, the appellant has only a prior written reprimand in her disciplinary history. Also, some of the underlying charges were properly dismissed in this matter. Regardless, the Commission finds that the appellant's sustained misconduct was highly inappropriate, especially for such a high level supervisory public safety employee. The Commission cannot emphasize enough that such actions by a superior office not only tend to bring negative notoriety and disrepute to the appointing authority, but also tend to diminish the confidence of the public in the effective administration of government and public service. Accordingly, the Commission finds that a 60 working day suspension should impress upon the appellant that such misconduct will not be tolerated, and any future misconduct could lead to an increased penalty up to and including removal from employment.

Since the penalty has been modified, the appellant is entitled to back pay, benefits and seniority for the difference in time between the conclusion of the 60 working day suspension and the 90 working day suspension.[2] *See N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees.[3] Pursuant to *N.J.A.C.* 4A:2-2.12(a), an award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. Mar. 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission

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[2] Assuming the appellant was previously paid back pay for the difference in time between the conclusion of the Commission's originally imposed 90 working day suspension and the appointing authority's original six-month suspension

[3] In her original initial decision, the ALJ recommended awarding 50% counsel fees, which was reversed by the Commission in its March 6, 2019 decision. In this regard, the ALJ's award of such counsel fees was not appropriate. A reduction in penalty may lead to an award of partial counsel fees, but only under circumstances where an appellant has prevailed on the most serious charges leaving only *incidental* charges, which give rise to a significantly reduced penalty, such as a minor discipline. *See e.g., Thomas Grill and James Walsh v. City of Newark,* Docket No. A-6224-98T3 (App. Div., January 30, 2001); *In the Matter of Diane Murphy* (MSB, decided June 8, 1999); *In the Matter of Joanne Chase* (MSB, decided June 24, 1997); *In the Matter of James Haldeman* (MSB, decided September 7, 1994); *In the Matter of Donald Fritze* (MSB, decided January 26, 1993). Such was not the case in that matter, nor is it the case in the current matter.

dismissed some of the charges against the appellant, but it has sustained a serious charge and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

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

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the six-month suspension to a 60 working suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority as specified above. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF FEBRUARY, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09792-20
CSV 01123-18 **(ON REMAND)**
AGENCY REF. NO. 2018-1878

IN THE MATTER OF MONIQUE SMITH,
IRVINGTON TOWNSHIP,
DEPARTMENT OF PUBLIC SAFETY.

Steven D. Altman, Esq., for appellant Monique Smith (Benedict and Altman, attorneys)

David I. Solomon, Esq., for respondent Irvington Township (Florio Perrucci Steinhardt & Cappelli, attorneys)

Record Closed: December 10, 2020 Decided: January 6, 2021

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

STATEMENT OF THE CASE

Monique Smith (appellant) appealed from disciplinary action taken by respondent, Irvington Township, Department of Public Safety (Irvington), to suspend her from her position as a Captain in the Police Department for six months on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The charges relate to circumstances that occurred during the evening of her promotional ceremony, January

5, 2015, on which date several motor vehicle warrants were issued for appellant's arrest.

PROCEDURAL HISTORY

Appellant was suspended without pay for six (6) months effective January 6, 2015, by Preliminary Notice of Disciplinary Action handed to appellant the same day. After deferring to the collateral criminal proceedings, discussed in more detail below, Tracy Bowers, the Director of Public Safety for Irvington, served unusually as both the hearing officer and the appointing authority, entering both a decision and the Final Notice of Disciplinary Action on December 20, 2017. Appellant filed an appeal on January 2, 2018, which was granted by the Civil Service Commission on or about January 17, 2018.

The appeal was transmitted to the Office of Administrative Law (OAL), on January 22, 2018, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearings were held on December 3 and 4, 2018. On January 31, 2019, I issued my Initial Decision affirming the charges but reducing the suspension to ninety (90) days, with a grant of fifty (50%) per cent attorney's fees. This was modified by the Civil Service Commission with respect only to my grant of partial attorney's fees.

On October 2, 2020, the Appellate Division of the New Jersey Superior Court ruled on appellant's appeal from the final agency decision. It reversed and remanded the matter to the OAL holding that my Initial Decision was not supported by the substantial credible evidence in the record because of my ruling that appellant was estopped by the findings of a collateral Law Division case on the reckless driving summonses. I am directed to determine "whether Smith's reckless driving constituted conduct unbecoming of an officer and other sufficient causes to warrant discipline without reliance upon the criminal trial judge's fact-findings." [Op. at 8.]

Having conferenced with counsel on the issue on remand, and they are having determined that they did not seek to supplement the factual record but that I should rely

upon the original hearing record, this remanded matter is ripe for redetermination. I shall repeat those aspects of the earlier findings as are still applicable.

FACTUAL DISCUSSION

Detective Sergeant Gerard Malek testified on behalf of respondent. The detective has been assigned to the Irvington Internal Affairs (IA) Bureau since 2013. He has an additional ten years on the force. Sergeant Malek has had regular interactions with appellant over the years. He became aware of the domestic incident between Captain Smith and James after it occurred and was directed to monitor the situation because of her high rank. Respondent presented through this witness, the warrants and summonses issued against appellant. [Respondent's Exhibit Tabs A, B, C, D.]

Detective Malek detailed the history of the disciplinary action taken against appellant. On January 6, 2015, respondent suspended appellant without pay pursuant to N.J.A.C. 4A:2-2.5(a)(1) because of the criminal charges issued against her the prior evening. [Respondent's Exhibit Tab E.] On June 23, 2015, appellant was indicted on charges of Aggravated Assault, Unlawful Possession of a Weapon, Possession of a Weapon for an Unlawful Purpose, and Criminal Mischief. [Respondent's Exhibit Tab F.] On April 25, 2017, appellant was found not guilty by a jury on the Unlawful Possession of a Weapon and Possession of a Weapon for an Unlawful Purpose charges. [Respondent's Exhibit Tab M.]

On July 31, 2017, the Hon. Michael L. Ravin, J.S.C., ruled on the non-indictable motor vehicle charges in a bench trial and found appellant not guilty on the Criminal Mischief, Harassment, and Leaving the Scene of an Accident charges. However, Judge Ravin found appellant guilty of Reckless Driving. [Respondent's Exhibit Tab M.]

Detective Sergeant Malek relied primarily upon the package of documents forwarded to IA from the Essex County Prosecutor's Office after all the criminal proceedings had concluded. The incident had been referred to that office on January 8, 2015. Detective Sergeant Malek completed a report for the Loudermill hearing but his IA report was completed only on August 29, 2017. [Respondent's Exhibit Tab Q.] In addition to reviewing the prosecutor's file, he stated that he interviewed James, Jamillah

Beasley-McLeod, and appellant. Nevertheless, his own report indicates that he only took the statements of Beasley-McLeod and appellant, both in late August 2017. [Respondent's Exhibit Tab Q at 14.]

In addition to the criminal actions, Detective Sergeant Malek concluded that Captain Smith was wearing her Police Uniform during all pertinent portions of the behavior alleged. This conclusion was in part based upon his interview of appellant. Detective Sergeant Malek also concluded that she entered Marlos restaurant, an establishment in which alcohol is sold, on January 5, 2015. He relied upon Beasley-McLeod's statement that she saw appellant holding two glasses of wine, although she did not observe appellant drinking. [Id. at 15.] In Detective Sergeant Malek's report, appellant denied having anything to eat or drink at Marlos. [Id. at 15.]

On cross examination, Detective Sergeant Malek explained that he was notified of the incident at approximately 11:00 p.m. on January 5, 2015. He had not been at appellant's ceremony, held at a church, did not know who was in attendance, and never investigated that aspect of the day's events. The detective admitted that it was customary to remain in uniform for the party celebrating a promotion. It was also standard to have the party at a restaurant that serves alcohol. No one has ever been charged for being in uniform and drinking at such a celebratory event. He never inquired as to who else was there but confirmed during the hearing that the Chief and the Mayor were in attendance. There was no dispute that everyone at the restaurant raised glasses in a toast to Captain Smith. Any surveillance footage from Marlos was unavailable to either Irvington or Essex County because it had been overwritten and erased.

The Township also submitted the testimony of Director Bowers. He testified minimally, as I would not permit him to testify with respect to his role as the hearing officer below. He has been the Public Safety Director, a civilian position, since November 2015. Prior thereto, he was the Police Director for a year, also a civilian position. Bowers had twenty-three years as a uniformed officer, advancing to the rank of Captain in 2013.

Bowers testified that he has worked with appellant, having known her since she came into the department. He stated that she has had a prior letter of reprimand for a misplaced weapon earlier in her career. With respect to the current incident, Bowers only learned of it after appellant's arrest. He was not involved in the investigation. As stated above, Bowers served as the hearing officer and also the appointing agency's final decisionmaker.

Appellant opted to not present any witnesses at the hearing.

FINDINGS OF FACT

Accordingly, and based upon due consideration of the scant testimony but also the documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Appellant is presently a Captain in the Irvington Police Department.

2. During 2014 and into the very early beginning of 2015, appellant was in a personal relationship with John Sharpe James (James), Councilman for the South Ward of Newark, and the son of former Newark Mayor Sharpe James.

3. Appellant was promoted to Captain on January 5, 2015, with a ceremony and a reception that followed at Marlos restaurant.

4. Appellant apparently had expected James to come to her ceremony and reception as her significant other. He did not, in spite of texts and phone calls from appellant. Apparently, he had decided to break up with her in the days just preceding her promotion.

5. When James did not come to the ceremony or reception, appellant left the party and went to his apartment. She found him outside in his vehicle. When James saw appellant, he drove off but appellant followed him where they eventually both

ended up outside the home of his parents. As detailed in the documentary evidence submitted by Irvington at this hearing, discussed below, appellant's driving was aggressive, and her emotional state was one of anger and overcome with emotion. There were allegations that she struck his car with her own.

6. Appellant drove off but turned herself in after warrants were issued.

7. The newspapers carried the story of the initial incident, the eventual indictment, and then the verdict of not guilty at the ultimate criminal trial. She was charged with conduct unbecoming a public employee for bringing Irvington into disrepute. [Charge #1, FNDA; Exhibit Tab N.]

8. Appellant was acquitted of the criminal charges, but she was found guilty of reckless driving in a bench trial before the Honorable Michael L. Ravin, J.S.C. This was the basis of her being charged with another count of conduct unbecoming. [Charge #2, FNDA; Exhibit Tab M.] That same conviction for reckless driving became the basis of Irvington charging appellant with other sufficient causes, specifically, failing to obey the laws of the State of New Jersey and thus violating the Internal Police Department Manual § 3.1.11, requiring such obedience. [Charge #3, FNDA; Exhibit Tab P]

9. Appellant was found not guilty of leaving the scene of an accident and criminal mischief by Judge Ravin. Nevertheless, Irvington charged appellant with conduct unbecoming and other sufficient cause for damaging John James' vehicle during her pursuit of him, based upon its reading of Judge Ravin's bench decision. [Charges #4, #5; FNDA; Exhibit Tab M.]

10. Because appellant was still in uniform when she was driving in pursuit of Mr. James, Irvington charged her with conduct unbecoming for violating the above-referenced Internal Police Department Manual. [Charge #6; FNDA; Exhibit Tab P.]

11. With respect to being in uniform that evening, Irvington charged her with conduct unbecoming and other sufficient cause because she was inside Marlos, an establishment that served liquor, and its assumption that she drank some alcohol that evening. [Charge #7 and #8, FNDA.]

12. Other high-ranking officers attended the promotional party at Marlos in uniform, including the Chief. While alcohol was undoubtedly served during this party to officers in uniform, the record was clear that this was consistent with the customary and ordinary practice for promotional events, and not unique to this one occasion.

13. There was no proof that Captain Smith failed to carry her proper identification badge with her. [Charge #9, FNDA.] Moreover, insofar as the promotion had just taken place, there was also no proof that she would have been provided a new Captain's identification on the same day as the promotional ceremony.

14. Appellant has had one prior letter of reprimand in her career with Irvington.

ANALYSIS AND CONCLUSIONS OF LAW

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

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, Irvington bears the burden of proving the charges against appellant by a preponderance

of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933).

"Unbecoming conduct" is broadly defined as conduct that adversely affects the morale or efficiency of the government unit or has the tendency to destroy public respect and confidence in the delivery of government services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). As stated by our Supreme Court in Karins v. Atl.City, 152 N.J. 532, 553-54 (1998):

> Conduct unbecoming a firefighter or other public employee, in many ways, is reminiscent of the common-law offense of misconduct in office and the statutory offense of official misconduct, N.J.S.A. 2C:30-2. The contours of the common-law offense were not always perfectly clear. State v. Hinds, 143 N.J. 540, 544, 674 A.2d 161 (1996). Before the common-law offense was abolished in 1979 by the Code of Criminal Justice, courts brought clarity to the offense by requiring as an element of the offense that the alleged conduct "involved and touched" the public employment of the accused. Id. at 546, 674 A.2d 161. Whether the offense was committed off-duty or during the working hours was not relevant. Ibid.; State v. Bullock, 136 N.J. 149, 153-55, 642 A.2d 397 (1994); State v. Johnson, 127 N.J. 458, 462-63, 606 A.2d 315 (1992); Ward v. Keenan, 3 N.J. 298, 309-11, 70 A.2d 77 (1949).

Based upon the facts set forth above, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant was properly charged with

violating departmental rules and regulations when she attended her own promotional ceremony and party at a restaurant that served alcohol. The great weight of Irvington's own case on this charge was that this was a customary and accepted practice for officer promotions. Moreover, the Chief, other dignitaries, and high-ranking members also were in attendance, some of whom also wore their uniforms. Accordingly, the FNDA charges #7 and #8 will be dismissed. Similarly, there is no competent evidence that appellant was missing her identification. Rather, at most the evidence only circumstantially demonstrated that she had not yet received her new Captain identification. Accordingly, FNDA charge #9 will also be dismissed.

In this case, the evidence presented by respondent to support the other disciplinary charges was hearsay, to which appellant objected. While hearsay evidence is admissible, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

Respondent argues that its sources of proofs included: (1) the statements of Councilman James; (2) the Statements of former Newark Mayor Sharpe James; (3) the several findings/reports of the Essex County Prosecutor's Office; (4) the findings of Judge Ravin; and (5) Detective Sergeant Malek's independent investigation. Some of the factual basis for said charges were corroborated by Detective Sergeant Malek's own interview of appellant. [See Exhibit Tab Q at 14-16.] Irvington asserts that its documentary evidence, therefore, is admissible because several reports were prepared in the ordinary course of law enforcement's business, and some were based on interviews of persons with actual knowledge including the victim, several eyewitnesses, and Captain Smith herself. [Id. at 6-9, 14-16.]

Appellant was convicted of Reckless Driving but was found not guilty of Leaving the Scene of an Accident or Criminal Mischief by Judge Ravin. As stated above, she was acquitted of all indictable charges by the jury. Accordingly, this disciplinary action

comes down to the charges based on appellant's reckless driving and pursuit of James, and the embarrassing press coverage of the incident and trials.

While Captain Smith has no control over what gets printed in a newspaper, her reckless and emotional conduct that evening of driving after James into Newark was such that it should have occurred to her that it might be newsworthy and embarrassing to the city. Irvington argues that "[w]hether or not the substance of the allegations are [sic] true, Captain Smith's conduct, arrest, and trial resulted in a plethora of poor publicity upon Irvington's Police Department." [Letter-Brief at 11.]

The pertinent portions of the Irvington Police Department Manual provide:

> 3.1.1 Standards of Conduct. Members and employees shall conduct their private and professional lives in such a manner as to avoid bringing the police department into disrepute.

I **CONCLUDE** that respondent has proven FNDA Charge #1 by a preponderance of the credible and admissible evidence.

On the disciplinary charges based upon appellant's driving behaviors, respondent argues that Judge Ravin's findings of facts should be judicially noticed for purposes of this proceeding given the higher burden of proof in criminal proceedings. Notwithstanding its claim that this hearing contained sufficient factual evidence to also support a finding that Captain Smith drove her vehicle on the wrong side of the road, and contacted John James' vehicle with her own, there was no evidence adduced that was not derivative of the prior criminal proceedings.

I must **CONCLUDE** that almost all of the other documents relied upon by Irvington are inadmissible as hearsay. Irvington argues that an investigator's report is likely to be reliable because it was prepared and preserved in the ordinary course of the operation of a business or governmental entity. See generally Biunno, supra, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 803(c)(6); comment 2 on N.J.R.E. 803(c)(8). While a prosecutor's investigation report may be created in the ordinary

course of its business, that does not mean that embedded hearsay is thereby admissible under Weston.

Similarly, although it is not disputed here that the statements were taken as part of the Essex County Prosecutor's Office regular business activity to conduct investigations; nevertheless, such a report is generally not admissible to prove the contents of statements provided to an investigator. Biunno, supra, Current N.J. Rules of Evidence, comment 4 on N.J.R.E. 803(c)(6). Determining that the statement qualifies as a business record does not end the inquiry because "a statement included within an otherwise admissible record or report may itself constitute inadmissible hearsay." Ibid.; see also In re Registrant C.A., supra, 146 N.J. at 98 (declarant-victim's statements to the police included in police reports were not admissible under 803(c)(6)). The notion of reliability is underscored by the fact that neither appellant nor I have had any opportunity to review and question the collision experts or any of the witnesses whose statements were taken by the Prosecutor's Office. The hearing in this matter was merely a summary by Detective Sergeant Malek of his readings of the municipal and criminal transcripts. Having been acquitted of every indictable and non-indictable offense except reckless driving, appellant is entitled to a *de novo* hearing in this forum.

I **CONCLUDE** that respondent has not sustained FNDA Charges #2 and #3 as it is premised upon inadmissible hearsay, and respondent never proved the underlying facts or produced the persons who were interviewed or provided statements.[1] There simply was no residuum of competent evidence in this record. I **FIND** that the fact that appellant was in uniform while in her vehicle was merely presumed in FNDA Charge #6 and no evidence of such was presented by Irvington. I **CONCLUDE** that this charge has also not been sustained.

Progressive discipline is the touchstone of our civil services laws, even with respect to para-military organizations. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be

[1] As I stated in the original Initial Decision, Charges #4 and #5 should be merged and dismissed because of appellant's acquittal of criminal mischief by Judge Ravin.

an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

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

I **CONCLUDE** that the penalty imposed here must be reduced commiserate with the charges that have not been sustained. While the actions of appellant on the evening in question were impulsive and ill-conceived, she also has no disciplinary history in her career except for a prior written reprimand. In the collateral proceedings, appellant was found not guilty of all of the criminal charges except for reckless driving. Only Charge #1 has been sustained here. Accordingly, I **CONCLUDE** that appellant should be suspended for a term of fifteen (15) working days.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of Irvington Township, Department of Public Safety, against appellant Monique Smith is hereby **REVERSED IN PART** and **AFFIRMED IN PART** consistent with the decision set forth above. It is further **ORDERED** that appellant Monique Smith is entitled to back pay and any other benefits that would have otherwise accrued had she not been suspended beyond fifteen (15) days.

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

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

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

January 6, 2021
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 1/6/21

Date Mailed to Parties: 1/6/21

id

APPENDIX

LIST OF WITNESSES

For Appellant:

None.

For Respondent:

Gerard Malek

Tracy Bowers

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None.

For Respondent:

Tab A	Warrant 0714-W-2015-000257
Tab B	Warrant 0714-W-2015-000258
Tab C	Summons 0714-AV-404226
Tab D	Summons 0714-AV-404227
Tab E	Order 15-01; and Preliminary Notice of Disciplinary Action, dated January 6, 2015
Tab F	Indictment 2015-6-1426
Tab G	Correspondence re Loudermill Hearing
Tab H	[not in evidence]
Tab I	Essex County Prosecutor's Office Report, dated October 11, 2016
Tab J	[not in evidence]
Tab K	DVD entitled #3 1044 Bergen Street"
Tab L	[not in evidence]
Tab M	Superior Court of New Jersey, Decision and Order, Hon. Michael L. Ravin, J.S.C., dated July 28, 2017
Tab N	Newspaper Articles
Tab O	[not in evidence]

Tab P	Irvington Police Manual, Chapter 3
Tab Q	Irvington Internal Affairs Bureau, Supplemental Report, dated August 29, 2018
Tab R	Preliminary Notice of Disciplinary Action, dated September 7, 2017
Tab S	[not in evidence]
Tab T	Final Notice of Disciplinary Action, dated December 20, 2017