Stuart J. Alterman, Esquire
N.J. Attorney ID No. 327229999
Alterman & Associates, LLC
8 South Maple Avenue
Marlton, NJ 08053
Phone: (856) 334-5737
Fax: (856) 334-5731
salterman@alterman-law.com
Attorneys for Appellant

DONALD BUCCI,	) Superior Court of New Jersey) Appellate Division
Appellant	) Docket No.: A-000934-22 (Team 2)
v.	) On Appeal from the Superior Court) of the State of New Jersey, Law
TOWNSHIP OF HAMILTON,	) Division
Respondent.	) SAT BELOW:) Superior Court (Law Division)
	) Docket No. ATL-1928-20
	) **BRIEF OF APPELLANT**) **DONALD BUCCI**

On the Brief

Stuart J. Alterman, Esquire
N.J. Attorney ID No. 327229999
salterman@alterman-law.com

Date Submitted: August 3, 2023

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PRELIMINARY STATEMENT

For allegedly failing to property conduct nineteen (19) property checks called into dispatch coupled with allegedly misrepresenting his location and failing to conduct an additional eight (8) property checks, Respondent Township of Hamilton ("HT") charged Appellant Donald Bucci ("Bucci"), one of its police officers with fifteen (15) years of law enforcement service, with violations of Conduct Unbecoming a Police Officer, violations of Untruthfulness, and violations of Neglect of Duty for which it sought the penalty of removal.

Unfortunately, the Internal Affairs ("IA") investigation undertaken by HT was flawed. It was so flawed that the charges filed against Bucci were not brought within the statutorily required time limit and should be procedurally dismissed. Assuming, *arguendo*, this Court does not procedurally dismiss the charges, Bucci is confident this Court will find that HT failed to meet its burden of proof on some or all of the levied charges. Additionally, Bucci is confident that this Court will find that removal is inappropriate under the totality of circumstance given the concept of progressive discipline underlying New Jersey jurisprudence.

PROCEDURAL HISTORY

On March 27, 2019, HT, a non-civil service jurisdiction, served a Notice of Charge and Hearing on Bucci. (Pa5-Pa8).

Bucci entered a plea of "not guilty" and requested a departmental hearing, which took place on ten diverse dates; namely, August 7, 2019, September 20, 2019, September 24, 2019, October 16, 2019, November 14, 2019, November 15, 2019, December 12, 2019, January 23, 2020, January 28, 2020, and February 14, 2020. (1T-10T).

Following a Departmental Hearing, the assigned Hearing Officer[1] sustained the charges and recommended a penalty of removal. (Pa288-Pa402). HT took the Hearing Officer's Decision under advisement and ultimately voted to accept his recommendations as to charges and penalty. (Pa9). A Final Notice of Disciplinary Action ("FNDA") was issued against Bucci on June 30, 2020. (Pa10-Pa11). Bucci was removed by the FNDA. (Pa10-Pa11).

Bucci filed his appeal of the FNDA to the Superior Court of the State of New Jersey pursuant to N.J.S.A. 40A:14-150, where supplementation of the record took place on May 23, 2022 through May 25, 2022. (11T-16T). Additionally, the

[1] Neither Bucci, his attorneys, or his union played any role in the selection of Departmental Hearing Officer.

Superior Court Judge was supplied with the record below[2]. (1T-10T; Pa1-Pa216; Pa254-Pa402).

Written closings were submitted by Bucci and HT to the Superior Court Judge, who then issued a Memorandum of Decision (Pa218-Pa249) and an Order (Pa217) on October 19, 2022. Same affirmed the findings of the Departmental Hearing Officer below and sustained the removal of Bucci. (Pa217-Pa249).

On November 28, 2022, Bucci filed a timely Notice of Appeal. (Pa250-Pa253). This appeal now follows.

[2]It should be noted Bucci has supplied this Court with the most legible copies in his possession as to the documents contained at Pa1-Pa216; Pa254-Pa402). Moreover, Bucci has not supplied this Court with the complete record supplied to the Superior Court Judge which is itemized at Pa1-Pa4. This is because some of the Google Maps and other exhibits are completely non-legible and Bucci will defer to HT to supply cleaner copies or more legible copies to this Court as part of their Appendix (assuming cleaner or more legible copies exist). Additionally, a complete copy of the New Jersey Attorney General Guidelines as to Internal Affairs was part of the record below given to the Superior Court Judge. However, that document is publicly available and Bucci has opted not to attach its 200+ pages to what is already a lengthy Appendix.

STATEMENT OF FACTS[3]

The Underlying Allegations

Gregory Ciambrone ("Ciambrone") worked for HT since 1997. (11T56:7). Ciambrone served as Patrolman, Sergeant, Lieutenant, and Chief of Police. (11T56:10). Ciambrone became Chief of Police on July 2, 2019. (11T56:14).

Ciambrone (then a Lieutenant) became involved in the IA investigation which formed the basis of the charges in this matter. (11T57:8). Sgt. Christopher Prychka ("Prychka") had advised Ciambrone that Bucci did not properly perform a property check. (11T57:14).

Specifically, on November 20, 2017, Prychka was purportedly performing a property check function at the Victoria Pointe clubhouse parking lot in HT. (13T169:16). Prychka called out the check on his car radio. (13T169:21). Prychka was still in the complex itself and Bucci radioed in that he was doing a property check at Victoria Pointe. (13T170:1-4). Prychka testified that he waited in the area for Bucci, but Bucci did not arrive. (13T170:9). Prychka, however, did not and had not called Bucci on the radio. (13T171:5).

Prychka testified that after several minutes of waiting and not seeing Bucci, Prychka contacted dispatch by phone to find out Bucci's location on the GPS.

[3] Most references in this Statement of Facts are transcript references and not appendix references. That stems from the volume of the record below coupled with the page limitations of the Brief in this Court.

(13T173:2). Prychka did that because he did not have his GPS on in his car or his Mobile Data Terminal ("MDT") on at the time. (13T173:7,11,13). Prychka testified that dispatch notified him that Bucci's car was located at the Mays Landing clubhouse. (13T173:16). Prychka purportedly drove to that location and testified that he observed Bucci's car parked in the parking lot of the clubhouse. (13T174:25). Prychka testified that he did not know who was in the car and could not affirmatively say that he saw Bucci in the car. (13T176:1).

Prychka did not recall the car number but testified that Bucci was using one of HT's SUVs. (13T177:5). Prychka testified that he was "done with that situation" and so proceeded on. (13T178:2).

Based on Prychka's allegations, Ciambrone also looked at GPS data before and after Bucci went out on injury leave. (1T59:9). Ciambrone testified the reason he did that was because he, "just wanted to make sure that [Bucci] didn't forget how to do a property check." (11T59:15-17). So, Ciambrone testified that is why he checked how Bucci did a check before and then how Bucci was doing property checks after he came back from injury leave. (11T59:19-20).

Ciambrone testified he identified nineteen (19) incidents where Bucci's property checks had issues. (11T60:5). Ciambrone testified that a list of seven (7) incidents in his report consisted of property checks that were performed, but according to Ciambrone, were not performed correctly. (11T61:3). Ciambrone also

indicated eight (8) other property checks called in by Bucci which Ciambrone alleged were not done at all. (11T62:2). Ciambrone conceded that "apparently" some HT Officers did not know what a property check was. (11T102:23).

Facts Specific to the 45-Day Rule at Departmental Hearing

Ciambrone conceded that the Attorney General IA Policy and Procedures were implemented by statute under N.J.S.A. 40A:14-181. (6T56:15, 22). Ciambrone conceded that a witness' memory of an event is better closer to the date of the event. (6T62:17). Ciambrone testified that his focus was on the data and so taking contemporaneous testimony was not a concern of his. (6T63:1). Ciambrone conceded that the IA Guidelines provide that all relevant reports should be obtained and preserved as expeditiously as possible. (6T65:7). Ciambrone conceded that the IA Guidelines contain an impetus to act quickly and expeditiously in an investigation. (6T66:6).

Ciambrone conceded that Bucci worked his regular schedule from November 20, 2017 through March 25, 2019 with no incidents involving similar allegations to this matter. (6T69:12-13).

Ciambrone conceded that it was more than a year, fourteen to sixteen months, after the event that he interviewed Bucci. (6T104:1). Ciambrone, in part, attributed his failure to complete the investigation in a timely manner to having to do work for HT's Police Department's accreditation, training, and doing year-end reports.

(6T71:17-23; 72:14-15). Ciambrone had a lot of things going on. (6T73:4). Ciambrone did not interview Bucci until a year after the initial notice of IA. (6T74:14). Ciambrone never requested additional information from the Atlantic County Prosecutor's Office ("ACPO").

Facts Specific to the 45-Day Rule at Superior Court

Ciambrone conceded that from the first time he interviewed Bucci was almost a year after Bucci was served with the initial IA target notice. (11T168:12). Ciambrone advised Bucci he was under investigation for a property check issue on December 11, 2017. (11T170:8,10).

Ciambrone was in charge of IA at that time. (11T173:19). Ciambrone reported to then-Chief of Police Stacy Tappeiner ("Tappeiner") who advised him to conduct an IA investigation. (11T174:4). Ciambrone notified the ACPO that HT was initiating an IA based on Prychka's allegation that Bucci reported a property check he never performed. (11T176:10). The ACPO "kicked it back" declining to prosecute because there was not anything criminal and told HT they could do the IA investigation administratively. (11T176:19).

Regarding the delays in interviewing Bucci, Ciambrone attributed same to scheduling issues with Bucci's attorneys. (13T99:4-16).

Ciambrone indicated that he could not "say yes or no" to whether he read all pertinent parts of the New Jersey IA Guidelines promulgated by the New Jersey

Attorney General. (13T96:19). Ciambrone did not want to assume, and was not sure, whether the IA Guidelines were implemented by statute. (13T97:3). Yet Ciambrone conceded that the IA Guidelines provide that investigations must be concluded on a timely basis. (13T97:15). Ciambrone conceded that the IA Guidelines mandate that all investigations should be conducted as soon as possible and as close to the date of the infraction being investigated. (13T97:21). Ciambrone conceded that he did not keep the ACPO apprised of the progress of the investigation. (13T102:9).

Ciambrone conceded that he was aware of the "45-Day Rule." (13T132:14). Ciambrone conceded that he submitted his report to the Chief of Police over one (1) year and four (4) months after notifying Bucci he was the target of an administrative investigation. (13T132:25). Ciambrone's excuse for failing to abide by the 45-Day rule was that he did not have all the data he needed because it was a continual process. (13T133:13). Moreover, Ciambrone conceded that he failed to keep a chronology of the IA investigation status. (13T133:19). Ciambrone conceded that when he served Bucci with the IA notice that he was a target back in 2017 Ciambrone was in possession of the GPS/ABL data regarding Prychka's report of an improperly conducted property check at that time. (13T135:14).

Tappenier is the former Police Chief for HT. (15T5:25). Tappenier worked at HT for thirty-one (31) years. (15T6:7). Tappenier rose through every rank in the HT Police Department and for a time was in charge of IA. (15T6:14,22).

Tappenier knew about the initiation of the IA investigation of Bucci in this matter but did not know any of the times or specific dates anything happened procedurally. (15T8:10,12,17,22).

Tappenier did not recall when Ciambrone started interviewing anyone. (15T9:11). Tappenier conceded that the fact that Bucci was not interviewed until practically a year later after the submission of the complaint was due to delays by Bucci's attorneys because that is what Ciambrone told him, but ultimately he did not know what the specific reasons for delay were. (15T12:16,19-24). Tappenier conceded that he never directed Ciambrone to simply summon Bucci in and interview him, which could have been done. (15T13:21).

Other Deficiencies in the IA Investigation

Ciambrone testified that he did not interview Prychka, but rather, just had a brief conversation where Prychka initially reported that Bucci did not do a property check. (11T187:24). Ciambrone also failed to take a full and thorough statement from Prychka at any point in time. (11T188:12). Ciambrone's excuse for not taking a statement from Prychka was that the investigation was "data driven." (11T188:14).

Ciambrone conceded that the only information he received from Prychka was in Prychka's initial brief conversation. (11T188:22).

Ciambrone also failed to direct Prychka to write a report on this matter. (11T1189:9). Ciambrone did not recall going back to Prychka and talking to him at all about the case. (11T191:19).

Ciambrone conceded that he only had an issue nineteen (19) of five-hundred-eighty-six (586) property checks that Bucci performed. (11T194:18). Ciambrone conceded that he only looked at data near the exact times Bucci called in a property check, and not at the entire shift, to see whether Bucci did a property check on a particular area as he called in, but did it at a different time during his shift, which was something other Officers testified was a regular occurrence when patrolling the Township. (11T194:9 - 196:4).

Ciambrone conceded that what he wrote in his report regarding Bucci and the Victoria Pointe property check GPS/ABL mapping data was not accurate. (12T205:19 - 206:9).

Ciambrone testified that he did not think Bucci was "guilty" of misrepresenting that he was on foot patrol. (12T206:21 - 207:6).

Ciambrone further conceded that he mischaracterized what occurred during the real-time GPS data review during the second interview, which Ciambrone termed a "meeting." (12T209:15 - 210:8).

Ciambrone conceded that at the end of the recorded IA interview with Bucci a request was made to look at real time GPS. (13T19:3). When the real-time data was being viewed was from Hamilton Commons to the Fairways. (13T24:22). Ciambrone conceded that after leaving the interview following Bucci's comment that he was on foot, Ciambrone never continued any interviews with Bucci again. (13T27:14).

Ciambrone conceded that all the dates referenced in his report occurred roughly one (1) year to one-and-a-half (1.5) years at the time of the recorded IA interview of Bucci. (13T81:12). Ciambrone conceded that he verbalized some dates but did not show Bucci any data or information. (13T82:7).

Ciambrone conceded that Bucci worked without incident between November 7, 2017 all the way through March 25, 2019 when he was charged by HT. (13T103:7).

Regarding the truthfulness charge against Bucci, Ciambrone testified that the basis thereof was that Bucci allegedly misrepresented his location and failed to conduct eight (8) property checks that he called in to dispatch. (13T131:18-20). Ciambrone's report also conceded that Bucci did not properly conduct the property checks and contended that Bucci's explanation that he was out on foot patrol was a fabrication. (13T131:20-24).

IA Inefficiencies Confirmed By Expert Testimony

Joseph J. Blaettler ("Blaettler"), with a Master's degree in Police Administration, graduate of the FBI National Academy, manager of Professional Criminal Justice at the College of Saint Elizabeth serving as an adjunct professor for around ten (10) years, and former Police Officer for twenty-three (23) years (retiring with the title of Deputy Chief) served as Bucci's expert in the area of the proper way to conduct IA investigations. (5T9:24 - 10:4, 7; 11:4; 18:12-14; Pa278-Pa287). Blaettler reviewed the IA file in this matter as well as listened to the interviews and reviewed the IA report. (5T18:24-25; 19:1-5; Pa278-Pa287).

Blaettler concluded that 18 months for an investigation to be undertaken from the date of the event to completion was "unacceptable" and did not meet the New Jersey AG IA Guidelines' requirements. (5T23:3-12; Pa278-Pa287).

Background of Bucci and Foot Patrols/Property Checks within HT

Bucci was employed with HT for fifteen (15) years. (8T42:17, 20). When Bucci began with HT, he was trained by Officer Gerhard Thorensen ("Thorensen") where Thorensen showed Bucci around and trained him in the use of equipment, the call structure, the format used to handle certain calls, and general duties and expected operations of HT Police Officers. (8T49:1-6). However, Thorensen did not train

Bucci how he was supposed to conduct a foot patrol. (8T49:9). Bucci's understanding of a property check was comprised of a number of things. (8T49;13-14). Bucci understood that a property check could be conducted either on foot or by car and the purpose was to improve the quality of that property or doing certain things in relation to protecting the property to canvass for specific activity and to prevent crime. (8T49:13-25). Bucci was "pretty much self-taught" how to conduct property checks. (8T60:1).

Bucci was not familiar with any rules and regulations promulgated by the HT Police Department on how to do property checks and never received any training in any classroom from anyone at HT on how to do property checks. (8T61:2, 6).

In May 2017, Bucci got injured while on patrol at the Hamilton Township Mall. (15T55:3). Bucci had surgery in June of 2017 and was cleared by Functional Capacity Exam and returned to work in October of 2017. (15T57:21).

In and around the November 2017 timeframe, Bucci and the Department experienced problems with the radios having issues with transmitting and receiving calls in the Police cars and in the portable radios. (15T166:4,6,17). Bucci did not always use the radio when he got out to perform foot patrol property checks, whether through complacency or whether things were routine, he would sometimes go out of the car and not call it in. (15T167:14,16). Bucci also went on foot patrol with other Officers in the Department. (15T168:1).

Bucci worked from November 2017 through March 27, 2019 and performed property checks the same way he had done them in the past. (15T94:23; 15T95:3 - 96:23).

Prior to November 2020, no one from HT told Bucci that he was performing property checks in a fashion not acceptable to HT. (15T64:13).

Confirmation of Bucci's Testimony Concerning Property Checks

Officer James Esposito ("Esposito") worked at HT's Police Department for twenty-eight (28) years, knew Bucci, and worked with him for ten (10) years. (7T29:25; 30:5, 11-12). When Esposito worked with Bucci they were required to perform property checks. (7T31:10).

Esposito was not aware of any written directives, SOPs, or even training manuals on how to perform a property check. (7T32:4). Esposito showed Bucci how to perform property checks and explained to Bucci that you are not going to see anything from inside the patrol car, you would preferably want to be out walking around because the police cruiser is a "beacon." (7T32:14-18). Most of the property checks Esposito performed were on foot and it was not unusual to do so. (7T33:7, 9).

Esposito explained that the radio system had problems with transmission and that an officer sometimes would make a transmission and it would not go through. (7T34:12-13). If an officer realized the transmission was not going through the

officer would have to say it a few more times, walk to different locations and try again to get a response. (7T34:9-15). Esposito indicated that some property checks were possible to conduct by driving. (7T34:22). Esposito indicated that riding by the Hamilton Mall, or driving by the old canine academy could constitute property checks. (7T35:7, 12).

Esposito testified that walking on foot patrol is the best way to catch bad folks doing bad things. (7T37:9-10).

Detective Christopher Rizzo ("Rizzo") works for HT's Police Department, has been a Detective for one year and a Police Officer for fourteen (14) years. (7T159:13-14, 19; 160:2). When he was a Patrol Officer, Rizzo would deploy out of his vehicle on foot patrol. (7T160:23). Rizzo worked in Area 6, the same area as Bucci. (7T161:13). Rizzo worked with Bucci and deployed on foot with Bucci. (163:3, 6). Rizzo was not aware of any official departmental document, directive, rule, SOP, or regulation that says how to do a foot patrol or how to deploy on foot. (7T:164:3).

Regarding property checks, Rizzo indicated that in his experience he had physically started to conduct a property check, did not call it in, and was reassigned to something prior to completing the property check. (7T165:21-24). Rizzo indicated that he had called in a property check and then all of a sudden got

reassigned or something else came up where he could not perform the property check. (7T166:6).

Rizzo also indicated that he experienced problems with the transmission of the radio system. (7T166:10). These problems occurred particularly when an Officer was out on foot. (7T166:25). There were times when Rizzo was speaking on the radio and thought he was transmitting but the transmission was not going through. (7T167:6).

Officer Ryan A. Brady ("Brady") is a Patrol Officer with Manalapan Township Police Department and was formerly a Patrol Officer with HT's Police Department, having worked in Hamilton as a Police Officer for three-and-a-half (3.5) years. (9T4:11, 17, 22-23). Brady was a co-worker of Bucci and worked with him for the 3.5 years Brady worked for Hamilton. (9T5:2, 5-6). As an Officer, Brady conducted property checks, which involved checking an area, the buildings, looking for suspicious activity, break ins, forced entry, in both residential and commercial districts. (9T5:16-20). Other Officers had different opinions of what constituted a property check. (9T6:5-6). It was a regular occurrence to be conducting a property check and, for one reason or another, an Officer is distracted and must leave the property check to go to a different call or other more pressing activity. (9T6:8-18). It was a regular, if not frequent, occurrence to be involved in

doing a property check and become distracted with some other duty-related activity and forget to call in the property check. (9T6:25).

The only training Brady received in conducting property checks came when he was shadowing another officer who showed Brady that Officer's way of doing property checks, but Brady did not receive any formal training resulting from formal policies of how to conduct a property check. (9T7:8-17).

Per Brady, at times, the Officers of HT would experience problems with their radios, including the car radio and portable radios. (9T9:8-14). Sometimes an Officer could key the radio while on foot patrol, thinking the call to report the property check went through, but it did not. (9T9:18).

Officer William McElrea ("McElrea"), who served as a United States Marine, works as a Patrol Officer with HT's Police Department. (5T81:19). McElrea has served in the patrol division since February of 2002, knows Bucci, and worked with Bucci. (5T81:21, 23; 82:1).

McElrea personally worked with Bucci and has been out self-deploying on foot patrol. (5T83:25). McElrea and Bucci have gone on various property checks and self-deployed many times over the years. (5T84:4-6).

McElrea has self-deployed on foot patrol and walked someplace leaving the patrol car at one point and walking to another. (5T85:3).

McElrea also indicated that at times when they were out on foot patrol Officers would have problems with their portable radios. (5T87:11). There have been problems with the portable radios throughout McElrea's tenure with HT. (5T87:15). McElrea's radio problems included difficulty sending and receiving messages on his portable radio. (5T88:9). McElrea has also had problems sending and receiving on his car radio. (5T88:12).

Current Atlantic County Undersheriff Michael Petuskey ("Petuskey") was employed in HT as a Police Officer for twenty-six (26) years, retiring with the rank of Deputy Chief. (7T4:19). Petuskey knew Bucci and worked with Bucci. (7T5:2). Petuskey was aware of officers of various ranks who went out on foot patrol in certain areas. (7T6:14). HT encouraged foot patrols. (7T6:17).

Petuskey indicated that parking an Officer's car by the clubhouse at the Mays Landing Country Club and going on foot patrol over to the Fairways area is possible to do as part of an Officer's normal duties. (7T7:2-3).

Petuskey did not know of any written directives as to how to conduct a property check for the HT Police Department. (7T12:6). Based on Petuskey's experience, it was possible to call in a property check and be diverted somewhere else and not actually perform the property check. (7T12:14). Besides the Field Training Office follow-along training there was no formal training or directives on how to conduct property checks within HT. (7T14:3).

Thoreson has been employed by HT's Police Department for over nineteen (19) years. (14T218:18). Thoreson served as Bucci's Training Officer when Bucci was hired. (14T219:12). Thoreson testified that Bucci did not need remediation on anything when Thoreson trained him over seventeen (17) years ago. (14T220:7). Bucci responded well to training and came to the job with experience from a couple of other Police Departments. (14T220:10).

Officers for HT have to do a certain amount of property checks per shift. (14T221:1; 14T222:18 - 223:7; 14T223:11-25). Thoreson has performed property checks of the mall by walking in and around the mall on foot. (14T224:4,10).

Thoreson confirmed that around the April 2017 through December 2017 time period there were burglaries in that area of Bucci's property checks and Officers would perform foot patrols to identify motor vehicle burglaries. (14T229:3-14). Thoreson also confirmed that foot patrols were common "about everywhere in the Township." (14T229:25 - 230:1).

Thoreson also testified that there are times when driving down a road an Officer will call out a property check with the intent of going in there and something else happens where somebody needs backup or something and the Officer does not go in there. (14T245:1).

Thoreson estimated the farthest he ever walked on a foot patrol was two (2) miles. (14T254:14,18). Thoreson would do that in the dark, and most of the time at

night. (14T254:21,23). Thoreson also would go out on foot patrol by himself. (14T255:19).

Thoreson testified that when he would go out on foot patrol, he would generally call out to dispatch to let them know he was doing that. (14T262:20). However, in 2017, there were a couple of years where they had a lot of problems with the radio systems. (14T263:19; 14T263:22 - 264:6; 14T267:20 - 268:20).

Thoreson personally performed property checks by parking his car in one location and walking to another location calling out the property check many times. (14T264:15). In 2017, there were no mobile GPS units on the Officers' persons. (14T264:22).

Even Prychka testified that he was not aware of any rules or regulations which informed Officers of HT's Police Department how to conduct a property check. (2T57:2-3). Prychka testified that he was not aware of any written directives advising Officers the proper or preferred way to conduct a property check. (2T57:5). Prychka testified that there was no specific standardized method that HT's Police Department demonstrates how to perform a property check other than an Officer's initial FTO training where they follow another Officer around to learn the ropes. (2T57:9).

Technology with HT's Police Department

Steven Adair ("Adair") works in HT Police Information Technology ("IT") Unit. (3T4:9-10). Adair testified that the police cars have GPS systems, and the Officers can see one another on the GPS systems. (3T6:14). Officers cannot see supervisory personnel on the GPS. (3T6:17). Dispatch can see everyone. (3T23:19). If an MDT is turned off, it also turns off the GPS. (3T6:23).

The GPS system of HT was four or five years old when Adair testified. (3T15:25). Officers' portable radios did not have GPS capability. (3T18:20). Officers on November 20, 2017 were not equipped with body worn cameras. (3T18:23-24). Adair could not recall whether there were any directives speaking to or governing the use of GPS within HT's Police Department. (3T19:11). Adair could not recall whether any rules and regulations had been promulgated at HT's Police Department governing the use of vehicle locators. (3T19:20). The GPS data retention period is indefinite. (3T63:22).

Adair testified that the entire HT Police Department is hooked up to ProPhoenix in their police vehicles. (3T24:16). ProPhoenix is software that the department uses for records management, report writing, dispatching, and the MDTs in the cars and for tracking the daily activities of the Police Department. (3T25:14-18).

Adair testified that rather than Officers using the ProPhoenix system to enter their property checks and stats, dispatch enters that information. (3T27:9). Adair conceded that if the dispatcher failed to log the event into the system because they get distracted then the event will not be logged into the system by any other means. (3T28:14). It was possible to turn the GPS system off and still be able to use ProPhoenix by unplugging the GPS device but that requires screws and unbolting it from the mount. (3T29:10-12). If an Officer were not logged into the computer, the GPS would not activate. (3T30:23-24).

Adair testified that the police cars, even sergeant's cars, should have had dashboard cameras. (3T32:12). The dash cams operate independently of the MDT systems. (3T32:21). The cameras are connected to the ignition system of the police vehicles so when the car turns on the camera system turns on. (3T32:23-25). They activate when the lights are turned on, if they have a wireless microphone, if they travel at a certain speed, or if there is a G force from an impact. (3T33:1-9). The dash cameras in the vehicles Bucci were assigned were not integrated with the MDT but instead operated independently. (3T63:17).

Adair indicated that he recalled there being a directive, order, rule, or regulation by the Department that requires people out on patrol, such as sergeants, lieutenants, or patrol officers, to be logged into their MDTs. (3T36:9-11). Adair

indicated that if an Officer was not logged into their MDT they are "off the grid" and dispatch has no other way to track them. (3T37:21).

Adair also noted that there have been problems as far as the radios not working correctly or getting stepped on or static interference and communications failing to transmit and go through. (3T38:4). Adair did not have a record of those problems and did not know whether such records were kept. (3T38:8). Adair would, however, keep track of what emails were sent about those issues. (3T38:10-11). Adair indicated that a radio transmission can go out but not be received by dispatch or the other Officers where neither dispatch nor the other Officers hear the message being transmitted. (3T40:9-10). There would be no specific tone to indicate to the Officer sending that transmission that it was not received. (3T40:16-17). If the radio failed to transmit while an Officer's MDT was turned off, no one would know where an Officer who was in trouble in that situation was located. (3T45:2-3). Also, only one person can transmit it across the radio system at a time. (3T47:13-14). There were also dead spots in the transmission which created a problematic situation. (3T68:13).

All of the officers are assigned specific vehicles for their use and supervisors are not assigned to a particular car because it has a particular type of equipment in it. (3T51:19-25). All of the vehicles are basically equipped the same way for patrol. (3T52:3).

Adair was unaware whether Prychka was using his GPS system on November 20, 2017. (3T52:7). Also, Prychka's dashcam was not integrated into his patrol vehicle. (3T68:3). On November 20, 2017, there is no GPS data to reflect that Prychka was using his MDT. (3T64:2-3). There was also no entry to show that Prychka was logged into the MDT on November 20, 2017. (3T64:5-6).

If the MDT is powered off the GPS is not working. (3T54:2). ProPhoenix also would not be working. (3T54:4). When an Officer logs into ProPhoenix the GPS system is automatically on. (3T54:15). Also, dispatch can tell who is logged into ProPhoenix. (3T54:21). The radios did not have GPS, there were no body cameras with GPS, and the only GPS capabilities came through the MDT attached to the car. (3T56:5, 10, 12). If an Officer were away from his car there would be no way to know where the Officer was, you would only know the location of his car, however, not Prychka's car because Prychka did not have GPS in his car. (3T56:12).

The MDT has a night mode where it dims and darkens the light being emitted from the MDT screen. (3T59:22). The screen on the MDT is mounted but Officers can rotate and angle the screen left and right. (3T61:6). In addition, the screen of the MDT can be blocked out so that the entire screen goes black. (3T64:13). The computer would still be logged in and running but the screen would be black. (3T64:18).

Bucci's Testimony Concerning the Property Checks at Issue

During the course of his employment, Bucci would regularly park at the Mays Landing Country Club by the Fairways clubhouse. (8T64:10, 13-14). To be covert, especially at night, Bucci would park in a "great spot" right near the fence line next to a vinyl fence, where an officer could park his or her car and no one could see the car from the road. (8T64:21-25, 65:3). The reason for having such a spot was that Bucci could go out on foot patrol, and nobody would see the police vehicle. (8T65:6-8).

Bucci could not recall the exact amount of time that he went out walking. (8T80:8-9). When Bucci left the car to go on foot patrol he left his MDT on. (8T81:13). As far as notifying the department, Bucci would either key up from his car radio that he was going to get out and go on foot patrol or a property check, or he would get out and start doing the property check and call dispatch on the portable radio. (8T81:19-23). However, the radios have issues with poor functionality. (8T82:1). Bucci had complained many times that there were problems receiving transmissions on the portable radio. (8T82:22).

Bucci knew what Prychka's car looked like but never saw Prychka drive by when Bucci parked at the clubhouse. (8T83:13). When Bucci returned to his car after going on foot patrol, Prychka or dispatch had gotten on the radio and asked Bucci to do a warrant pickup. (8T86:3). When Bucci received the radio call he had

returned to his patrol car after completing his foot patrol. (8T86:13). There was no delay in Bucci answering the radio call. (8T87:5).

Bucci was working on November 20, 2017, and was on patrol. (15T58:15). At all times Bucci knew he had GPS in his vehicle. (15T59:25). Bucci also thought their portable radios had GPS as well but found out later they did not. (15T60:3). The GPS in the cars had to be turned on via MDT. (15T61:5). Officers could see themselves as well as everyone else on shift and dispatch. (15T61:13,20).

During the first IA interview which occurred approximately a year after the event, Bucci was confronted about his whereabouts that night and Bucci reported that it could have been a case of where he went through the area earlier in the night or hit the property check later on after he did it. (8T87:13-16). Bucci was also asked about other instances but was not given all the facts for which he was being investigated. (8T88:3). Prior to giving his initial statement to Ciambrone, Bucci was not given any reports, GPS Realtime Video, or materials to review about the subject of Ciambrone's inquiry. (8T88:8). During the interview, all Bucci was given were a couple still photos of GPS, which meant nothing and were useless from an evidential perspective. (8T88:11-12).

Bucci has had issues misidentifying Victoria Pointe and Victoria Crossing. (8T96:24).

Bucci indicated that there are numerous reasons why a property check might be called in and then an Officer would be unable to complete the check. (8T98:24 - 99:10).

Bucci indicated that the GPS was an unbelievably valuable tool that he used regularly. (8T103:11). Bucci also extensively used the MDT which was in his police car as an essential tool to conduct necessary police procedures. (8T104:2). Bucci never just turned off the MDT and the policy was that the MDT was never to be turned off. (8T104:18, 21). Prychka instructed the officers that it was mandatory to use the MDT and if there was a malfunction or the MDT did not work for some reason there was a written mandate to let a supervisor know. (8T104:21 - 105:2).

In Bucci's initial IA interview, Bucci repeatedly indicated that, since the interview was taking place more than a year after the day of the alleged event, that Bucci could not remember everything with specificity. (9T16:15-16).

What Ciambrone wrote in his recitation of the second interview, which was not tape recorded in violation of the Attorney General Guidelines, did not accurately reflect what Bucci told him. (9T23:18-19). During the second interview when Bucci was shown one of the still photos of the GPS data, he told Ciambrone that that was one of the nights Bucci was out on foot patrol. (9T24:3-4). Ciambrone looked at Bucci, raised his voice, and said that they were done, and that Ciambrone was not talking to Bucci. (9T24:7-8). Ciambrone categorically rejected Bucci's truthful

statements because Bucci's truthful statements in the IA interviews did not fit with Ciambrone's predetermined conclusion. Bucci was stunned by this reaction. (9T24:10). During the second interview Bucci asked Ciambrone to check the GPS on his portable radio to show that Bucci was on foot patrol, but Ciambrone did not answer Bucci. (9T24:20-23).

When the GPS data was finally produced, after over a year and multiple requests which went unheeded by Ciambrone or HT, Bucci reviewed several dates which were raised as issues by HT. (10T7:2). Bucci looked at the following dates: April 4, 2017, April 5, 2017, April 8, 2017, April 13, 2017, April 18, 2017, April 21, 2017, October 12, 2017, November 14, 2017, November 17, 2017, November 19, 2017, November 23, 2017, April 23, 2017, and April 28, 2017. (10T7:2-7).

LEGAL ARGUMENT

POINT I

ALL CHARGES LEVIED AGAINST BUCCI MUST BE DISMISSED DUE TO HT'S BLATANT VIOLATIONS OF THE 45-DAY RULE. (Pa218-Pa249; Pa288-Pa242[4]).

N.J.S.A. 40A:14-147 through N.J.S.A. 40A:14-151 provide the statutory framework for disciplinary proceedings against a police officer. As to Bucci, N.J.S.A. 40A:14-150 provides:

> Any member or officer of a police department or force in a municipality . . . who has been tried and convicted upon any charge or charges, may obtain a review thereof by the Superior Court . . . The court shall hear the cause *de novo* on the record below and may either affirm, reverse, or modify such conviction. If the applicant shall have been removed from his office, employment or position the court may direct that he be restored to such office, employment, or position and to all his rights pertaining thereto, and may make such other order or judgment as said court shall deem proper.

Proceedings at the local or departmental level are inherently arbitrary, biased, unreasonable and/or prejudicial to the employees the public entity is attempting to discipline. See Grasso v. Borough Council of Borough of Glassboro, 205 N.J. Super. 18 (App. Div. 1985). Due to this inherent bias and uneven playing field at the local

[4] This Legal Argument was made in Bucci's written closing at the Departmental Level and in his written closing at the Superior Court Level. Reference to same is made in the Hearing Officer's Decision and the Memorandum of Decision of the Superior Court Judge.

level, N.J.S.A. 40A:14–150 was enacted for the benefit of public employees not subject to civil service to provide them with protection from arbitrary, unreasonable, biased or prejudicial action of the municipal officials by providing a right to a *de novo* hearing on the conviction of the charges of breach of discipline and sentence imposed. Grasso at 27.

Following conviction at the department level, review in the Law Division is "*de novo* on the record below and [the court] may either affirm, reverse or modify such conviction." In re Philips, 117 N.J. 567, 575 (1990). A *de novo* review:

> . . . provides [the Superior Court] with the opportunity to consider the matter anew, afresh [and] for a second time. . . . In a *de novo* proceeding, a reviewing court does not use an abuse of discretion standard, but makes its own findings of fact.

Phillips at 578.

While the *de novo* court is to give deference to the findings of the original tribunal, the ultimate obligation of the Law Division requires thorough and independent findings:

> Although a court conducting a *de novo* review must give due deference to the conclusions drawn by the original tribunal regarding credibility, those initial findings are not controlling. Ibid. Rather, the court reviewing the matter *de novo* is called on to "make reasonable conclusions based on a thorough review of the record. That process might include rejecting the findings of the original tribunal." Id., at 580. In sum, the additional layer of review underscores "the fundamental purpose" of having

> an independent, neutral, and unbiased forum review the disciplinary conviction. Ibid.

Phillips at 580; Ruroede v. Hasbrouck Heights, 214 N.J. 338, 357 (2013).

In the final analysis, the factfinder must base his ultimate findings and conclusions upon competent evidence in the record:

> It is the duty of the finder of fact, no matter the forum chosen for a police disciplinary proceeding, to point to the competent evidence in the record supporting his or her ultimate fact findings and conclusions drawn therefrom. The record before the hearing officer in this matter should have been scrutinized in that manner.

Ruroede at 361.

On appeal from the *de novo* court, this Court must:

> . . . review the record to determine whether there is sufficient, competent evidence to prove the charges against Ruroede by a preponderance of the evidence. . . .

Ruroede at 361.

Finally, legal rulings by the trial court on *de novo* review are not governed by the abuse of discretion standard and are instead reviewed by this Court *de novo*. State ex rel Qarmout v. Calvallo, 340 N.J.Super. 365, 367 (App. Div. 2001); State v. Baumann, 340 N.J.Super. 553, 556 (App. Div. 2001). The Appellate Court owes no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts. . .." Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

N.J.S.A. 40A:14-147 reads:

> 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 forty-fifth day after the date on which the person filing the complaint obtains sufficient information to file the matter upon which the complaint is based**. The forty-five-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of the state. The forty-five-day limit shall begin on the day after the disposition of the criminal investigation. The forty-five requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.
>
> **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**.

Id. (Emphasis added).

In interpreting N.J.S.A. 40A:14-147, Aristizibal v. Atlantic City, 380 N.J.Super. 405 (Law Div. 2005), explained that:

> Along these same lines, it is important that there is no delay between the conclusion of the investigation by the assigned investigator, and the decision to file charges by the person who has that responsibility. Although the 45-day clock begins at the time the person who has the responsibility to file charges has sufficient information, **an agency would have a difficult time justifying an**

> **extensive bureaucratic delay once any member of that agency has established sufficient information . . . .**

Aristizibal at 427 (quoting the Internal Affairs Policies and Procedures promulgated by the Attorney General). (Emphasis added). The Court also concluded:

> Considering (1) the judicial and administrative case law discussed above, (2) the Guidelines, and (3) the plain language of the statute, the following principles emerge regarding the intent of the 45–day rule:
>
> . . .
>
> **...extensive bureaucratic delay in conducting investigations and bringing disciplinary charges is unacceptable.**
>
> . . .
>
> The intent of the statute is to protect law enforcement officers from an appointing authority unduly and prejudicially delaying the imposition of disciplinary action.

Aristizibal at 427-428. (Emphasis added).

The New Jersey Attorney General Guidelines have the **force of law** for police entities. O'Shea v. Township of West Milford, 410 N.J.Super. 371, 382 (App. Div. 2009). (Emphasis added).

Here, despite Ciambrone's contradictory sworn statements and vacillation on the witness stand in both the local hearing and *de novo* supplementation of the record below, the Atlantic County Prosecutor's Office clearly declined to prosecute this

matter because it was administrative, not criminal, in nature. It is also troubling and of note that, when confronted at the local level on the question of the cause of the delays, Ciambrone testified:

> I guess there was a number of reasons. We were trying to finalize the previous IA and that took time to try to get the -- there was going to be another hearing on that, that IA, so it was hard to nail down a hearing date so it went on for a while. So, at that point, my Chief said, listen, you got to deal with one at a time, so just hang tight on this investigation and deal with the one at hand that's already completed.

(4T27:7-25).

However, during supplementation of the record, Ciambrone changed his response to the inquiry and instead testified that the reason for the delay was Bucci's counsel. (13T99:4). Specifically, Ciambrone testified:

> So is it your reason that it took you almost a year to interview Don Bucci because I refused to sit down with you?
>
> A. It was extremely hard to get a meeting with you and us on the same – at the same time, and I believe there was a lot of times it was either postponed, you wouldn't get a hold of me or I couldn't get a hold of you. I do know that there was an email sent to me, it was July of possibly 2018, if my memory serves me correctly, that you weren't even sure if you had another IA involving Don Bucci. And I believe that's in the record as well.

(3T99:4-16).

Whether it be a fabrication, falsehood, inaccuracy, or misrepresentation, Ciambrone's newfound explanation fails to absolve HT from its responsibility under N.J.S.A. 40A:14-147, the New Jersey Attorney General's IA Guidelines, and Aristizibal.

The letter from the Atlantic County Prosecutor designating the matter as administrative, not criminal, was sent on December 29, 2017, but is stamped received January 8, 2018 by HT. Accordingly, the latest date which began the forty-five (45) day clock under N.J.S.A. 40A:14-147, the New Jersey Attorney General's IA Guidelines, and Aristizibal was January 8, 2018. Bucci was not even interviewed until November 7, 2018, which is 303 days after the Prosecutor's Office designated the matter administrative in nature. Bucci was not charged until March 27, 2019, which is 443 days, almost 400 days more than N.J.S.A. 40A:14-147, the New Jersey Attorney General's IA Guidelines, and Aristizibal permit.

Even attributing some delay to scheduling issues, as Ciambrone said during the supplementation of the record no documents in the record can attribute the entire 443 days of sloth and negligence to Bucci. Accordingly, Bucci was prejudiced by these unlawful and impermissible delays, the statute and Guidelines have been violated, and the remedy the law requires is dismissal of the charges. Therefore, the charges must be dismissed, and the penalty of removal must be reversed.

POINT II

ALL CHARGES LEVIED BY HT AGAINST BUCCI SHOULD BE DISMISSED SOLELY ON THE EGREGIOUS VIOLATIONS OF THE NEW JERSEY ATTORNEY GENERAL GUIDELINES CONCERNING IA INVESTIGATIONS. (Pa218-Pa249; Pa288-Pa242[5]).

Disciplinary proceedings must be "conducted with fundamental fairness, including adequate procedural safeguards." Sabia v. City of Elizabeth, 132 N.J.Super. 6, 14 (App. Div. 1975). The hearing must be "fair and impartial" and must afford the officer "procedural and substantive due process." See Ferrari v. Melleby, 134 N.J.Super. 583, 586 (App. Div. 1975); Quaglietta v. Haledon, 182 N.J.Super. 136, 143 (Law Div. 1981).

The Appellate Division decided in O'Rourke v. City of Lambertvile, 405 N.J. 8 (App. Div. 2008), cert. denied 198 N.J. 311 (2009), that failure to comply with New Jersey Attorney General Guidelines on Internal Affairs Policies and Procedures mandates the dismissal of charges:

> In summary, we are convinced **that when a law enforcement agency adopts rules pursuant to N.J.S.A. 40A:14-181 to implement the Attorney General Guidelines, the agency has an obligation to comply with those rules. Because it failed to do so**, and because the deficiencies tainted the disciplinary process, **the City's decision to remove plaintiff from his position cannot stand**. . . .

[5] This Legal Argument was made in Bucci's written closing at the Departmental Level and in his written closing at the Superior Court Level. Reference to same is made in the Hearing Officer's Decision and the Memorandum of Decision of the Superior Court Judge.

O'Rourke at 23. (Emphasis added).

The violations of the New Jersey Attorney General Guidelines relating to IA by the HT in this matter were egregious concerning the 45-Day Rule. The only proper remedy is a complete dismissal of the charges contained in the FNDA at issue by the Court pursuant to the mandates of O'Rourke.

POINT III

THE RECORD DOES NOT SUPPORT THAT BUCCI WAS UNTRUTHFUL. (Pa218-Pa249; Pa288-Pa242[6]).

The New Jersey Supreme Court has said: "[A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law.... He represents 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." In re Carter, 191 N.J. 474 at 486, (alteration in original) (quoting Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 566 (App .Div. 1965), cert. denied, 47 N.J. 80 (1966)). This high standard of conduct "is one of the obligations [a State Trooper] undertakes upon voluntary entry into the public service." In re Phillips, 117 N.J. 567 at 577 (1990) (quoting In re Emmons, 63 N.J.Super. 136, 142 (App. Div. 1960)). For these reasons, an officer's dishonesty in an internal affairs investigation "is significant." Ruroede at 362–63.

In order to violate a truthfulness standard there must be an intentional, material misrepresentation which would affect the fact-finding result. See Napue v. People of State of Ill., 360 U.S. 264, 269–70 (1959); Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972).

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[6] This Legal Argument was made in Bucci's written closing at the Departmental Level and in his written closing at the Superior Court Level. Reference to same is made in the Hearing Officer's Decision and the Memorandum of Decision of the Superior Court Judge.

Here, Bucci was truthful at all times in this matter. The basis for Ciambrone's truthfulness contention was Bucci's statement to him during the second interview, or meeting, that Bucci was out on foot patrol. Ciambrone instantly stormed out and refused to continue any discussions with Bucci and refused to review any further real-time GPS data. As was confirmed and corroborated by witnesses at the local hearing, specifically Detective Rizzo (now Sergeant), Officers Esposito, Brady, McElrea, and Thoreson, foot patrols were a common occurrence, and were conducted in the manner in which Bucci testified and reported during the IA process that he had done. Perhaps of greatest significance is Thoreson's testimony that these foot patrols were done in the wee hours of the morning, generally around 2:00 a.m. to 4:00 a.m. when not much was going on in town. Bucci's foot patrol on November 20, 2017, was performed around 1:20 a.m. This dovetails with Thoreson's account of the manner and timing of foot patrols and Ciambrone's knee-jerk dismissive reaction based on Bucci's report of his foot patrol runs contrary to all evidence presented which establishes that foot patrols were a common occurrence in the Township and that Bucci's actions in undertaking a foot patrol on November 20, 2017 were appropriate.

In addition, Ciambrone testified that Bucci was untruthful in reporting to dispatch. However, as was established by the GPS data, testimony, and all evidence

in this matter, Bucci did perform the checks he called in to dispatch. Therefore, Bucci was truthful to dispatch as well.

Bucci's testimony and statements regarding foot patrols were independently verifiable. Therefore, the charges must be dismissed, and the penalty reversed.

POINT IV

HT POLICE DEPARTMENT'S RULES AND REGULATIONS DID NOT SPELL OUT HOW TO CONDUCT PROPERTY CHECKS WITH ANY DEGREE OF SPECIFICITY. (Pa218-Pa249; Pa288-Pa242[7]).

A police officer is not required to be clairvoyant in determining what methods of conducting property checks are permitted and which are not.

In the context of a statute: "A law is void 'if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" State v. Schad, 160 N.J. 156 (1999) (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983)).

By corollary, there were no written policies, procedures, rules, or regulations which mandated the form which a property check was required to take within HT. A policy which does not even exist must be the height of the definition of "vague" because no conduct is prohibited or required. Bucci testified he learned how to do

[7] This Legal Argument was made in Bucci's written closing at the Departmental Level and in his written closing at the Superior Court Level. Reference to same is made in the Hearing Officer's Decision and the Memorandum of Decision of the Superior Court Judge.

property checks on the job and based on what other officers taught him. Bucci was never trained at all by HT in any formal sense. There was almost no guidance regarding the manner and method of conducting property checks. In addition, there was documentation that it was appropriate to conduct a property check in certain circumstances while still driving in the patrol vehicle.

Bucci, Prychka, and Ciambrone all confirmed that there were no written directives, guidelines, rules, regulations, policies, or procedures which provide the proper or preferred method of conducting a property check with HT. The fact that there did not exist any formal rules, regulations, or policies and procedures specifically outlining the method in which Bucci was to conduct his property checks cannot be held against Bucci. Bucci was served with termination charges based solely on Ciambrone's opinion, not on any verifiable factual basis. Bucci must not be held to be clairvoyant and psychically determine what HT wanted of him as far as property checks were concerned.

The discipline HT brought against Bucci indicates that they found something wrong with Bucci's methods of conducting property checks even though no policies or rules prescribing or proscribing certain behavior existed. HT should have addressed any problems they had with Bucci's property checks directly with Bucci and he would have modified his methods accordingly. To move for termination

under these circumstances is the height of inequity and the charges are unsupported by just cause.

POINT V

HT FAILED TO MEET ITS BURDEN OF PROOF IN THIS MATTER. (Pa218-Pa249; Pa288-Pa242[8]).

The burden of proof falls on the agency in enforcement proceedings to prove violation of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J.Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

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[8] This Legal Argument was made in Bucci's written closing at the Departmental Level and in his written closing at the Superior Court Level. Reference to same is made in the Hearing Officer's Decision and the Memorandum of Decision of the Superior Court Judge.

In Liberty Mutual Insurance Company v. Land, 186 N.J. 163 (2006), the New Jersey Supreme Court examined the preponderance standard as follows:

> Under the preponderance standard, "a litigant must establish that a desired inference is more probable than not. **If the evidence is in equipoise, the burden has not been met.**" Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005); see also McCormick on Evidence, supra, § 339 ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence."). Application of the preponderance standard reflects a societal judgment that both parties should "share the risk of error in roughly equal fashion." Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

Land at 169. (Emphasis added).

Webster's dictionary defines equipoise as "a state of equilibrium" or "counterbalance." https://www.merriam-webster.com/dictionary/equipoise. In other words, the New Jersey Supreme Court has provided that, even where a fact is equally as likely as not to have occurred, a party has not met its burden of proof. Land at 169.

Here, taking Ciambrone's conclusions at face value the accusations may at first blush appear concerning. Certainly, if an officer deliberately failed to conduct property checks which he reported conducting that would be an issue. However, when actually looking at the abysmal quality of the investigation in this matter, where Ciambrone did not even look at the entirety of Bucci's shift, but rather an

hour or half hour before or after Bucci called out the property check, begins to undermine the façade presented by Ciambrone's report.

Add to that the multitude of evidence of Bucci being in precisely the locations he said he was when calling in numerous property checks, supported by the very GPS data Ciambrone testified drove his investigation, and HT's façade weakens further. Add in the testimony and evidence supporting foot patrols by officers in the area Bucci was patrolling on November 20, 2017, overlaid with a healthy consideration of Ciambrone and Prychka's lack of credibility in light of both of their sworn contradictory statements and incredibility, and HT's case falls to dust, or perhaps sand. In truth, HT's case is nothing more than a house of cards that when faced with the slightest scrutiny falls flat.

HT failed to prove that it is more likely than not that Bucci was not out on foot patrol when he was walking the Fairways, either to Victoria Pointe (where he called a property check) or Victoria Crossing, which borders the fairways of the Country Club and is occasionally mistaken for Victoria Pointe. Regardless, it was concretely established that officers performed the type of property checks that Bucci was performing. It was further established that officers perform property checks by driving past or through locations and, even if Bucci's checks driving by the Sandwash were not correctly performed, they were performed and the proper remedy was training or remediation, not termination.

But the burden is not on Bucci to disprove HT's erroneous and unsupported claims, the burden is on HT to establish that it is more likely than not that Bucci did, not just something incorrect, but rather that Bucci actually engaged in conduct worthy of removal. The evidence in this matter has not risen to a level which overcomes HT's burden in this matter.

POINT VI

THE NOTION OF PROGRESSIVE DISCIPLINE IS NOT SERVED BY IMPOSING REMOVAL UPON BUCCI. (Pa218-Pa249; Pa288-Pa242[9]).

The use of progressive discipline benefits employees and is strongly encouraged. West New York v. Bock, 38 N.J. 500, 522-524 (1962). The core of this concept is an evaluation of the nature, number, and proximity of prior disciplinary infractions, and in turn, the imposition of progressively increasing penalties. Id. The early theory of progressive discipline set out that a public employee's disciplinary history "may be resorted to for guidance in determining the appropriate penalty for the current specific offense." Bock at 552.

The New Jersey Supreme Court reviewed the origin and purpose of the progressive discipline doctrine as follows:

> The concept of progressive discipline finds its origins in West New York v. Bock, supra, 38 N.J. at 523, which

[9] This Legal Argument was made in Bucci's written closing at the Departmental Level and in his written closing at the Superior Court Level. Reference to same is made in the Hearing Officer's Decision and the Memorandum of Decision of the Superior Court Judge.

> addressed the necessary desire to promote proportionality and uniformity in the rendering of discipline of public employees. Bock involved a fireman who was dismissed from his position based on a pattern of tardiness. The former Commission reduced the discipline, and the Appellate Division reduced it further. In affirming the Appellate Division's reduction of sanctions, we determined that just cause for dismissal could be found where there had been "habitual tardiness" or "chronic misconduct." Id. at 522. Bock further stated that although a "single instance" of aberrant conduct may not itself be sufficient for dismissal, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to a neglect of duty" and, thus, constitute sufficient grounds for termination. Ibid.

In re Anthony Stallworth, 208 N.J. 182, 195-196 (2011). (Internal citations and quotations omitted).

In Stallworth, the New Jersey Supreme Court further explained how progressive discipline should be used:

> Since Bock, the concept of progressive discipline has been utilized in two ways: (1) to ratchet-up or support imposition of a more severe penalty for a public employee who engages in habitual misconduct; and (2) to mitigate the penalty for an employee who has a record largely unblemished by significant disciplinary infractions.

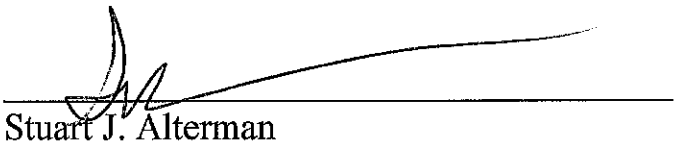
Stallworth at 195-196.

Bucci, who has faithfully served the citizens of HT for 15 years should not removed given the attendant circumstances.

CONCLUSION

A fifteen (15) year career hangs in the balance in this matter. An objective, impartial weighing of the evidence in this matter leaves no room for any conclusion other than the one that Bucci was truthful throughout these proceedings. Even if mistakes were made, given his virtually unblemished record, a penalty must be reversed. Progressive discipline is better served with remedial training with a defined suspension.

Respectfully submitted,
ALTERMAN & ASSOCIATES, LLC

By: 
Stuart J. Alterman

SUPERIOR COURT OF NEW JERSEY

DONALD BUCCI, Appellant, v. TOWNSHIP OF HAMILTON, Respondent.	APPELLATE DIVISION Docket No.: A-000934-22 (T2) *Civil Action* ON APPEAL FROM: LAW DIVISION: ATLANTIC COUNTY DOCKET NO.: ATL-1928-20 SAT BELOW: JOHN C. PORTO, P.J.Cv.

BRIEF OF RESPONDENT - TOWNSHIP OF HAMILTON

BLANEY, DONOHUE & WEINBERG, P.C.
2123 Dune Drive, Suite 11
Avalon, New Jersey 08202
(609) 435-5368
Attorney(s) for Respondent

William G. Blaney, Esq., Attorney of Record
bill@blaneydonohue.com

Kyle D. Weinberg, Esq., Co-Counsel
kyle@blaneydonohue.com

Charles E. Schlager, Jr., Esq. Co-Counsel/On Brief
chuck@blaneydonohue.com
NJ Atty ID No. 01951993

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APPLICABLE STANDARD OF REVIEW

Standards for Appellate review are the guidelines used by Appellate Courts to answer this question: was the error that occurred in a trial court or administrative agency so serious that it requires reversal or other intervention by the Appellate Court? It is the legal standard under which the Appellate Court determines how much deference to give the actions of the court or agency that the Appellant is challenging. It is also required that for an appeal to be sustainable, the Appellant must "properly present the issue on appeal" and adequately brief the issue. *See* *Pressler & Verniero*, Current N.J. Court Rules, cmt. 5.1 on R. 2:6-2 (2022). It has been determined that "an issue not briefed on appeal is deemed abandoned." State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), *aff'd o.b.*, 240 N.J. 56, 56 (2019); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

The scope of the Appellate Court's review is limited to the issue of whether there was adequate evidence before the Superior Court to justify a finding of guilt. As a result, the Superior Court's decision must stand unless the Appellate Court finds the decision was arbitrary, capricious, unreasonable, or unsupported by substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1963); In re Phillips, 117 N.J. 567, 579 (1990).

Here, it should be noted that the Appellant has failed to include a "Standard of Review" section within his submitted Appellant Brief. The closest the Appellant comes to arguing a standard of review is through *citing* Grasso v. Borough Council of Borough of Glassboro, 205 N.J. Super. 18 (App. Div.1985) and claiming that all local or departmental level proceedings are "arbitrary, biased, unreasonable and/or prejudicial." Pb29. It is worth noting that not only is this not the proper standard of review, but misses the point that the current appeal only concerns the Superior Court's *de novo* review of the Appellant's disciplinary charges and not any findings or decision from the local proceedings. *See* N.J.S.A. 40A:14-150. Wherefore, this Panel should use the previously recited proper standard to affirm the decision of the Superior Court in its entirety.

STANDARD FOR APPEALING A NON-CIVIL SERVICE DISCIPLINARY ACTION

Under N.J.S.A. 40A:14-150, an officer, if convicted of any disciplinary charge, is entitled to appeal such charges for the Superior Court's review. If the disciplinary charges are appealed to the Superior Court, the standard of review is *de novo*, meaning the Superior Court must make an independent finding of fact through a "neutral and unbiased" review of the record. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 355 (2013). In its review, the Superior Court must give some deference to the original tribunal's findings of credibility; however, the original tribunal's findings are not controlling. Musser v. Eastampton Twp. Police Dep't, 2022 WL 884627, at *1 (N.J. Super. Ct. App. Div. Mar. 25, 2022).

If the Superior Court's *de novo* review is appealed, the Appellate Court cannot make new factual findings, but must only decide whether there was adequate evidence before the Superior Court to justify a finding of guilt. Miller v. Borough of Berlin Police, 2021 WL 2525587 at *3 (N.J. Super. Ct. App. Div. June 21, 2021); *see also* In re Phillips, 117 N.J. 567, 579 (1990). As a result, the Superior Court's *de novo* review would only be disturbed if the Appellate Court found the decision was either "arbitrary, capricious, unreasonable" or

"unsupported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 580 (1963).

PRELIMINARY STATEMENT

This matter arises from a Hamilton Township Police Department internal affairs investigation into the on-duty location and activities of the Appellant, Donald Bucci, relating to multiple property checks that were intentionally misrepresented by Officer Bucci. Pa260. This internal investigation of the Hamilton Township Police Department resulted in a Notice of Charges and Hearing Form dated March 27, 2019, issued to Plaintiff/Appellant Donald Bucci (hereinafter referred to as "Bucci" or "Appellant"), an officer for the Township of Hamilton (hereinafter referred to as "Township" or "Respondent"), seeking termination. Pa5. The disciplinary charges of Conduct Unbecoming a Police Officer, Truthfulness, and Neglect of Duty and Repeated Violations thereof and of established rules and regulations, policies, procedures, and/or directives/orders were conferred upon Bucci for his repeated misrepresentation of his location and failure to conduct numerous property checks that he called in to dispatch. Id. His failure to properly conduct these property checks and also fabricating an explanation for some of the incomplete property checks by claiming to have conducted them via foot patrol. Pa260. In failing to properly perform his duties, he compromised the statistical data, which is the by-product of the property checks and is used for state reporting, federal reporting, and grant applications. Pa260. While the above incidents alone provided proper cause for

termination, Bucci's disciplinary record demonstrated gross negligence and failure to follow established rules and regulations, policies, procedures, and/or directives/orders, including multiple incidents of "pattern sickness", "lateness,", “failure to investigate”, and “failure to meet evaluation standards”.

PROCEDURAL HISTORY

This matter arose from sustained factual allegations that Officer Bucci (Appellant) acted in a manner of conduct that was unbecoming a police officer [N.J.S.A.40A:14-128 (40A:14-147)], truthfulness – (Class 1 Offense), Neglect of Duty – (Class 2 Offense) and repeated violations of the rules and regulations, policies, procedures, directives, and orders. Pa10.

Officer Bucci appealed his severance from employment, and on or about June 22, 2020, Officer Donald Bucci was formally terminated from his employment as a law enforcement officer from the Township of Hamilton for cause in conformance with the June 12, 2020, recommendation of Hearing Officer Robert A. Verry. Pa9.

Thereafter, Officer Bucci filed for arbitration, according to N.J.S.A. 40A:14–210 and N.J.A.C. 19:12-6.1 *et seq*. The Public Employment Relations Commission appointed Mr. James Mastriani as the arbitrator. The Township filed a Scope of Negotiations Petition on August 28, 2020, asserting Bucci's termination appeal should properly be before the Superior Court (see, N.J.A.C. 19:13.2.2(a)(5). In addition to filing an appeal with the Commission, Bucci also filed a contemporaneous appeal in Superior Court.

In support of its jurisdictional forum challenge to the Commission, the Township asserted, in large part, this matter is similar[1] to the matter in Isaacson v. Public Employment Relations Commission and Township Of Hardyston, Docket No. A–2991–14t4, 2017 WL 745766, Argued December 21, 2016, Decided February 27, 2017. This matter is similar to Isaacson in that both

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[1] The lower court considered the testimony of Chief Ciambrone that he [Bucci] only had an issue [with] nineteen (19) of [the] five-hundred eighty-six (586) property checks that Bucci performed. 11T194:18. The lower court considered the following factors for credibility:

- "Manner in which they testified"
  The Court found the Plaintiff's testimony guarded and measured in a manner so as to not be definitive or unequivocal, . . .whereas the Township's witnesses were unequivocal
- The witness' interest in the outcome of the trial
  The Court found the Plaintiff [Bucci] had a strong interest as he was fighting termination and an end of his law enforcement career. The Township's witnesses testified in a manner upholding the appropriate conduct of police officers as well as their truthfulness.
- Their means of obtaining knowledge
  The Township's facts were backed by credible GPS evidence and corroborated testimony
- Witness' power of discernment meaning their judgment- - understanding
  The Court found the Township's witnesses power of discernment and judgement was better than that of the Plaintiff.
- Witness' ability to reason, observe, recollect, and relate.
  The Court found the Township's witnesses ability to reason, observe, recollect, and relate was more credible than that of the Plaintiff.
- The possible bias, if any, in favor of the side for whom the witness' testified
  The Court did not find the Township's witnesses testified with any bias either for or against the Plaintiff [Bucci] or that of the Township.
  The Court found . . . the Plaintiff testified in a manner designed to present himself in a clearly favorable light and was guarded
- The extent to which each witness is either corroborative or contradicted, supported, or discredited by other evidence.
  The Township's evidence was corroborated by the witness testimony and the GPS evidence. The Plaintiff's [Bucci} was not corroborated. The Plaintiff testified he was on foot patrol, he did not notify dispatch he was a way from his patrol vehicle and was seen in his vehicle by Prychka and not seen "on foot" on November 20, 2017.
- Whether the witness testified with an intent to deceive this Court
  The Court found this to be so on the part of the Plaintiff's testimony
- The reasonableness or unreasonableness of the testimony the witness has given
  The Plaintiff's [Bucci] testimony was not reasonable at all. For example, despite being taught how to conduct property checks by his FTO, he testified that he was "self -taught." The Court did not find this reasonable in light of credible evidence confronting him from his FTO.
  Additionally, the Plaintiff testified he was on foot patrol when confronted with evidence he [his] patrol vehicle was stationary was incredible. The Township's witness testimony was very reasonable and corroborated. Pa218 at 8-10.

officers lied about their location and circumstances in reference to their police conduct and then provided false documents and/or statements. In rendering its decision requiring the matter to be heard in the Superior Court, the Commission supported the Township's assertion that this type of conduct violates N.J.S.A. 2C:28–2 (false swearing), and N.J.S.A. 2C:28–3 (unsworn falsification to authorities) and as such, would by rule, negate reliance on N.J.S.A. 40A:14-147 (45-day rule).

STATEMENT OF FACTS

The Township of Hamilton is a non-Civil Service municipality. After an extensive internal investigation, on March 27, 2019, Officer Bucci was charged with Conduct Unbecoming a Police Officer, in violation of N.J.S.A. 40A:14-128 and 40A:14-147, Department Rules and Regulations, 3.2.4 (Truthfulness), 3.3.3 Neglect of Duty, 4.1.6 Repeated violations. Pa5. After multiple days of hearing, Officer Donald Bucci was terminated from his employment as a law enforcement officer from the Township of Hamilton for cause in conformance with the recommendation of Hearing Officer Robert Verry on or about June 22, 2020. Pa9; Pa10; and Pa288.

The initial internal investigation established that Officer Bucci was alleged to have violated the following:

"(a) Conduct Unbecoming a Police Officer, in violation of N.J.S.A. 40A:14-128 (40A:14-147) by violating the good behavior standards required of all police officers and disobedience of rules and regulations established for the government of the police department.

(b) R.3.2.4 - Truthfulness. - (Class 1 Offense)

All employees are required to be truthful at all times whether testifying under oath or when not under oath, and while reporting and answering questions posed by superior officers and/or internal affairs investigators. Violating the

good behavior standards required of all police officers and disobedience of rules and regulations established for the government of the police department by misrepresenting his location and failing to conduct eight (8) property checks that he called in to dispatch. His failure to properly conduct these property checks and also fabricating an explanation for some of the incomplete property checks by claiming to have conducted them via foot patrol diminishes the position that we hold as law enforcement officers to protect and serve our community. The same community that relies on our truthfulness, knowledge, integrity, and oath to uphold the laws of the State of New Jersey and the Constitution of the United States to keep them safe. Furthermore, this statistical data, which is the by-product of the property checks, is used for state reporting, federal reporting, and grant applications. His lack of suitable attention in this area is unacceptable and will not be tolerated.

(c) R.3.3.3 - Neglect of Duty – (Class 2 Offense)

Employees shall faithfully and diligently carry out all of the duties and fulfill all of the obligations of their office. Failure to take appropriate action on the occasion of a crime, disorder, or other action or condition deserving of police attention or any other omission by an employee which represents an abandonment of one's duties, obligations, or assignment is neglect of duty and will subject that employee to discipline by failing to properly conduct nineteen

(19) property checks that he called in to dispatch. His failure to properly conduct these property checks diminishes the position that we hold as law enforcement officers to protect and serve our community. The same community that relies on our truthfulness, knowledge, integrity, and oath to uphold the laws of the State of New Jersey and the Constitution of the United States to keep them safe. Furthermore, this statistical data, which is the by-product of the property checks, is used for state reporting, federal reporting, and grant applications. His lack of suitable attention in this area is unacceptable and will not be tolerated.

(d) R.4.1.6 - Repeated Violations- (Class 1 offense)

Repeated violations of the rules and regulations, policies, procedures, directives, or orders shall be indicative of an employee's disregard of the obligations of all employees and shall be cause for dismissal. This shall apply regardless of the severity of the offense and reckoning period, and regardless of whether the violations are of the same type.

Officer Bucci failed to properly conduct nineteen (19) property checks that he called into dispatch. In 2017, Officer Bucci was investigated and plead guilty to the violation of departmental rules and regulations, "neglect of duty" for inaccurately recording statistical data which affected his bi-annual evaluations, which he failed five (5) out of seven (7) times from January 2014 to the end of 2017.

In 2015, Officer Bucci was investigated for reporting motor vehicle/pedestrian stops inaccurately, at which time he pled guilty to two (2) violations of departmental rules and regulations, specifically, "performance of duty" for failing to comply with Traffic Enforcement and MVR policies. Pa23-34, Pa50-103.

In January 2016, Officer Bucci was assigned to Sergeant Prychka to obtain remedial training on the MVR Policy, Traffic Enforcement Policy, as well as how to properly calculate your Monthly Activity Sheet. Officer Bucci was shown by Sergeant Prychka how to compare his Monthly Activity Sheet against the RMS system to ensure an accurate Monthly Activity Sheet. Officer Bucci advised that he does not compare his Monthly Activity Sheet against the RMS system regularly as he was instructed to do so by Sergeant Prychka.

Statistical Data is vital in directing resources and ensuring that we are efficiently serving our community. Officer Bucci continued to inaccurately record his statistical data, which affects his bi-annual evaluations, which he has failed five (5) out of seven (7) times from January 2014 to the end of June 2017. It also affects the peer per-day statistics, as well as the way we provide service to the people of our community. Most importantly, it diminishes the position that we hold as law enforcement officers to protect and serve our community. The same community that relies on our knowledge, integrity, and oath to uphold

the laws of the State of New Jersey and the Constitution of the United States to keep them safe. His lack of suitable attention in this area is unacceptable and will not be tolerated.

Further, Officer Bucci's disciplinary history throughout his career evidences gross negligence:

From May of 2008 to present, Officer Bucci was disciplined or counseled in regards to the following violations of rules and regulations, policies, procedures, and/or directives/orders:

3 Pattern Sickness. (Three (3) Performance Notices)

2 Late to his shift or post (Performance Notice)

1 Failure to Investigate a Domestic Violence Incident (4-day suspension)

1 Failure to notify of lost equipment in a timely manner (Performance Notice)

1 MVA in assigned Patrol vehicle- Preventable. (Reprimand)

5 Failing to meet Evaluation Standards during the last five(5) of seven(7) evaluations. One (1) Performance Notice, One (1) Reprimand, Two (2) Administratively handled, One (1) issue pending.

2 Improper reporting of statistical data

1 - Four (4) day suspension,

1 - Twelve (12)-day suspension and remedial training."

- Pa5; Pa260

Based upon the aforementioned charges, Officer Bucci requested a hearing. As a result, the Township appointed Robert Verry as the independent hearing officer, and hearings were conducted on August 7, 2019; September 20, 2019; September 24, 2019; October 16, 2019; November 14, 2019; November 15, 2019; December 12, 2019, January 23, 2020, January 28, 2020, and February 14, 2020. *See* 1T – 10T. By decision dated June 12, 2020, Hearing Officer Verry sustained the aforementioned charges. Pa288.

On appeal to Superior Court before the Honorable John C. Porto, A.J.S.C. considered the record below comprised of testimony and evidence presented at the aforementioned local hearing as well as supplementation of the record. The supplemental testimony began on May 23, 2022, and was conducted over a three-day period. *See* 11T – 16T. On or about October 19, 2022, Judge Porto issued his decision sustaining the charges imposed by the Township and affirming the dismissal and termination of employment within the Township of Hamilton. Pa217 & Pa218.

After receiving the lower court's adverse decision, the Appellant filed a motion of reconsideration[2] with the Public Employment Relations Commission seeking anew their request for an appointment from the special disciplinary arbitration panel.

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[2] Both parties, pursuant to Section 19:12-6.5, submitted briefs on their position and the Director of Arbitration issued a final agency decision on May 26, 2021. Here, the Appellant (Bucci), unlike the course of action taken by the Plaintiff in the Matter of DiGuglielmo, 465 N.J. Super. 42, 63 (App. Div.2020), 252 N.J. 350, 285 A.3d 305 (2022), chose not to appeal the Commission's final decision.

After failing to prevail in their initial PERC petition pertaining to the forum of appeal, and failing to prevail in Superior Court before the Honorable John C. Porto, and failing in their attempt for an additional bite of the proverbial apple pursuant to their motion for reconsideration before PERC.

As established under the New Jersey Employer-Employee Relations Act, Title 34, Chapter 13A, any determination made by the Commission may be appealed to the Appellate Division of the Superior Court. N.J.S.A. 34:13A-5.4(d). The Township presented its rebuttal pursuant to N.J.A.C. 19:14–8.4, specifically asserting the time limit of "fifteen (15) days," as established by law, has been well exceeded. The Township further argued that the Commission rendered its initial decision on May 26, 2021, and 601 days later; the Petitioner filed its motion for reconsideration. Moreover, the Township expressed, even if the deference was given to the Supreme Court's decision creating "extraordinary circumstances," the Supreme Court decided this matter on November 28, 2022, and the Appellant did not file its motion for reconsideration fifty (50) days. The Township asserted that the Appellant's motion for reconsideration is time-barred. The Commission agreed. Thereafter, the Appellant filed its appeal of the lower court decision to the Appellate Court.

LEGAL ARGUMENT

POINT I

THE FORTY-FIVE (45) DAY RULE WAS NOT VIOLATED AND AS SUCH, THE CHARGES AND DECISION MUST BE SUSTAINED (Pa218 -Pa249; Pa288 -402)

In New Jersey, employee discipline as it pertains to municipal police officers is, in certain circumstances, subject to N.J.S.A. 40A:14-147, also known as the "45-day rule". The purpose of this Rule was to ensure municipalities act within a reasonable time frame to bring disciplinary charges against public safety officers. The New Jersey Attorney General's Guidelines also provide that pursuant to N.J.S.A. 40A:14-147, disciplinary charges alleging a violation of the agency's rules and regulations must be filed within 45 days of the date the person filing the charge obtained sufficient information to file the charge. Specifically, N.J.S.A. 40A:14-147 states:

> 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[3] to file

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[3] Our Supreme Court has stated, "it is not the happening of the event giving rise to discipline that starts the clock for purposes of evaluating timeliness, but the receipt of sufficient information by the one who is authorized to file the charge that is significant." Roberts v. State, Division of State Police, 191 N.J. 516, 524 (2007).

The fact that other supervisory officers in the Department may know about the content and conclusions of the investigation report before the Chief did "is irrelevant, because only the Chief had the authority to file disciplinary charges". Webb v. New Jersey Transit Corp., 2012 WL 1192025 (App. Div. 2012), at *2.

> the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. (emphasis supplied)

The Appellate Division has clarified the implication of N.J.S.A. 40A:14-147 in McElwee v. Borough of Fieldsboro, A-1230-06T3 opining N.J.S.A. 40A:14-147's time limit for bringing disciplinary charges against an employee does not apply when the charges are based on misconduct grounded in Title 4A of the New Jersey Administrative Code, nor 2C of the New Jersey Criminal Code.

Specifically, McElwee Court stated:

> However, a violation of "internal rules and regulations" is only one of the grounds upon which a police officer may be disciplined. The statute also allows a police officer to be removed for incapacity or misconduct but imposes no time constraints on a complaint seeking removal on those grounds. McElwee, 400 N.J. Super at 394, emphasis added.

Further, it is reasonable to assume that "if the Legislature intended to limit the time period in which to bring charges under N.J.S.A. 40A:14-147, then it would not have specifically limited the forty-five day rule to violations of rules and regulations. It is also reasonable to believe that the Legislature knew exactly what it was doing by limiting the forty-five day rule to rule and regulation violations, since misconduct under N.J.S.A. 40A:14-147 is not premised on the violation of any rule or regulation. Thus, municipalities may take their time in charging alleged misconduct and do not have to adhere to the "45-day" rule so long as the alleged misconduct is grounded in title 4A of the New Jersey Administrative Code or 2C of the New Jersey Criminal Code.

Our Supreme Court has said: "[A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law... He represents 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." Twp. of Moorestown v. Armstrong, 89 N.J.Super. 560, 566, 215 A.2d 775 (App.Div.1965), *certif. denied*, 47 N.J. 80, 219 A.2d 417 (1966). This high standard of conduct "is one of the obligations [a police officer] undertakes upon voluntary entry into the public service." In re Phillips, 117 N.J. 567, 577, 569 A.2d 807 (1990) (*quoting* In re Emmons, 63 N.J.Super. 136, 142, 164 A.2d 184

(App.Div.1960)). For these reasons, an officer's dishonesty in an internal affairs investigation "is significant." Ruroede, supra, 214 N.J. at 362–63, 70 A.3d 497.

Despite the disingenuous attempt by the Plaintiff to create the impression that this appeal creates a *de novo* review, the lower court is controlling except if the appellate tribunal finds that the decision below was 'arbitrary, capricious, unreasonable, or unsupported by substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, supra.; *see also* In re Phillips, 117 N.J. 567, 579 (1990). The lower court, in deciding that the Township did not violate the "45-day Rule," stated, in pertinent part:

> The chronology of events is critical. The IA investigation was opened on November 20, 2017. [Then Lt.] Ciambrone notified Plaintiff [Bucci] of the investigation on December 11, 2017. The Atlantic County Prosecutor's Office was notified of the IA, and they "kicked it back"; they declined to prosecute because there was nothing criminal involved. Ciambrone was informed that he could do the IA administratively. However, if there was probable cause for anything criminal, Ciambrone was to report back to the Prosecutor. Ciambrone testified the charges were criminal in nature", but also informed Plaintiff it was an administrative investigation. Ciambrone did not have any further contact with the

Prosecutor's Office; Ciambrone conducted the formal interview with the Plaintiff on November 7, 2018. On March 27, 2019, Plaintiff was charged with the aforementioned violations.

At the time of the interview, Ciambrone did not think Plaintiff was guilty of misrepresenting he was on foot patrol, and he "had to go back in..." Ciambrone never had any further interviews with Plaintiff. Additionally, Prychka was later interviewed by Ciambrone in February 2019. Ciambrone reported back to then Chief Tappeiner one year and four months after he notified Plaintiff of the administrative investigation. When questioned about the length of the investigation, Ciambrone testified he did not have all of the data he needed "because it was a continual process." The Court finds the Complaint charging the Plaintiff was filed within 45 days after the Chief obtained sufficient information to file the matter. Ciambrone completed the thorough IA investigation when he had sufficient information and reported to the Chief at that time. The Court again finds Ciambrone credible when he testified, he did not have all of the data he needed "because it was a continual process", and in scheduling a meeting with the Plaintiff and counsel [It was noted that the Plaintiff also had other pending unrelated IA

matters at this time]. The Court finds, on this record, that the 45-day rule was not violated by the Township.

The Court next considers the appropriate discipline. In light of the entire circumstances involved, the Court finds the Township established just cause and termination is appropriate and clearly within the appropriate range of discipline. This Court considered Plaintiff's prior disciplinary record, the nature of the conduct, and the impact of the misconduct on the public interest, and public safety. As required by N.J.S.A. 40A:14-147, a police officer cannot be suspended, removed, fined, or reduced in rank without just cause.

The Court finds the Township met its burden of proof by a preponderance of all of the credible evidence. The Court finds this record presents the type of case where progressive discipline should not be imposed even in light of the Court's consideration of the Plaintiff's past record. The Court finds the nature of the violations displayed by the Plaintiff in his disregard of his duties and untruthfulness are serious and removal is appropriate. See Rawlins v. Police Dept. of Jersey City 133 N.J. 182, 197-98 (1993).

- Pa288 at pages 27-30.

The Township relies strongly upon the compelling analysis of Judge Porto. This reliance is not only because of the trial court's comprehensive analysis of the 45-Day Rule, but his unique perspective and understanding of the evidence presented at trial. Given the persuasive determination of the trial court, the Township asserts that the forty-five day rule under N.J.S.A. 40A:14-147 was not violated, and the trial court's ruling must be upheld.

POINT II

THE ATTORNEY GENERAL GUIDELINES ARE BASED ON FUNDAMENTAL FAIRNESS, WHICH WAS AFFORDED TO OFFICER BUCCI, AND AS SUCH, THE CHARGES AND THE LOWER COURT'S DECISION MUST BE SUSTAINED.

Despite the redundant nature of this issue raised by the Appellant in his brief at Point II (Pb 36), the Township acknowledges that due process is guaranteed to police officers as set forth in the Attorney General Guidelines on Internal Affairs made applicable to all law enforcement agencies under N.J.S.A. 40A:14-181. The Attorney General Guidelines provide, in part, that:

> The goal of internal affairs is to ensure that the integrity of the department is maintained through a system of internal discipline where fairness and justice are assured by an objective and impartial investigation and review.

The Attorney General Guidelines further state,

> Every law enforcement agency shall establish an internal affairs unit or function. Depending upon the need, the internal affairs unit can be full or part-time. In either case, this requires the establishment of a unit or the clear allocation of responsibility and resources for carrying out the internal affairs function...

After his termination as a result of Hearing Officer Verry's recommendation, Officer Bucci filed for arbitration under N.J.S.A. 40A:14–210 and N.J.A.C. 19:12-6.1 *et seq*. The Township challenged the arbitration petition of Officer Bucci, asserting this forum falls outside the standards established by law and the court and should properly be heard before the Superior Court (see, N.J.A.C. 19:13.2.2(a)(5). While the Commission was returning a decision in favor of the Township, Officer Bucci had already filed a complaint in Superior Court, Atlantic County, challenging the recommendation of Hearing Officer Verry. Officer Bucci did not appeal the decision of the Public Employment Relations Commission.

POINT III

APPELLANT HAS FAILED TO PROPERLY PRESENT AND BRIEF AN ISSUE FOR APPEAL BEFORE THE APPELLATE COURT AND, AS SUCH, IS OUTSIDE THE SCOPE OF REVIEW OF THE APPELLATE COURT. (*not argued below*)

The Appellant has appealed the Superior Court's finding that the disciplinary charges against the Appellant should be dismissed after a *de novo* review pursuant to N.J.S.A. 40A:14-150. The issues on appeal, typically involve "one or more of four basic standards of review: 1) the de novo, or plenary, standard of review applied to rulings of law; 2) the highly deferential standard applied to findings of facts; 3) the mixed standard applied to mixed questions of law and fact; or 4) the highly deferential standard applied to matters committed to the sound discretion of the lower court". "New Jersey Standards For Appellate Review" by Ellen T. Wry, Director, Central Appellate Research Staff, Appellate Division, New Jersey Superior Court (August 2022 Revision), *citing*, Mandel, N.J. Appellate Practice §34:2-3 (2022). The Appellant primarily presented issues subject to 'findings of fact'.

The Appellant's legal issues presented in Points II, III, IV, and V[4] are tethered to the lower court's finding of facts to which a deferential standard must

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[4] II. All Charges Levied by HT Against Bucci Should Be Dismissed Solely On The Egregious Violations Of The New Jersey Attorney General Guidelines Concerning IA Investigations. Pb36.
III. The Record Does Not Support That Bucci Was Untruthful. Pb38.

be applied. The Appellant's brief fails to present any facts or illustrate how the lower court committed an error of fact or law during a trial. Instead, the Appellant presents the same *de novo* arguments presented to Judge Porto through extensive exhibits and an exhaustive list of witnesses, including experts. In presenting these *de novo* arguments, the Appellant critically fails to present any argument as to why the lower court's interpretation of these facts and its decision was arbitrary, capricious, and unreasonable.

As previously stated, N.J.S.A. 40A:14–150, provides a non-civil service police officer, "who has been tried and convicted upon any charge or charges" the ability to have the Superior Court hear the matter *de novo* based on "the record below" and "supplemented record" provided "due deference" is given to "conclusions drawn by original tribunal regarding credibility, those initial findings are not controlling." In re Phillips, supra., *also see*, Romanowski v. Brick Township, 185 N.J.Super. 197, 204, 447 A.2d 1352 (Law Div.1982), *aff'd* o.b., 192 N.J.Super. 79, 469 A.2d 85 (App.Div.1983); Ruroede v. Borough of Hasbrouck Heights, supra.; Musser v. Eastampton Twp. Police Dep't, supra.

On appeal, the "appellate court plays a limited role in reviewing the de novo proceeding." In re Phillips, supra. 579 (*citing*, In State v. Johnson, 42 N.J.

IV. HT Police Department's Rules and Regulations Did Not Spell Out How To Conduct Property Checks With Any Degree Of Specificity. Pb40.

V. HT Failed To Meet Its Burden Of Proof In This Matter. Pb42.

146, 199 A.2d 809 (1964), [the court's] "function on appeal is not to make new factual findings but simply to decide whether there was adequate evidence before the Court to justify its finding of guilt.") Id. at 161, 199 A.2d 809 (*quoting*, *State v. Dantonio*, 18 N.J. 570, 575, 115 A.2d 35 (1955)). "[U]nless the appellate tribunal finds that the decision below was "arbitrary, capricious or unreasonable" or "[un]supported by substantial credible evidence in the record as a whole," the de novo findings should not be disturbed." In re Phillips, supra. at 579 (*quoting*, Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980), Campbell v. Department of Civil Serv., 39 N.J. 556, 562, 189 A.2d 712 (1963)); *see also* Jason Miller v. Borough Of Berlin Police, No. A-1321-19, 2021 WL 2525587 (N.J. Super. Ct. App. Div. June 21, 2021), Cert. Denied Sub Nom. Miller V. Borough Of Berlin Police, 248 N.J. 519, 261 A.3d 321 (2021).

In the revised publication, *"New Jersey Standards For Appellate Review"* by Ellen T. Wry, Director, Central Appellate Research Staff, Appellate Division, New Jersey Superior Court (August 2022 Revision), it states, "Appellate courts apply a deferential standard in reviewing factual findings by a judge." Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Ibid quoting, Griepenburg v. Twp. of Ocean, 220 N.J.

239, 254 (2015). Deference is given to credibility findings. Ibid. (*quoting* State v. Hubbard, 222 N.J. 249, 264 (2015)). "Appellate courts owe deference to the trial court's credibility determinations as well because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Ibid. (*quoting*, C.R. v. M.T., 248 N.J. 428, 440 (2021) (*quoting* Gnall v. Gnall, 222 N.J. 414, 428 (2015)).

"A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" New Jersey Standards For Appellate Review (*citing* State v. Mohammed, 226 N.J. 71, 88 (2016) (*quoting* State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (*quoting* Rova Farms Resort, Inc. *v.* Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

The publication provides, "[t]he general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Ibid. (*quoting* Gnall v. Gnall, 222 N.J. 414, 428 (2015) (*quoting* Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)), *see* State v. Camey, 239 N.J.

282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record"). The deferential standard is applied "because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020) and "[l]imiting the role of a reviewing court is necessary because '[p]ermitting appellate courts to substitute their factual findings for equally plausible trial court findings is likely to undermine the legitimacy of the [trial] courts in the eyes of litigants.'" State v. McNeil-Thomas, 238 N.J. 256, 272 (2019) (alterations in original) (*quoting* State v. S.S., 229 N.J. 360, 380-81 (2017)).

The Township asserts that the Appellant has failed to present any substantive issue or argument that the lower court's decision was in error, but

instead attempts to present again and anew, its original case brought before the lower court. The Township asserts that this constitutes a fatal error under the standard of review and fails to show or present an argument as to how the lower court's decision was arbitrary, capricious, or unreasonable. As such, the Appellant's appeal must fail, and the lower court's decision must be upheld.

SUMMARY AND CONCLUSION

The Township asserts that the lower court fully considered evidence and testimony presented by the parties regarding the 45-Day Rule (N.J.S.A. 40A:14-147). The lower court applied the standard(s) established in McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008) and Aristizibal v. City of Atlantic City, 380 N.J. Super. 405 (Law Div. 2005) in reaching its decision that the 45-day rule was not violated. While the Appellant raises the issue on appeal, they offer no proofs or arguments that the lower court's decision was arbitrary, capricious, unreasonable, or unsupported by substantial credible evidence. As such, the lower court's *de novo* findings should not be disturbed.

There is no substantive evidence on the record or by argument to substantiate that the New Jersey Attorney General Guidelines were not followed, nor that Officer Bucci was not afforded adequate procedural safeguards to permit fundamentally fair disciplinary proceedings. The procedural history and applicable standards were established by the lower court and generally shown herein. Effectively, the Appellant, in raising this issue, is merely attempting to again argue a violation of the 45-day rule. As above, the Appellant offers no proofs or argument that the lower court's decision was arbitrary, capricious,

unreasonable, or unsupported by substantial credible evidence. As such, the lower court's de novo findings should not be disturbed.

The Appellant's brief presents certain issues that are, as presented, outside the scope of this Court's review. As to these issues, the Appellant failed to establish any facts or illustrate how the lower court committed an error of fact or law during a trial. Instead, the Appellant merely regurgitates the same *de novo* arguments they presented to Judge Porto through extensive exhibits and an exhaustive list of witnesses, including experts.

In presenting these *de novo* arguments, the Appellant critically fails to present any argument as to why the lower court's interpretation of these facts and its decision was arbitrary, capricious, and unreasonable. As such, the lower court's de novo findings should not be disturbed.

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. Henry v. Rahway State Prison, *supra*. Other factors to consider are the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. As these standards were applied by the lower court and no evidence was presented to show the decision below was arbitrary, capricious, unreasonable, or

unsupported by substantial credible evidence in the record as a whole, the *de novo* findings should not be disturbed.

Respectfully submitted,

Blaney, Donohue & Weinberg, P.C.

/s/ Charles E. Schlager, Jr.

Charles E. Schlager, Jr., Esquire

Stuart J. Alterman, Esquire
N.J. Attorney ID No. 327229999
Alterman & Associates, LLC
8 South Maple Avenue
Marlton, NJ 08053
Phone: (856) 334-5737
Fax: (856) 334-5731
salterman@alterman-law.com
Attorneys for Appellant

DONALD BUCCI, Appellant v. TOWNSHIP OF HAMILTON, Respondent.	Superior Court of New Jersey Appellate Division Docket No.: A-000934-22 (Team 2) On Appeal from the Superior Court of the State of New Jersey, Law Division SAT BELOW: Superior Court (Law Division) Docket No. ATL-1928-20 **REPLY BRIEF OF APPELLANT DONALD BUCCI**

On the Brief

Stuart J. Alterman, Esquire
N.J. Attorney ID No. 327229999
salterman@alterman-law.com

Date Submitted: November 15, 2023

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PROCEDURAL HISTORY

Bucci adopts and incorporates by reference the Procedural History contained in his Moving Brief.

STATEMENT OF FACTS

Bucci adopts and incorporates by reference the Statement of Facts contained in his Moving Brief.

LEGAL ARGUMENT

POINT I

THE OPPOSITION BRIEF OF HT CONTAINS SEVERAL FACTUAL INACCURACIES.

The Opposition Appellate Brief of HT contains several inaccuracies that must be touched upon.

First, at page 8, HT asserts "plaintiff was seen in his vehicle by Prychka" and not seen on foot. This is incorrect. Prychka at no time testified that he saw Bucci. In fact, he testified that Bucci's vehicle was in three different locations during his testimony. Initially, he testified he stated that his vehicle was "tucked in" which would render seeing it impossible.

Prychka thereafter changed the location of Bucci's vehicle only after Bucci testified he was on foot patrol.

A recreation was done to show where Bucci parked his vehicle on November 20, 2017. There was no way possible anyone could see inside of Bucci's vehicle on the night in question.

Second, HT claimed Bucci said he was self-taught in performing property checks. In reality, Bucci's FTO testified that he taught Bucci how to conduct them. Thoresen also testified that he too would conduct property checks on foot and did so in a manner that was similar to how Bucci testified he did them. Thoresen stated that he would park his vehicle in the parking lot of Hamilton Commons and walk across to the area of Shore Toyota and check those buildings at night. Bucci testified that he did the same thing.

POINT II

HT'S RELIANCE ON McELWEE DOES NOT SAVE ALLEGED RULE AND REGULATION CHARGES FROM DISMISSAL UNDER THE 45-DAY RULE.

On March 27, 2019, Bucci was charged with Conduct Unbecoming a Police Officer, in violation of N.J.S.A. 40A:14-128 (40A:14-147) , 3.2.4 Truthfulness - (Class 1 Offense), 3.3.3 Neglect of duty (Class 2 Offense), 4.1.6 Repeated violations - (Class 1 offense), with the penalty sought of Dismissal. (Pa5-Pa8). Except for the charge of Conduct Unbecoming a Police Officer, the balance of the charges were rule and regulation charges of HT.

In McElwee v. Borough of Fieldsboro, 400 N.J.Super. 388 (App. Div. 2008), the Appellate Division opined:

> As the statute provides, the requirement that a complaint be filed within forty-five days of the date when the complainant has sufficient information to make the complaint pertains to alleged violations of "internal rules and regulations established for the conduct of [the] law enforcement unit [.]" However, a violation of "internal rules and regulations" is only one of the grounds upon which a police officer may be disciplined. The statute also allows a police officer to be removed for incapacity or misconduct but imposes no time constraints on asserting a complaint seeking removal on those grounds.
>
> **Here, the Borough sought plaintiff's removal for misconduct, not for the violation of a specific internal rule or regulation governing the operations of the Borough's police department. Therefore, the forty-five day requirement in *N.J.S.A.* 40A:14–147 did not apply and the statute did not require the dismissal of the charges.** We accordingly reject plaintiff's contention that the charges at issue were time-barred.

McElwee at 394. (Emphasis added).

In the case at bar, the only non-rule and regulation charge brought by HT against Bucci Conduct Unbecoming a Police Officer, in violation of N.J.S.A. 40A:14-128 (40A:14-147). The balance of the charges were all rule and regulation charges of HT. So, even under the most generous reading of McElwee, the only charge that survives a 45-Day Rule argument is Conduct Unbecoming a Police Officer, in violation of N.J.S.A. 40A:14-128 (40A:14-147). McElwee does not stand for the proposition that because one or more charges are brought under

N.J.S.A. 40A:14-147, by corollary, which saves rule and regulation charges from being dismissed that would otherwise be in violation of the 45-Day Rule.

POINT III

CIAMBRONE'S ACTIONS UNDERMINE THE VIABILITY OF HT'S UNTRUTHFULNESS CHARGE AGAINST BUCCI.

On page 11 of HT's Opposition Brief, it alleges Bucci was untruthful and in that he was "fabricating an explanation for these property checks". In reality, if Ciambrone believed Bucci was untruthful, it required a re-report under the New Jersey Attorney General Guidelines as to IA to the ACPO to see it wanted to pursue the alleged lie under oath from a criminal perspective. (Pa257).

The initial declination letter by the ACPO specially stated that if during the investigation any evidence was discovered of possible criminal conduct that the investigator was to contact their office and stop the investigation. (Pa257). Ciambrone not only continued his investigation but used his opinion to charge Bucci with untruthfulness.

HT's contention that the declination letter stated there was "no criminal conduct" is not accurate. (Compare Pa257). Instead, the letter states emphatically that "if any evidence" is discovered "at any point in the investigation" to stop and contact them. (Pa257).

CONCLUSION

A fifteen (15) year career hangs in the balance in this matter. An objective, impartial weighing of the evidence in this matter leaves no room for any conclusion other than the one that Bucci was truthful throughout these proceedings. Even if mistakes were made, given his virtually unblemished record, a penalty must be reversed. Progressive discipline is better served with remedial training with a defined suspension.

Respectfully submitted,
ALTERMAN & ASSOCIATES, LLC

By: _____
Stuart J. Alterman