IN THE MATTER OF MICHAEL PALINCZAR, TRENTON POLICE DEPARTMENT,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2777-22 SAT BELOW: CIVIL SERVICE COMISSION DOCKET NO.: CSR06311-2019S

BRIEF IN SUPPORT OF APPELLANT MICHAEL PALINCZAR'S APPEAL

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PROCEDURAL STATEMENT

On April 11, 2019, the City of Trenton (hereinafter, "the City") served Police Officer Michael Palinczar (hereinafter "Palinczar") with a Preliminary Notice of Disciplinary Action ("PNDA"), Civil Service form 31-A. (Pa64). A Final Notice of Disciplinary Action ("FNDA") was issued by the City on April 18, 2019 terminating Palinczar's employment without a hearing. (Pa82).

Palinczar filed his Civil Service Appeal and a trial was conducted on October 19, 2020, October 20, 2020, October 21, 2020, October 29 and November 10, 2020. When no decision was issued for over two years, Palinczar's attorney began contacting the trial court and, ultimately, the Chief ALJ Moscowitz as to the inordinate delay. Ultimately, Judge Moscowitz, *sua sponte*, entered fifteen (15) *nunc pro tunc* forty-five (45) day extensions covering the period of the inordinate delay. (Pa265).

By decision dated March 6, 2023, the Court upheld Palinczar's termination. (Pa12). Palinczar filed exceptions on March 17, 2023. On May 3, 2023, the Civil Service Commission ("CSC") adopted the Court's findings and affirmed Palinczar's termination (Pa9). Palinczar filed an Amended Notice of Appeal on May 17, 2023 (Pa1).

STATEMENT OF FACTS

Officer Michael Palinczar ("Palinczar") graduated from Trenton Police Academy in May 2001 and served the City of Trenton Police Department (the "City") as a police officer for the next eighteen (18) years. (T4 89:19-23).[1] In June 2014 he was involved in a motor vehicle accident while on duty and sustained severe injuries to his neck and back. (T4 96:3-97:18). Palinczar went out on medical leave for six (6) to eight (8) weeks and attended extensive physical therapy. (T4 96:21-97:1). Although he could have retired with a disability pension, Palinczar continued to work while in significant pain. (T4 97:9-18).

The City terminated Palinczar via a Final Notice of Disciplinary Action ("FNDA") dated April 18, 2019. (Pa82). The allegations underlying the FNDA, arose, primarily, out of an incident at Palinczar's home on July 21, 2018 when an acquaintance of his, referred to as "TL" suffered a medical crisis to which EMTs were summoned. (Pa100). The investigation into this incident then sprawled and became a wide-ranging inquisition into Palinczar's life which resulted in additional charges unrelated to the events of July 21, 2018. (Pa100).

[1] T1, T2, T3, T4, T5 and T6 reference, respectively, the trial dates of October 19, 2020, October 20, 2020, October 21, 2020, October 29, 2020, November 10, 2020 and November 23, 2020.

The Charges

At the departmental level, Palinczar was charged and found guilty of fifty-eight (58) separate charges.[2] (Pa82). The charges included:

(a) Conduct unbecoming an employee (charges #1-13)

(b) Incompetency, inefficiency or failure to perform duties (charges #14-17)

(c) Neglect of Duty (charges #18-21)

(d) Other Sufficient Cause (charges #22-34)

(e) Departmental Rules and Regulations – Reporting Violations of Law (charges #35-38)

(f) Departmental Rules and Regulations – Performance of Duty (charges #39-43)

(g) Departmental Rules and Regulations – Performance of Duty (charge #44)

(h) Departmental Rules and Regulations – Neglect of Duty (charges #45-49)

(i) Departmental Rules and Regulations- Performance of Duty (charge #50)

(j) Departmental Rules and Regulations – Being under the influence of Alcohol or Drugs on duty (charges #51-52)

[2] Charge no. 4, and associated charges no. 51 through 54, alleging conduct unbecoming a public employee and misconduct based upon the factual allegation that Palinczar was observed in an impaired condition while on duty was abandoned by the City before the trial began for lack of evidence. Specifically, counsel for the City stated that "the charges of impairment on the job we are going to withdraw." (T1 9:15-18; T1 11:4-12).

(k) Departmental Rules and Regulations – Being under the influence of Alcohol or Drugs on Duty (charges #53-54)

(l) Departmental Rules and Regulations – Notification about medication (charge #55)

(m) Departmental Rules and Regulations – Truthfulness (charge #56-57)

(n) Departmental General Order Sick Leave (charge #58).

(Pa82).

The overlapping charges arise from factual specifications more specifically addressed *infra* and summarized as follows:

(a) The TL Incident involving circumstances arising from police/medical response to Palinczar's home to address the medical emergency of a third party;

(b) The Unlicensed Driver's Incident involving circumstances arising from the use of Palinczar's vehicle by unlicensed third parties;

(c) Use of Pain Medication involving circumstances relating to Palinczar being prescribed pain medication and allegedly failing to provide required notice and/or abusing that medication;

(d) Sick Leave/Sinus Surgery/Rehab involving circumstances arising from Palinczar providing notice of his status and/or location.

Palinczar is Prescribed Pain Medication

An acquaintance of Palinczar's recommended a pain management specialist, Dr. Goswami. (T4 98:12-104:8). Dr. Goswami is Ivy League educated and received positive reviews from other patients. (T5 106:2-20). Palinczar traveled approximately one (1) hour and fifteen (15) minutes to Dr. Goswami's office in Wayne because he was a highly rated pain management doctor. (T5 106:2-107:21).[3] Palinczar was not attempting to conceal his use of pain medication by travelling to Wayne. (T5 107:22-24). Prior to initially prescribing pain medication, Dr. Goswami examined Palinczar and reviewed his medical records relating to the motor vehicle accident in 2014. (T5 145:11-146:10). In addition to prescribing pain medication (oxycodone) for Palinczar's neck and back issues, Dr. Goswami also administered steroid injections to address Palinczar's injuries once a month for almost two (2) years. (T5 146:11-147:3).

Palinczar always took the prescribed medication as directed. (T4 104:9-19). The City's witnesses, Detective Snyder and Dr. Guller, confirmed that there was nothing illegal or improper relating to Palinczar having been prescribed medication for pain. (T1 164:8-14; T2 52:3-6). Palinczar never took the medication while on duty and was never impaired while at work. (T4 104:17-19). There is no evidence that Palinczar filled any prescriptions more quickly than prescribed by the doctor, or

[3] Palinczar also travelled to Philadelphia to visit his sinus doctor, which is approximately one and one-half (1 ½) hours from his home. (T5 106:12-15).

that Palinczar abused his medication in any manner. (T1 164:14-165:5 and 167:8-11; T5 102:20-103:17). There is no reliable evidence that Palinczar ever gave his pain medication to anyone else. (T4 116:6-13). Palinczar voluntarily executed HIPAA forms for Dr. Goswami so that the Department could access his records at any time. (T1 165:6-12; T5 102:14-19, 108:3-6).

Palinczar was not aware of the Department policy mandating that officers report to their superior any prescribed medications. (T4 121:23-122:7). He testified that, when he graduated from the Academy, he was provided with a large book which, unbeknownst to him, apparently contained the medication reporting rule, but he was not trained as to the policy. (T4 121:23-122:7).

The TL Incident

On the evening of July 20, 2018, Officer Palinczar and TL were at Palinczar's home. (T4 123:24-125:5). They were watching TV when Palinczar noticed that TL had passed out and he was not able to wake her up. (T4 127:3-12). Palinczar called 9-1-1 and reported an unresponsive female having trouble breathing. (T4 129:7-11). Palinczar performed CPR on TL, and he detected alcohol on her breath. (T4 129:19-24, 131:3). He also found a small bottle of alcohol in her purse when he looked for ID. (T4 130:1-6). Palinczar's house was clean and there were no drugs or other alcohol bottles present. (T4 58:1-16; 130:21-25).

Palinczar checked TL's arms for marks, and she did not appear to have injected heroin. (T4 131:1-3). TL did not appear to have attempted suicide, since there were no slash marks on her wrists. (T4 131:3-5). There was no medication on her person, and nothing else in her pockets offering Palinczar information as to what had caused TL's condition. (T4 131:15-17). Palinczar had not seen TL do anything to cause her to be in such a condition. (T4 131:18-23). Palinczar attempted to ascertain what was wrong with TL until the first responders arrived. (T4 131:5-10).

Palinczar went outside with a flashlight to alert the first responders to his location. (T4 132:2-7). Officer Fornorotto, of the Ewing Police Department, was first to arrive at Palinczar's home. (T4 134:11-14). Palinczar was, understandably, nervous and sweating. (T4 132:12-15). Detective Snyder acknowledged that when someone is nervous or upset, they can appear jittery and can sweat from anxiety. (T2 101:10-102:1). Fornorotto testified that Palinczar was "all over the place," which Fornorotto testified may have been because he was nervous. (T4 76:5-15). Fornorotto had received no training whatsoever as to identifying narcotic intoxication and his impression of Palinczar's condition was entirely speculative. (T4 74:8-75:2). No Drug Recognition Expert ("DRE") examined Palinczar at any time. (T4 75:7-9).

Fornorotto testified that Palinczar stated that he and TL had been drinking prior to the arrival of the Ewing Police. (T4 67:13-19). This claim is not in

Fornorotto's report, and was denied by Palinczar, who does not drink alcohol. (T4 67:13-19; T5 172:4-173:13; Pa207). Fornorotto asked Palinczar what TL had taken, and Palinczar replied truthfully that he did not know. (T4 134:14-15). Fornorotto appeared as if he did not like Palinczar's answer. (T4 135:15-17). Based upon the symptoms TL was exhibiting, Palinczar said to Fornorotto that she might have taken oxycodone. (T4 134:17-21). Palinczar reached this conclusion through the process of elimination knowing that TL drank, smoked marijuana and took pills. (T4 134:24-135:2).

Palinczar is trained in the use of Narcan, and asked Officer Fornorotto for Narcan. (T4 132:20-25). Fornorotto administered Narcan, which did not initially work. (T4 135:22-136:8; Pa207). Fornorotto testified that response time to Narcan is usually immediate. (T4 70:18-24). Another Ewing Officer administered a second dose of Narcan 5 to 10 minutes later.TL became responsive 1 to 2 minutes after receiving the second dose of Narcan and vomited on the floor. (T4 63:9-14, 136:15-137:1).

At the trial, Officer Fornorotto was unable to provide the approximate number of occasions on which he:

- Made DWI arrests (T4 74:1-3);
- Was involved in DWI's where individuals were intoxicated on narcotics rather than alcohol (T4 74:4-7);
- Called a Drug Recognition Expert ("DRE") during a DWI (T4 75:3-6);
- Witnessed an individual respond to Narcan more than five (5) minutes after administration (T4 71:8-18);

- Received Narcan training (T4 65:16-23);
- Administered Narcan (T4 65:9-12);
- Responded to overdose calls (T4 64:23-65:3); and,
- Responded to medical calls (T4 64:18-22).

In its decision, the Court described Officer Fornorotto's testimony as "not particularly credible." (Pa31).

A supervisor from Ewing PD arrived on the scene and advised Palinczar that he would notify the City as to the occurrence. (T4 140:6-19). Palinczar was not uncooperative with Officer Fornorotto during the call. (T4 141:2-8). Palinczar did not know what had caused TL's condition. (T4 141:2-8). Palinczar did not believe that the incident with TL fell within the reporting requirements of the Department policy because it was a medical call which did not result in the issuance of summonses, an arrest or the discovery of contraband. (T4 141:24-142:16).

TL's subsequent urinalysis at the hospital was negative for opioids, but positive for cannabinoids. (T4 145:3-13; Pa134-Pa138). TL told the doctors at the hospital that she took 2 Percocet pills which is not indicative of an overdose. (T4 26:11-20, 29:17-20; Pa134-Pa138). Dr. Brundavanam, the emergency room doctor who treated TL, testified that TL's drug screen would have been positive for opioids if she had overdosed on opioids. (T4 23:13-22, 24:7-10, 24:11-25:3; Pa134-Pa138).

Excessive alcohol can lead to depressed breathing as expressed by Palinczar when he called the EMTs, and as was initially diagnosed by the EMTs. (T4 25:24-26:10). No blood test for alcohol was performed on TL. (T4 34:14-36:2; Pa134-

Pa138). Dr. Brundavanam testified TL could have been unconscious due to alcohol ingestion. (T4 35:8-36:2). The combination of alcohol and marijuana can potentially cause or contribute to unconsciousness. Narcan has the ability to reverse the effects of marijuana as well as opioids. (T4 31:4-21; Can Naloxone Be Used to Treat Synthetic Cannabinoid, www.ncbi.nlm.nih.gov › articles › PMC5846114; *Treatment of acute cannabinoid overdose with naloxone infusion*, Richards, John J.) (last visited August 22, 2023) (Pa226). The cause of TL's medical emergency was never conclusively determined. (T4 24:3-13).

An Internal Affairs Investigation is Initiated

Internal Affairs ("IA") called Palinczar in, while he was on vacation on July 24th, for a mandatory drug test. (T4 148:15-149:11). Palinczar's urine tested negative for any controlled dangerous substance. (T1 161:19-23; T4 at 149:12-150:5). On July 30, 2018, Palinczar returned to work for the first time since the TL incident. (T4 146:8-10). IA advised him that he was being investigated for a "major rule infraction." (T4 148:15-149:11). In conjunction with the IA investigation, Palinczar voluntarily executed HIPAA releases for Dr. Goswami permitting the Department to access Palinczar's medical records. (T4 114:22-116:1, 159:10-163:6).

IA ordered that Plaintiff attend a functional capacity evaluation ("FCE"). (T4 167:13-168:4). Palinczar "passed" the FCE and the doctor approved him for

light duty. (T4 168:5-169:9; Pa148). The FCE examiner, Dr. Gumadiala, advised Palinczar that he should go to rehabilitation ("rehab") in order to titrate off of the pain medication he had been prescribed. (T4 168:22-169:12; T5 136:4-139:11; Pa148). Palinczar did not feel like he needed rehab. (T4 at 169:10-12). Palinczar reasonably understood the doctor's statement as the Department ordering him to go to rehab. (T4 178:11-179:8).

Dr. Gumadiala wrote Dr. Goswami requesting an explanation for his prescription of opioids to Palinczar. Dr. Goswami responded in writing. (T4 169:13-170:4; T5 139:23-142:9; Pa148). Dr. Goswami told Palinczar that it would be difficult to wean him off opioids because he had been prescribed them for three (3) years. (T4 183:20-184:9).

Palinczar left the FCE accompanied by Detectives Snyder and Mondello. (T4 170:12-171:15). Although the FCE doctor approved Palinczar for light duty work, Snyder and Mondello determined that Palinczar should not be working at all and he was put on stress leave. (T4 179:9-180:19). Palinczar wanted to work, and not go out on stress leave. (T1 170:6-17).

Palinczar Has Sinus Surgery and Attends Rehab While On Sick Leave

Palinczar had sinus surgery scheduled for September 2018. (T4 172:11-13; Pa149). He had two (2) prior sinus surgeries, in 2014 and 2016. (T4 172:11-13; Pa152 – Pa154). For the previous two (2) surgeries, he would bring a note into HR

and be permitted to leave his residence without requesting permission. (T4 172:11-177:8). Palinczar had sinus surgery in September 2018 while still out on stress leave. (T4 185:16-186:14). In October 2018, Palinczar checked himself into rehab to wean off of opioids. (T4 186:15-189:14). He did so at that time because he was already on leave for stress and his sinus surgery. (T4 189:15-189:17). Detective Snyder confirmed that the Department never checked on Palinczar to determine if he was at his residence while he was on sick leave. (T1 at 174:11-176:1). Palinczar spent three (3) weeks at Florida House rehab and completed the program. (T4 189:17-20, 193:1-2).

Dr. Guller

Dr. Matthew Guller is the City's psychologist whom Palinczar was ordered to see for a fitness for duty exam ("FFD"). (T4 198:21-200:13). Palinczar told Dr. Guller that he attended rehab while out on sick leave. (T4 189:17-191:13). Palinczar did not believe that he had violated the Department's reporting policy in not advising the City that he went to rehab. (T4 191:11-13). The Department's Rules and Regulations, as to such reporting requirements, were revised in November 2018, after Palinczar had gone out on leave. Palinczar was never trained as to the new Rules and Regulations. (T4 177:9-178:10; Pa179).

The FFD

The FFD evaluation was understood to relate to Palinczar's stress as a result of the TL incident. (T4 198:21-200:13). The TL incident, however, was barely addressed. Dr. Guller's questions focused on the IA investigation into Palinczar and potential misconduct. (T4 198:21-200:13; T5 16:17-18:19; Pa193).

Dr. Guller received instruction on how to conduct the evaluation from Lt. Spakowski, who was assigned to the Human Resources Department ("HR") at the time. (T2 8:25-9:1, 40:15-22, 42:21-25). The Department had, in fact, given Dr. Guller a draft IA report, despite the fact that the investigation had not been completed and the IA investigation was not the reason that Palinczar was sent for an FFD. (T2 8:25-9:1, 40:15-22, 42:21-25, 108:15-109:8). HR was not entitled to possess the draft IA report which it provided to Dr. Guller. (T2 8:25-9:1, 40:15-22, 42:21-25, 108:15-109:8). Dr. Guller referred to the draft IA report as a "sustained disciplinary action," and further testified it was clear why he was seeing Palinczar for an FFD. (T2 40:15-22, 42:21-44:24).

Dr. Guller testified, without factual basis, to his belief that Palinczar had a "fast and loose" lifestyle, and that there was "sharing" of pills going on Palinczar's house. (T2 55:15-56:5, 58:14-18). Dr. Guller also testified (incorrectly and without basis) that individuals had been caught in Palinczar's car on three (3) occasions with drugs in the car. (T2 58:14-18). The sole objective psychological test that Dr. Guller

conducted on Palinczar, the MMPI, did not indicate that Palinczar had an issue with opioid abuse. (T2 67:6-11).

Dr. Guller testified that his FFD report was unrelated to Palinczar being out on stress leave. (T2 61:22-62:12; Pa193). Dr. Guller did not care that stress was the reason that Palinczar was out of work because, "the real issue… was substance abuse." (T2 61:22-62:12). Dr. Guller conducted Palinczar's FFD under this belief, despite the fact that the Department did not advise him that substance abuse was an issue for Palinczar. (T2 61:22-62:12). Dr. Guller did not find any evidence of drug abuse by Palinczar, but testified that "any use is abuse." (T2 67:5-68:1). By this logic, the lawful prescribing of medication would make Palinczar unfit for duty. (T2 67:5-68:1). Guller agreed that Palinczar could have been prescribed opioids for pain. Dr. Guller had no idea how much pain Palinczar was in because Guller had never asked or treated him. (T2 71:16-73:25).

Dr. Guller provided a list of recommendations to the City regarding Palinczar including attending IOP and AA meetings, and urine tests. (T5 19:22-2013; Pa202). Dr. Guller would have recommended that Palinczar attend inpatient rehab, but Palinczar had already done so at Florida House. (T2 47:6-48:1; T5 97:9-21). Dr. Guller also recommended a last chance agreement because Palinczar had been "engaging in substance use/abuse." (T2 46:12-14; Pa202). There is no evidence that Palinczar abused any of the medication that he was legally prescribed. (T1

164:8-14). Palinczar completed all of Dr. Guller's recommendations. (T5 20:25-21:2).

Dr. Guller confirmed that he did not provide medical treatment to Palinczar, and that Palinczar was lawfully prescribed opioids for pain. (T2 48:10-25). According to Dr. Guller, anyone prescribed opioids for as long as Palinczar would likely require a "detox" program to wean off of the medication. (T2 49:22-50:14).

Palinczar Cancels His Trip to Florida

On Friday, November 30, 2018, Sgt. Ponticello called Palinczar and directed him to come into IA. (T5 37:23-38:7; Pa120). Palinczar responded he was on his way to Florida to attend his stepfather's funeral. (T5 38:1-7). Ponticello replied he could come in on Monday. (T5 38:8-21). Seeking to avoid further issue, Palinczar turned his vehicle around and came home. (T5 38:12-21). Palinczar called Ponticello the next morning advising he was home and available to come into IA. (T5 38:22-39:9). Ponticello told him to come in Monday. (T5 38:22-39:9). No evidence was produced that Palinczar was untruthful in telling Sgt. Ponticello he was on his way to Florida. (T2 96:9-98:15; T3 61:2-63:15). Ponticello testified that it was confusing to him that after having spoken to Palinczar late in the evening that he was available to go to IA so early the next morning. (T3 60:4-62:25). Ponticello conceded that Palinczar's version of events could have adequately explained Ponticello's confusion. (T3 62:8-25).

On December 3, 2018, Palinczar reported to IA, where Lt. Doyle advised him that the IA investigation was complete. (T5 23:1-11). Doyle advised Palinczar he was mandated to complete all of Dr. Guller's recommendations, and then be seen again by Dr. Guller for approval to return to duty. On March 20, 2019, Palinczar advised Officer Snyder that he had completed all of Dr. Guller's recommendations. Snyder told him that he would contact Dr. Guller to schedule an FFD to bring Palinczar back to work. (T5 23:12-24:8).

The Facebook Dispute

On April 1, 2019 Officer Palinczar had a dispute with City of Trenton Councilman Blakely on Facebook. Blakely accused Palinczar of being a racist based upon a Facebook post in which Palinczar stated that citizens of Trenton do not work. (T5 24:10-32:24). On April 2, 2019, Blakely and the Mayor publicly called for Palinczar's removal as a police officer. (T5 32:24-35:6). Blakely went on the radio calling Palinczar a racist who does not deserve to be a police officer. (T5 49:24-50:14). On April 4, 2019, Palinczar was called into IA and told he was being investigated for a "major rule infraction" for violating the Department's social media policy as a result of the Facebook post. (T5 36:11-23).

Detective Snyder, the lead detective on the TL investigation, was aware of Palinczar's confrontation with Councilman Blakely at the time it had occurred. (T1 151:7-16, 153:6-13). Snyder was also aware that Councilman Blakely had publicly

called for Palinczar's termination. (T2 130:18-131:4). Snyder conceded that the IA investigation into the TL matter was initiated on since July 23, 2018 and then, one (1) week after Palinczar Facebook dispute with Blakely in April, 2019, the TL investigation was concluded and Palinczar was terminated. (T1 151:17-152:22).

The Unlicensed Drivers

Following the TL incident, the Ewing Police Department provided the City information as to motor vehicle infractions involving Palinczar's personal vehicle which had occurred in Ewing. Palinczar's vehicle had been pulled over on three occasions while being driven by unlicensed drivers. Palinczar was not issued a summons on two of those occasions and did not believe that he was required to report these incidents to the Department. (T1 158:2-3; T3 64:6-65:24; T5 39:10-45:17; Pa204 – Pa211). On the third occasion, Talitha Navedo ("Navedo") was stopped while driving Palinczar's car without a valid license. The municipal court dismissed the summons as to Palinczar due to a lack of any evidence he was aware Navedo did not have a valid license. (T5 39:10-45:17). Navedo is Palinczar's son's aunt, whom, on the occasion in question, was running errands for Palinczar, including picking up supplies for his child's birthday party. (T5 44:12-21).

Palinczar had also asked Navedo to drop off a written prescription for oxycodone at the pharmacy for him. When Navedo was pulled over she had the written prescription in her possession. (T5 46:4-47:6; Pa214). Detective Snyder

confirmed that there was nothing illegal or improper about the fact that Navedo was found with a written prescription made out to Palinczar. (T1 159:10-14).

Palinczar's Alleged Failure to Provide Notice of Medication Usage

In conjunction with a random drug test, Palinczar notified the City in writing on September 5th, 2015 that he was taking pain medication and specified what it was as a result of the motor vehicle accident in June of 2014. (T5 91:19-25; 92:1-11). Palinczar has never tested positive for a random or scheduled drug test. The City, through IA, subpoenaed the record demonstrating that Palinczar had provided notice of his prescribed pain medication, but failed to follow through with the subpoena to obtain the records which would have corroborated Palinczar. (T5 92:12- 95:1).

Palinczar's testimony that he advised the City as to what medications he was taking in 2015 is uncontroverted. Palinczar did not believe that notifying the Department in that manner was a violation of the Department's reporting policy. (T5 95:2-6). Detective Snyder issued a Supplemental IA Report regarding his attempt to locate the form where Palinczar had listed the medication that he was taking in conjunction with the random drug test. (T1 142:21-143:13; Pa216). Snyder was unable to locate the form, and was unable to establish that Palinczar did not advise the Department that he was taking medication or that he was being untruthful when he said that he did so. (T1 142:21-143:13, 163:1-11; Pa216).

Detective Snyder's Investigation and Testimony

Detective Snyder was the lead IA investigator for the TL incident. Detective Snyder confirmed that there was no complainant in the TL matter, and that the IA investigation was unusual as a result. (T1 172:16-174:3; Pa100). He confirmed the Department was generally looking for some type of wrongdoing on Palinczar's part. (T1 172:16-174:3; Pa100). Detective Snyder testified that the broad purpose of the investigation was "to see if there was inappropriate conduct on the part of Officer Palinczar as a law enforcement officer." (T2 113:9-13; see, e.g., Pa100).

Detective Snyder was unable to uncover any evidence that Palinczar had been untruthful during the course of the investigation. (T1 at 149:1-150:21). Detective Snyder agreed that the Department's Rules and Regulations as to reporting off duty incidents, such as the TL or unlicensed drivers incidents, did not apply to Palinczar. (T2 82:13- 89:12). Detective Snyder testified that the IA investigation was delayed because IA wished to interview Dr. Goswami and could not do so until a separate DEA investigation concluded. Detective Snyder conceded that IA could have obtained Palinczar's medical records from Dr. Goswami at any time based on Palinczar's prior execution of HIPAA releases. (T2 99:1-14, 109:9-15). Detective Snyder also confirmed the IA investigation was concluded seven (7) days after Palinczar's Facebook dispute with Councilman Blakely notwithstanding that the DEA investigation had not concluded and Dr. Goswami had not been interviewed.

(T2 99:1-101:10, 109:9-25). Detective Snyder conceded no evidence in the IA investigation related to the July 21, 2018 TL Incident that had been collected after August 30, 2018. (T2 153:6-16).

LEGAL ARGUMENT

I. THE DISCIPLINARY CHARGES AGAINST PALINCZAR WERE NOT SUFFICIENTLY SUPPORTED BY CREDIBLE EVIDENCE IN THE RECORD (ISSUE RAISED AT Pa9-Pa11, Pa12-Pa63; RAISED IN EXCEPTIONS AT POINT I, POINT II, POINT III)

To reverse the Civil Service Commission's ("CSC") adoption of an Administrative Law Judge's ("ALJ") recommendation, an Appellate Court must find that the Commission's decision is "arbitrary, capricious, or unreasonable, or [ ] not supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980), quoting Campbell v. Dep't. of Civil Serv., 39 N.J. 556, 562 (1963); In re Stallworth, 208 N.J. 182, 194–95 (2011).

The same "standard applies to the review of disciplinary sanctions as well" as to the ultimate question as to whether charges should be sustained. Knoble v. Waterfront Comm'n of N.Y. Harbor, 67 N.J. 427, 431–32 (1975)). Accordingly, when reviewing administrative sanctions, appellate courts should consider whether the "punishment is so disproportionate to the offense, in the light of all of the circumstances, as to be shocking to one's sense of fairness." In re Carter, 191 N.J. 474, 484 (2007), quoting In re Polk, 90 N.J. 550, 578 (1982); see also In re Herrmann, 192 N.J. 19, 28–29 (2007).

A. Multiple Findings in the Decision[4] Are Not Predicated Upon Facts in the Hearing Record (Issue Raised at Pa9-Pa11, Pa13, Pa43-Pa63; Raised in Initial Hearing Brief, and Exceptions at Point I, Point II)

Multiple findings by the ALJ do not comport with or are contrary to the evidence admitted at trial. The ALJ did not issue the Decision in this matter until twenty-two (22) months after the record was closed and subsequent to prompting by Palinczar's counsel and the involvement of the Chief Judge Moscowitz. The ALJ was granted fifteen (15) 45-day extensions *nunc pro tunc*, and finally issued the Decision. (Pa265). It is respectfully suggested that this significant delay likely contributed to the multiple instances wherein the Decision strays from the facts in the record. Notably, the ALJ made numerous inferences against Palinczar's interests based upon "facts" not within the record.

1. There is no competent evidence supporting the ALJ's finding that TL suffered a drug overdose at Palinczar's house (Issue Raised at Pa13, Pa43-Pa46, Pa54-Pa55; Raised in Exceptions Point (I)(a))

The ALJ found the following:

> Based upon the testimony at the Zoom hearings, the parties [sic] briefs and evidence, I **FIND** the following to the facts of the case:
>
> 1. On July 21, 2018, an acquaintance of appellant, T.L., suffered a drug overdose at the appellant's home (the Incident). Appellant was off-duty at the time of the Incident.

[4] The "Decision" refers to the Decision issued on March 6, 2023 by the Honorable Jeffrey N. Rabin, A.L.J. in the case entitled In the Matter of Michael Palinczar, OAL Docket No.: CSR 06311-19. (Pa12-Pa63).

Decision at p. 2. (Pa13).

The ALJ's finding that TL suffered a drug overdose is not supported by the facts in the record rendering the ALJ's finding in this regard arbitrary, capricious or unreasonable.

The following facts are undisputed. Subsequent to the TL Incident, TL's urinalysis drug screens at the hospital was negative for opioids. (T4 23:13-22, 24:7-10, 24:11-25:3, 145:3-13). Dr. Brundavanam, the emergency room doctor, testified that TL's drug screen would have been positive for opioids if she had overdosed on opioids. (T4 23:13-22, 24:7-10, 24:11-25:3). TL told the doctors at the hospital that she took 2 Percocet pills, which could not cause an overdose. (T4 at 26:11-20, 29:17-20). Excessive alcohol can lead to depressed breathing, which is what TL was diagnosed with by the EMTs. (T4 25:24-26:10). There was no blood test for alcohol done on TL. (T4 34:14-36:2). Dr. Brundavanam testified that TL could have been unconscious due to alcohol ingestion. (T4 35:8-36:2). What caused TL's medical issue was never determined. (T4 3-13).

What is clear is that there was insufficient evidence for the ALJ to find that TL "suffered a drug overdose" at Palinczar's house. That erroneous finding, thus, cannot provide support for any discipline of Palinczar.

2. <u>There is no competent evidence that Palinczar abused his lawfully prescribed medication (Issue Raised at Pa46-Pa50, Pa54-Pa55; Raised In Exceptions Point II)</u>

The allegation that Palinczar abused his pain medication permeates this

matter. However, both Detective Snyder and Dr. Guller confirmed that there was nothing illegal or improper with Palinczar having been prescribed pain medication. (T1 164:8-14; T2 52:3-6, 67:5-68:1). There was no competent evidence proving that Palinczar improperly obtained prescriptions or abused his medication in any manner. (T1 167:8-11; T5 102:20-103:17). There is no competent evidence that Palinczar shared his medication with any other person. (T1 164:8-165:5). There is no competent evidence that Palinczar took his medication while on duty or was impaired while at work. (T4 104:17-19). Palinczar never tested positive for any Departmental drug tests be it scheduled or random. (T1 161:19-23; T4 149:12-150:5).

Palinczar took his medication as prescribed. (T4 184:9-11). Palinczar's attendance at rehab does not demonstrate abuse of the medication. Instead, as confirmed by Guller, anyone prescribed opioids for as long as Palinczar was would likely be required a "detox" program to wean off of the medication. (T2 49:22-50:14).

Any part of the Decision predicated upon the finding or inference that Palinczar abused his pain medication must be disregarded.

a. <u>The ALJ's Findings that Palinczar Made False Statements and Was Untruthful Are Not Based in Fact and Should Be Disregarded (Issue Raised at Pa52-Pa55; Raised in Exceptions, Point I(b))</u>

The Commission's May 3, 2023 Decision agreed "with the ALJ's determinations regarding the charges, which were substantially based on his assessment of the credibility of the witnesses." (Pa9-10). The ALJ's credibility determinations, however, as to Palinczar were contrary to the evidence in the hearing record, and predicated upon the City's portrayal of Palinczar in a false light, as a drug-addled partier.

Section V of the ALJ's March 6, 2023 Decision titled "False Statements or Misrepresentations" references several instances in which the ALJ concludes that Palinczar's testimony was untruthful. (Pa54). The ALJ's findings in this regard are not founded upon facts contained in the hearing record.

The evidence in the hearing record diverges dramatically from the ALJ's findings. For instance, the Decision provides as follows:

> During the Incident, appellant greeted the responding police officer by requesting "the stuff" to revive his houseguest, taken to mean Narcan. **Yet when asked what T.L. might have taken, appellant did not mention opioids**.
>
> Decision at p.42 (emphasis added). (Pa53).

The ALJ's finding that Palinczar "did not mention opioids" when he was asked by Officer Fornorotto about TL's condition is inaccurate. In fact, Fornorotto testified that Palinczar advised him that TL may have taken oxycodone prior to the first time Narcan was administered. According to Fornorotto, Narcan was initially

administered within minutes after Fornorotto arrived at Palinczar's residence. (T4 63:3-8, 72:6-15). Thus, Palinczar referenced potential opioid use almost immediately. (T4 23:13-22, 24:7-10, 24:11-25:3, 145:3-13).

The Decision goes on to state:

> Appellant told IA the reason for the various responses was because he was using process of elimination. **But appellant knew what T.L. took**, knew that he had oxycodone in his home, and was familiar with the effects of opioids, enough so that he initially requested Narcan from Fornarotto. **He also lied about T.L.'s alcohol use, and about his knowledge of her alcohol use, as well as about knowing T.L. had an empty bottle of vodka in her purse and alcohol on her breath**.
>
> Decision at p.42 (emphasis added). (Pa53).

The ALJ's summary of the conversation between Palinczar and Fornorotto is not supported by the record. As addressed above, Palinczar suggested to Fornorotto potential opioid use by TL almost immediately after Fornorotto arrived. (T4 63:3-8, 72:6-15).

The ALJ's finding that Palinczar "knew" what TL took is not supported by the hearing record. It remains a mystery what, if anything TL took as the blood tests conducted at the hospital were negative for opioids, and the ER doctor testified that, if TL had overdosed on opioids, there would have been opioids in her bloodstream. (T4 23:13-22, 24:7-10, 24:11-25:3). There is simply no competent evidence that TL

obtained any pills from Palinczar as there were in opioids in her system, only cannabis. (T4 at 77:6-9).

There is also no competent evidence that Palinczar lied about T.L.'s alcohol use to Officer Fornorotto. The ALJ determined that Palinczar had knowledge about "her (TL's) alcohol use" but there is no evidence to support this conclusion. On the night of the Incident, Palinczar merely found a small bottle of alcohol in TL's purse when he looked for ID. (T4 130:1-6). There is no evidence that Palinczar knew that TL had consumed an excessive amount of alcohol. Palinczar had not seen TL do anything which would cause her medical emergency (T4 131:18-23). TL's condition could potentially have been explained by alcohol use, however there was no blood test for alcohol done on TL. (T4 34:14-36:2). The ALJ's conclusion that Palinczar lied about TL's alleged alcohol use is not founded upon fact and, thus, undercuts the ALJ's basis for concluding Palinczar was not a credible witness.

The Decision further provides:

> Appellant also lied about being under the influence of drugs. …. Appellant also lied to Fornarotto by saying he was on-duty and therefore could not have been on drugs, when he was off-duty at that time.
>
> Decision at p.43. (Pa54).

In fact, Palinczar never said anything to Officer Fornorotto about being under the influence of drugs, and Officer Fornorotto never asked. Fornorotto testified that

Palinczar exhibited some signs of being under the influence such as sweating which is equally attributable to Palinczar being nervous and upset about TL. (T2 101:10-102:1; T4 76:5-15, 132:12-15). Further, when Palinczar took an IA ordered urine test mere days after the TL incident, his urine tested negative for opioids or any other narcotic. (T1 161:19-23; T4 149:12-150:5).

The ALJ's finding that Palinczar lied about being on-duty at the time of the TL Incident is simply misguided. The ALJ found, in another portion of the Decision that "Fornarotto asked if appellant had taken drugs and he said, 'No, I'm on the job,' although he was off-duty at the time." (Pa45). The ALJ mistakenly concluded that Palinczar's statement "I'm on the job" indicated that he was currently working. To the contrary, "I'm on the job" in police vernacular simply means that he is a police officer. Palinczar's statement was not meant to indicate that he is currently on duty, rather he was advising Officer Fornorotto that he is a fellow police officer.

Comparatively, even though the ALJ concluded that Officer Fornorotto was not a particularly credible witness (Pa31), the ALJ fully relied upon his testimony.

The Decision further states:

> As set forth above, appellant also gave misleading and outright false statements regarding his third sinus surgery and going to Florida. He directly lied to Officer Ponticiello about his whereabouts on November 29, 2018.
>
> Decision at p.44. (Pa55).

There is no evidence that Palinczar gave false statements about going to Florida for rehabilitation. Palinczar had not told anyone that he went to Florida for rehab as he did not believe it was required. (T4 189:17-191:13). He told Dr. Guller during the FFD evaluation that he had gone to rehab. If Palinczar had not told Dr. Guller that he went to rehab while out on sick leave for stress, the Department never would have known, since the Department failed to check on Palinczar while he was out on leave. (T4 189:17-191:13). He did not believe that he had violated the Department's reporting policy by not advising that he went to rehab. (T4 191:11-13). Palinczar was also out on stress leave when he went for his third sinus surgery in Philadelphia in September 2018. (T4 185:16-186:14). In sum, Palinczar's statement to Dr. Guller about going to Florida for rehab was the only statement Palinczar made on the subject and it was not untruthful.

On Friday, November 29, 2018, Sgt. Ponticello called Palinczar and requested he come into IA. (T5 37:23-38:7; Pa34). Palinczar explained to Ponticello that he was driving and on his way to Florida to attend his stepfather's funeral. (T5 38:1-7). Ponticello responded that Palinczar should come in on Monday. (T5 38:8- 21). Wanting to be fully cooperative with the investigation, Palinczar turned his car around and came home. (T5 38:12-21). Palinczar called Ponticello the next morning advising he was home and could report to IA. (T5 38:22-39:9). Ponticello told him to come in on Monday. (T5 38:22-39:9). There is no evidence that Palinczar was

being untruthful in explaining that he was on his way to Florida when contacted by Sgt. Ponticello on November 29, 2018, and that he turned around to avoid further issue. (T2 96:9-98:15; T3 61:2-63:15). Sgt. Ponticello agreed that it would have been impossible for Palinczar to speak to him on the phone in Florida and make it back home the following morning if he had been in Florida at the time. (T3 60:4-62:25). Accordingly, there is insufficient evidence to support a finding that Palinczar lied to Sgt. Ponticello.

b. <u>The Disciplinary Charges Against Palinczar Cannot be Sustained by a Finding of Narcotics Abuse (Issue Raised at Pa46-Pa50; Raised in Exceptions Point I, Point II)</u>

Section II of the Legal Argument and Conclusion portion of the Decision is entitled "Appellant's Substance Use," and is devoted to Palinczar's alleged substance abuse. (Pa46). The ALJ made several findings to the effect that Palinczar's alleged drug abuse justified his termination The final paragraph of Section II states:

> I **FIND** that appellant's history of opioid and alcohol abuse indicated that he used poor judgment and displayed a lack of truthfulness. I **FIND** that appellant's numerous doctors, pharmacies and prescriptions, and his untruthfulness regarding his prescriptions and opioid use, indicated that appellant had been abusing prescription drugs, and in a manner that could affect his judgment and performance, while conducting his job duties as a Trenton Police Officer. I **CONCLUDE** that appellant's use and abuse of prescription drugs showed that he engaged in misconduct as a police officer under N.J.S.A. 40A:14-147, and displayed conduct unbecoming of a public employee,

> pursuant to N.J.A.C. 4A:2-2.3(a)(6). I **FIND** that appellant's daily use of high doses of opioids put himself at risk as well as members of the public whom appellant was sworn to protect, and **CONCLUDE** that this behavior constituted neglect of duty under N.J.A.C. 4A:2-2.3(a)(7), and Other Sufficient Cause pursuant to N.J.A.C. 4A:2-2.3(11) .
>
> Decision at p.39. (Pa50).

Crucially, the Department initially charged Palinczar with intoxication while on duty, but withdrew all such charges prior to the hearing for lack of evidence. (T1 9:15-18; T1 11:4-12). The ALJ's findings regarding Palinczar's alleged substance abuse do not correspond to any of the charges or specifications levied against Palinczar in the PNDA, and are not supported by the facts in the hearing record. The ALJ's opinions as to Palinczar's alleged substance abuse infected the entire decision sustaining the discipline against Palinczar.

There is no competent evidence that Palinczar abused his medication. Detective Snyder and Dr. Guller confirmed that there was nothing illegal or improper about the fact that Palinczar had been prescribed medication for pain. (T1 164:8-14; T2 52:3-6, 67:5-68:1). There is no competent evidence that Palinczar filled any prescription other than as prescribed by his doctor, or that Palinczar abused his medication in any manner. (T1 167:8-11; T5 102:20-103:17). There is no competent evidence that Palinczar ever shared his prescribed medication with anyone else. (T1 164:8-165:5). There is no competent evidence that Palinczar ever took the medication while on duty or was impaired while at work. (T4 104:17-19).

Palinczar never tested positive at a random or scheduled Departmental drug test, which were administered periodically while Palinczar was working. (T1 161:19-23; T4 149:12-150:5).

Accordingly, any conclusions or determinations based upon the unsupported conclusion that Palinczar abused drugs or that such abuse affected his judgment or performance while on duty as a police officer must be rejected.

c. The ALJ Erred in Accepting The Opinions of Dr. Guller After Explicitly Rejecting Him As An Expert Witness Relating to Opioid Abuse (Issue Raised specifically at T2 at 33:19-36:22, e.g., Pa48-Pa49; Raised in Exceptions Point III)

N.J.R.E. 702 provides that expert testimony will only be admissible if it "will assist the trier of fact to understand the evidence or determine a fact in issue…" N.J.R.E. 702. For a witness to be qualified as an expert, it must be shown that the witness has certain skills, knowledge or training in a technical area or one that is not common to the world. Scully v. Fitzgerald, 179 N.J. 114, 129 (2004); Hake v. Manchester Tp., 98 N.J. 302, 314 (1985). In such a setting where a witness does not meet the criteria of the rule, it has been said that such testimony is so lacking in foundation as to be worthless. Anderson v. A.T. Friedman Supply, 416 N.J. super. 46, 74-75 (App. Div. 2010), *certif. den.* 205 N.J. 518 (2011).

Here, the Respondent never offered Dr. Guller as an expert witness prior to having him provide a myriad of baseless opinions about Palinczar's alleged unfitness for duty as a result of his alleged "opioid abuse." Despite Dr. Guller not being a

medical doctor and his utter failure to understand or investigate the reasons for Dr. Goswami's opioid prescriptions, the ALJ nonetheless placed substantial reliance on Dr. Guller's worthless opinions in finding Palinczar guilty of the disciplinary charges. To make matters worse, the ALJ accepted the opinions ***after*** finding he would not accept Dr. Guller as an expert in the field of "substance abuse." (T2 33:23-36:22). As such, his conclusions should not be permitted to stand.

The ALJ relied significantly upon Dr. Guller's testimony about Palinczar's alleged substance abuse in forming his decision to sustain Palinczar's discipline. The Decision provides, in relevant part, as follows:

> Dr. Matthew Guller found appellant's opioid abuse to be an extension of his alcohol abuse. He determined that appellant was taking very high dosages of opioids three times per day, although opioids should only be used "as needed." He indicated that a person taking opioids three times daily would be an indication that the person was in constant pain; however, appellant was not in pain when examined by Dr. Guller….Dr. Guller indicated that a person having prescriptions filled for high doses of opioids but not needing them or using them was an indication that the person was sharing his prescription drugs with other people…Dr. Guller stated that opioids were highly addictive and, for that reason, opioid use should end thirty to sixty days after the use commenced. Dr. Guller indicated that one of the prescribing doctors, Dr. Goswami, should have been suspicious about appellant using more than one kind of opioid, and about appellant travelling great distances and using many doctors and pharmacies to obtain drugs which were indications of a person "doctor shopping" in order to receive additional drugs… Decision, p.37-38. (Pa48-Pa49).

During Dr. Guller's testimony, Palinczar's counsel objected to the admission of Dr. Guller's opinions arguing that Dr. Guller was not offered as an expert and was not qualified as a psychologist to opine on Palinczar's alleged opioid abuse since he could not even prescribe medication. (T2 34:1-35:17). Notably, the ALJ agreed with counsel and explicitly ruled "I am **not** going to accept Dr. Guller as an expert in substance abuse." (T2 33:23-36:22, emphasis added). Despite this decision, the ALJ inexplicably allowed the questioning to continue, indicating it would give the testimony the appropriate weight when making its findings. (T2 36:12-18).

Moreover, Dr. Guller testified that Palinczar was lawfully prescribed opioids for pain. (T2 48:10-25). Dr. Guller testified that he did not know anything about the reason that Palinczar had been prescribed opioids since he did not treat or examine Palinczar. (T2 48:10-52:6; T2 71:16-73:25). Thus, Dr. Guller had no specific information about Palinczar's physical condition that required prescription pain medications.

Prescribing medication and its effects are beyond Dr. Guller's training and experience. Moreover, Dr. Guller did not examine or treat Palinczar relating to the specific medication that he was prescribed or the reason underlying that prescription. Dr. Guller's testimony as to the length of time that medication should be prescribed, the dosages that should be prescribed and the impact of medication upon an individual's work performance has no probative value and should be disregarded.

While the ALJ explicitly ruled "I am not going to accept Dr. Guller as an expert in substance abuse." (T2 33:23-36:22), the ALJ relied upon and adopted Dr. Guller's testimony regarding the prescribing and the effects of opioid medication as if he was so qualified.

In sum, while the ALJ correctly ruled that Dr. Guller was not an expert witness and could not provide opinion testimony on opioid substance abuse, he nonetheless permitted the testimony and more egregiously relied heavily upon this inadmissible evidence to sustain the disciplinary charges against Palinczar. Also, Dr. Guller's testimony was not only improper as expert testimony, it was rampant speculation from a factual standpoint and his conclusions cited above by the Court should have been disregarded. For this reason, this court should reverse the decision below and permit a new hearing.

II. THE DOCTRINE OF PROGRESSIVE DISCIPLINE DICTATES A LESSER PENALTY THAN TERMINATION FOR OFFICER PALINCZAR AS TO ANY CHARGE WHICH CAN BE PROPERLY SUSTAINED (ISSUE RAISED AT Pa55-Pa59; RAISED IN INITIAL HEARING BRIEF POINT I(b) AND EXCEPTIONS POINT IV).

Termination, as to any sustained charge in this matter, would constitute an excessive form of discipline.[5] For example, in In the Matter of Eugene Collins,

[5] Notably, the most serious charge levied against Palinczar in the FNDA, charge no. 4, and related charges 52 through 54 – relating to impairment while on duty – were abandoned by the City prior to trial due to lack of evidence. Specifically, counsel for the City stated that "the charges of impairment on the job we are going to withdraw." (T1 9:15-18; T1 11:4-12).

City of Newark, OAL DKT. NO. CSV 03776-08, 2009 WL 1425165, at p.4-5 (May 15, 2009) (Pa238) the subject officer was charged with nine (9) separate specifications, primarily predicated upon Collins' failure to report various information to his superiors at the Newark Police Department.[6] This included failure to report a threat made against a fellow officer by an unknown male who had approached appellant on March 15, 2007. On or about March 30, 2007, the Office of Professional Responsibility was advised by another officer about the threat made and Collins' knowledge of who issued the threat. Collins was charged with violating several department regulations based upon his failure to contact Central Communications or Internal Affairs immediately after the incident. Charges against Collins were sustained based on a finding he was obligated to report the incident to a supervisor and should have detained the individual who issued the threat. Id. Despite the multiple charges of neglecting to report information to the Department and/or his superiors, Collins' removal was overturned by an ALJ and a suspension was imposed.

Officer Palinczar's conduct was not as egregious as Officer Collins' since there was no threat of harm to another officer caused by his alleged failure to report information. The charges against Palinczar consist of: failure to report unlicensed

[6] The officer was separately charged with an inability to perform the duties of a police officer under N.J.A.C. 4A:2-2.3(a)(3).

drivers being pulled over in his vehicle (for which he was not charged with any crime or wrongdoing); failure to report his legitimate use of lawfully prescribed medications; failure to report leaving his residence while on sick leave; and, permitting unlicensed drivers to operate his vehicle. While Palinczar vigorously disputes the veracity of these charges in the event any or all were sustained, Palinczar's termination would still be unjustified.

By way of further example, Trenton Officer David Ordille faced criminal charges and was charged by the Trenton Police Department with false swearing and perjury. (See Decision, I/M/O David Ordille) (Pa252). It was alleged that Officer Ordille lied on a search warrant and a federal judge ruled that his testimony was not credible. Ordille was designated a "Brady cop" and, essentially, became unable to testify in court because his trustworthiness was in doubt. There was significant media coverage related to Ordille's disciplinary matter. Articles can be found at: https://www.trentonian.com/news/trenton-cop-facing-dismissal-for-lying-on-search-warrant-in-federal-drug-case/article_095ae374-dacd-11ea-8850-2fccc3e64879.html, (last visited April 30, 2021); see https://www.trentonian.com/ news/trenton-councilwoman-asks-ag-to-keep-trenton-cop-who-lied-in-warrant-from-getting-job/article_36e81d0a-4ba4-11eb-a94b-178b441ca2c2.html, (last visited April 30, 2021).

A hearing officer sustained 16 out of the 17 departmental charges issued against Ordille, notwithstanding pleading guilty to 16 charges, Ordille was not

terminated but suspended for six months and is currently back at work with the department. See id.

The penalty of termination is disproportionate to the conduct for which Officer Palinczar has been charged. Progressive discipline has long been recognized as a principle of civil service jurisprudence. In Town of West New York v. Bock, 38 N.J. 500 (1962), the New Jersey Supreme Court held that an employee's past record should be considered when deciding the appropriate level of discipline. "Past record" includes an employee's history of promotions and commendations and recent history of adjudicated disciplinary actions. Id. Moreover, the penalty imposed may not be so disproportionate to the offense and the mitigating factors that the administrative decision is arbitrary or unreasonable; if a sanction is "so disproportionate to the offense ... as to be shocking to one's sense of fairness," it must be rejected. In re Stallworth, 208 N.J. 182, 193 (2011), citing In Re Herrmann, 192 N.J. 19, 28–29 (2007); Feldman v. Town of Irvington Fire Dep't, 162 N.J. Super 177, 182 (App. Div. 1978).

It is submitted that "the concept of progressive discipline in this case should be used 'to mitigate the penalty' for an employee who has a record largely unblemished by significant disciplinary infractions." In re Stallworth, 208 N.J. 182, 193 (2011), citing Herrmann, 192 N.J. at 30–33. Progressive discipline must be applied in this case to decrease the severity of any proposed discipline since the

alleged misconduct is not severe, it is not unbecoming to the employee's position, it does not render the employee unsuitable for continuation in the position, nor does it cause application of the principle of progressive discipline to be contrary to the public interest. Stallworth, 208 N.J. at 196-97. Moreover, progressive discipline should be applied insofar as Palinczar's conduct did not cause any "risk of harm to persons or property." Herrmann, 192 N.J. at 30–33.

Officer Palinczar's disciplinary history is negligible and his termination unwarranted. Officer Palinczar's disciplinary history is minimal. Over the course of an nearly twenty (20) year career, he has been subject to one four-day suspension (Pa220) and handful of instances of counseling/reprimand. (Pa224; Pa225). The conduct alleged herein is not sufficiently severe to justify not applying progressive discipline and advancing directly to termination. Herrmann, 192 N.J. 28–29.

Further, the Penalty section of the ALJ's Decision (Pa55) relies upon allegations that neither form the basis of any charges against Palinczar nor are supported by facts in the record. The ALJ's Decision states as follows:

> Appellant had been abusing prescription opioids and perpetrated untruthfulness regarding his prescriptions and opioid use, constituting misconduct as a police officer under N.J.S.A. 40A:14-147, and conduct unbecoming a public employee, pursuant to N.J.A.C. 4A:2-2.3(a)(6). **Appellant's daily use of high doses of opioids put himself at risk as well as members of the public whom appellant was sworn to protect, which behavior constituted neglect of duty under N.J.A.C. 4A:2-2.3(a)(7), and Other**

> **Sufficient Cause pursuant to N.J.A.C. 4A:2-2.3(11). …**
>
> Finally, appellant offered false statements, misrepresentations and evasive answers on several occasions, and such statements constituted conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) and Other Sufficient Cause, as set out in detail in the FNDA.
>
> Decision at p.46 (emphasis added) (Pa57).

The charges against Palinczar did not include charges based upon substance abuse and/or him placing the public at risk. The ALJ's erroneous conclusion as to Palinczar's purported substance abuse (as to which Palinczar was not even charged) requires, at a minimum, remand for the purpose of determining an appropriate remedy.

In addition, a significant portion of the justification for Palinczar's termination as set forth by the ALJ in the Decision is predicated upon a false narrative unsupported by the competent evidence.

The Decision provides as follows:

> Appellant also argued that his conduct in this matter "did not offend publicly accepted standards of decency or destroy public respect in the delivery of governmental services," and therefore should not constitute a valid basis for termination. **However, a police officer with an opioid addiction covering up an overdose in his home, was a matter of concern that went beyond the police department. Appellant valued his own personal concerns over those of his houseguest, T.L. and, therefore, over the public at**

> **large. His obfuscation of the facts regarding the Incident could have meant a delay in getting T.L. proper care. Having a cache of various pills at his home might have given T.L. the impetus or the opportunity to take an overdose of drugs. Failing to advise his superiors as to his medications meant that the Trenton Police Department might have had an armed officer on duty while on opioids.**
>
> Decision at p. 47 (emphasis added). (Pa58).

The ALJ ignores substantial facts that are contrary to the narrative laid forth above. As is discussed at length and in detail above, it is undisputed that Palinczar did not abuse his medication, and the proofs contradict the conclusion that TL overdosed in this home. (See above). Moreover, the record does not support the ALJ's opinion that Palinczar attempted to "obfuscate" facts about the Incident, and that he lied to Officer Fornorotto, or anyone else, at any time. (T5 75:22-77:8). The finding that Palinczar maintained "a cache of various pills at his home" constitutes an outrageous misrepresentation of the record which contains no competent evidence to support such a conclusion. (T4 23:13-22, 24:7-10, 24:11-25:3, 145:3-13).

There is, likewise, no competent evidence that Palinczar ever provided pills to TL or anyone else and, again, no evidence that TL overdosed on opioids.

There is no competent evidence that Palinczar was ever under the influence while on-duty, and he is not charged with such conduct. Detective Snyder and Dr. Guller both confirm that there was nothing illegal or improper about the fact that Palinczar had been prescribed medication for pain. (T1 164:8-14; T2 at 52:3-6, 67:5-

68:1). There is no sufficient evidence tending to prove that Palinczar filled any prescriptions more quickly than prescribed by his doctor. (T1 167:8-11; T5 102:20-103:17). Likewise, there is no evidence that Palinczar abused any of the medication that he was prescribed or that he ever shared it with anyone else. (T1 164:8-165:5).

In addition, there is no competent evidence that Palinczar ever took the medication while on duty or was ever impaired while at work. (T4 104:17-19). Palinczar's entry into rehab does not indicate abuse of the medication. According to Dr. Guller, anyone prescribed opioids to treat pain for as long as Palinczar would likely find it necessary to utilize a "detox" program to wean off of the medication. (T2 49:22-50:14).

Based upon the foregoing, the factual basis for the ALJ's opinion upholding Palinczar's termination is not predicated upon competent or sufficient facts in the hearing record and is, thus, arbitrary, capricious and unreasonable. Likewise the Commission's adoption of the ALJ's decision in this regard (Pa9-10) is arbitrary, capricious and unreasonable. Accordingly, Palinczar's termination should be overturned and he should be reinstated immediately with back pay or the matter should be remanded with appropriate directions for redetermination.

III. ANY REMAND ORDER SHOULD DIRECT THIS MATTER BE ASSIGNED TO ANOTHER ADMINISTRATIVE LAW JUDGE (ISSUE NOT RAISED BELOW)

Trial of this matter concluded on November 10, 2020. Following an inordinate delay and update requests, Palinczar's attorney was compelled to contact the Chief

Judge of the ALJ. A decision was, finally, issued on March 6, 2023 almost two and a half years after the case concluded. The decision was preceded by fifteen (15) *nunc pro tunc* extensions granted *sua sponte* by the Chief ALJ. (Pa265).

The excessiveness of this delay is self-apparent. This is especially true for a litigant whom, for almost four (4) years, had been fighting to be reinstated to his employment as a police officer to which he had dedicated his adult life.

That Palinczar's attorney was compelled to contact the ALJ's superior to obtain the decision creates an obvious concern of a resulting bias. This concern is magnified by the ALJ's decision wherein not only were all charges sustained but the ALJ took pains to criticize both Palinczar's conduct and character including finding, without either any or sufficient evidential basis, that Palinczar abused narcotics which caused him to be untruthful and place other persons in danger.

It is well understood that a judge should not sit in any matter wherein "a reasonable, fully informed person (would) have doubts about the judge's impartiality [.]" State v. Dalal, 221N.J. 601, 606 (2015) (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)). To this end, even an appearance of impropriety or impartiality compels recusal. See, DeNike, supra, 196 N.J. at 514. Accordingly, a litigant need not "prove actual prejudice on the part of the (judge) to establish an appearance of impropriety; an 'objectively reasonable' belief that the proceedings were unfair is sufficient." DeNike, supra, 196 N.J. at 514 (quoting State v. Marshall, 148 N.J. 89, 279 (1997).

The factual circumstances and history of this matter undoubtedly creates an "objectively reasonable" belief of the potential of partiality or unfairness should the matter be remanded to the same ALJ.

CONCLUSION

"If a reviewing court concludes that a decision of the Commission is arbitrary, the court may either finally determine the matter by fixing the appropriate penalty or remand it to the Commission for redetermination." In re Stallworth, 208 N.J. 182, 194–95 (2011), quoting Henry, 81 N.J. at 580, citing West New York v. Bock, 38 N.J. 500, 520, 527–28 (1962)). Pursuant to Rule 2:10-5, "the appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." The Supreme Court has recognized that in determining whether to exercise original jurisdiction the Appellate Court "must weigh considerations of efficiency and the public interest that militate in favor of bringing a dispute to a conclusion." Prince v. Himeji, L.L.C., 214 N.J. 263, 295 (2013).

Accordingly, Plaintiff requests that this Court exercise original jurisdiction and enter judgment dismissing the disciplinary charges against Palinczar and reinstating him to service with back pay and seniority. In the instant matter, considerations of efficiency, most notably the excessive delay in the ALJ's determination of this matter, weigh in favor of bringing this matter to a conclusion.

For the foregoing reasons, the disciplinary charges against Palinczar should be dismissed in their entirety and Palinczar reinstated to the position of police officer with the Trenton Police Department, with back pay and seniority.

Respectfully submitted,

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Date: September 11, 2023

IN RE MICHAEL PALINCZAR, TRENTON POLICE DEPARTMENT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-2777-22

SAT BELOW:

CIVIL SERVICE COMMISSION
DOCKET NO.: 2019-3130

OFFICE OF ADMINISTRATIVE LAW
DOCKET NO.: CSR06311-2019S
JUDGE BELOW:
HON. JEFFREY N. RABIN, ALJ

RESPONDENT'S BRIEF IN OPPOSOTION TO APPELANT'S APPEAL

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PRELIMINARY STATEMENT

The instant appeal can be summarized as follows – Appellant, Michael Palinczar ("Appellant" or "Palinczar"), refuses to accept the consequences of his own actions. Appellant admits to multiple substantive violations of New Jersey statutes and administrative code provisions, as well as the City of Trenton (the "City" or "Respondent"), Police Department's ("TPD") Rules and Regulations (the "Rules and Regulations"). Appellant admits to his own failure to report these dire transgressions to TPD, which he was required to do under the Rules and Regulations. Appellant failed to provide credible testimony or evidentiary support during his Office of Administrative Law Trial (the "OAL Trial"), before the Hon. Jeffrey N. Rabin, A.L.J. ("Judge Rabin").

Nevertheless, Appellant impermissibly asks this Court to ignore the credibility determinations made by Judge Rabin that were based on record evidence. Appellant attempts to create alleged inconsistencies to distract this Court from Appellant's self-admitted failure to report his numerous Rules and Regulations violations to TPD. Put another way, Appellant misses the forest for the trees. Nothing can change the fact that Appellant admitted to violating multiple Rules and Regulations and got caught lying during the OAL Trial and to Internal Affairs. Therefore, for the reasons set forth at length below, we respectfully request that this Court deny Appellant's appeal in its entirety.

PROCEDURAL HISTORY

On April 11, 2019, Appellant was served with a Preliminary Notice of Disciplinary Action ("PNDA"). [Pa64]. The PNDA clearly advised Appellant that if he wanted a departmental hearing, he was required to request one within five (5) days of receipt of the PNDA. [Pa64]. Appellant failed to request a hearing within five (5) days of receipt of the PNDA. [Pa82]. Accordingly, a Final Notice of Disciplinary Action ("FNDA") was issued on April 18, 2019. [Pa82]. The FNDA terminated Appellant's employment with TPD. [Pa82]. Appellant subsequently filed a Civil Service Appeal, and the OAL Trial was conducted on the following dates: October 19, 2020; October 20, 2020; October 21, 2020; October 29, 2020; November 10, 2020; and November 23, 2020. [Pa13]. [1] The OAL Trial resulted in Appellant's termination being upheld in a decision by Judge Rabin dated March 6, 2023. [2] [Pa12]. The Civil Service

[1] Transcripts shall be designated as follows:
1T = October 19, 2020 Hearing Transcript;
2T = October 20, 2020 Hearing Transcript;
3T = October 21, 2020 Hearing Transcript;
4T = October 29, 2020 Hearing Transcript;
5T = November 10, 2020 Hearing Transcript; and
6T = November 23, 2020 Hearing Transcript.

[2] We respectfully request that this Court take Judicial Notice of the unprecedented COVID-19 epidemic and its ensuing catastrophic impact on the New Jersey Judiciary during the relevant timeframe of the instant matter.

Commission (the "CSC"), adopted Judge Rabin's findings and conclusions, and affirmed Appellant's termination. [Pa9].

STATEMENT OF FACTS

Appellant Never Disclosed His Multiple Opioid Prescriptions

In June of 2014, Appellant was involved in a car accident that Appellant alleges caused him ongoing back pain. [4T96:5 - 4T97:11]. Appellant began receiving prescriptions for opioids from Dr. Goswami, a pain management specialist, in March of 2015. [5T162:13-15]. TPD Rules and Regulations section 4:6.8 (the "Medication Policy") states: "[w]hen employees are required to take any prescription medication that may diminish their alertness or impair their senses they shall **immediately** notify their immediate supervisor as to the medication, who shall then immediately communicate the information to their Commanding Officer. This information shall be confidential." **[Da4]** (emphasis added).

The Medication Policy therefore requires immediate notification to a TPD employee's immediate supervisor when the employee takes any medication with the potential to impair the employee, regardless of whether the medication itself actually does end up impairing the employee. [Da4]. Appellant did not notify TPD when he began receiving his opioid prescriptions in March of 2015. [5T148:9-12]. Appellant saw Dr. Goswami for over three (3) years, ending in

October of 2018, and Dr. Goswami prescribed Appellant opioids for this entire timeframe. [4T13:21].

Appellant also received opioids from Dr. Chung, his primary doctor. [Pa113-Pa116; 4T111:9-23]. Appellant testified that he only received oxycodone from Dr. Chung on one (1) occasion because Dr. Goswami was not available. [4T111:9-23]. However, Appellant filled a 15-day prescription for oxycodone from Dr. Goswami on March 1, 2018, filled a 15-day prescription for oxycontin from Dr. Goswami on March 2, 2018, and filled a 3-day prescription for oxycodone from Dr. Chung on March 4, 2018. [Pa114]. Between January of 2018 through August of 2018 alone, Appellant had prescriptions filled for oxycodone, oxycontin, promethazine codeine syrup (an opioid), oxycodone-acetaminophen (contains opioids), and hydrocodone-acetaminophen (also contains opioids). [Pa113-Pa116]. Appellant never informed his supervisors about any of the aforementioned medications, and Appellant's supervisors never received any notification from anyone that Appellant was taking the aforementioned medications. [Pa109].

Appellant alleges his only disclosure of prescription opioids occurred in connection with a random drug test in September of 2015. [5T148:13-17]. There is no record evidence to support this alleged disclosure. Appellant also confirmed that he would not have disclosed his prescriptions at all if he had not

been randomly selected for the September 2015 drug test. [5T148:21 – 5T149:6]. Appellant further concedes that the alleged forms for his September 2015 drug test were reviewed by an Internal Affairs officer, not an immediate supervisor as required by the Medication Policy. [5T163:13-18]. Even if Appellant did list his prescription opioids on the September 2015 drug test, this notification was not made to his immediate supervisor, and this delay of six (6) months cannot possibly be considered "immediate". [Da4; 5T163:19 - 5T164:21]. This alleged disclosure also violates the Medication Policy for all of Appellant's new medications prescribed after September of 2015. [Pa113-Pa116].

Additionally, TPD Rules and Regulations 4:5.1 (the "Performance of Duty Policy"), requires in part that all TPD employees "shall promptly and efficiently perform their duties as required by law, department rules, policies, directives, and job descriptions". [Da2]. TPD Rules and Regulations 4:5.11 (the "Neglect of Duty Policy"), states that "Employees shall not neglect their duties. Examples include, but are not limited to, carelessness, ignorance, or inattention to required duties. [Da3]. The FNDA found that Appellant violated the Performance of Duty Policy and the Neglect of Duty Policy by taking prescription opioid pain medications that could impair his functioning as a police officer and by failing to inform TPD or Appellant's chain of command of his use of these opioid

medications. [Pa93 - Pa94]. There is nothing in the record evidence that contradicts Appellant's violations of the Medication Policy, the Performance of Duty Policy, or the Neglect of Duty Policy.

The Investigation of Appellant

Appellant had a long and troubling disciplinary history during his time with TPD. [Da25-Da26]. An Internal Affairs Investigation (the "Investigation") was opened regarding Appellant as a result of an incident that occurred at Appellant's residence on July 21, 2018 (the "Incident"). [Pa100]. The Incident involved an acquaintance of Appellant's ("TL") suffering from an apparent drug overdose. [Pa100]. Detective Jason Snyder of TPD Internal Affairs Bureau ("Detective Snyder"), was tasked with conducting the Investigation. [1T37:2-21]. Judge Rabin concluded that Detective Syner was a credible witness. [Pa30]. As part of the Investigation, Detective Snyder interviewed Appellant twice regarding the Incident, reviewed Ewing Police Department ("EPD") Officer Corey Fornarotto's ("Officer Fornarotto"), Incident Report (Officer Fornarotto was the EPD Officer who first responded to the Incident [Pa101]), and interviewed Officer Fornarotto only three (3) days after the Incident. [Pa102]. The EPD also provided Detective Snyder with documents relating to the Incident [Pa100], as well as additional documents regarding other incidents involving Appellant that occurred in Ewing Township. [Pa101]. The only reason that Dr.

Goswami was not interviewed as part of the Investigation was because Dr. Goswami was the subject of an ongoing criminal investigation by the Drug Enforcement Agency (the "DEA"), and interviewing Dr. Goswami would have put the DEA investigation at risk. [Pa117].

Appellant's Failure to Report Multiple Incidents in Ewing

On October 12, 2014, Appellant called EPD regarding two (2) "unwanted house guests refusing to leave" and requested that EPD remove "CB" and "YF" (the "unwanted guests") from Appellant's residence. [Da27-Da28]. On October 13, 2014, Appellant allowed YF, one of the "unwanted guests", to operate Appellant's vehicle despite YF having a suspended driver's license. [Da29]. This resulted in YF crashing Appellant's vehicle into another vehicle, and an ensuing Crash Investigation Report being issued by EPD. [Da29]. Appellant never reported this incident to TPD. [1T53:6-9]. On January 15, 2015, Appellant permitted "FM" to operate Appellant's vehicle despite FM being under the influence of alcohol and having a suspended license. [Da30]. This resulted in FM crashing Appellant's vehicle into a utility pole. [Da30]. Appellant never reported this incident to TPD (the October 13, 2014, and January 15, 2015 occurrences are collectively referred to as the "Ewing Vehicle Incidents"). [1T53:6-9].

Appellant's Multiple Vehicle Incidents

On April 19, 2018, May 2, 2018, and November 19, 2018, Appellant permitted unlicensed and/or suspended licensed persons to operate his personal vehicle (the April 19, 2018, May 2, 2018, and November 29, 2018 occurrences are collectively referred to as the "Vehicle Incidents"). [Pa101, Pa119].

On April 19, 2018, "JM-W" operated Appellant's vehicle without a valid driver's license, and JM-W and "DL" (the mother of Appellant's son), were arrested and charged with possession of suspected CDS (marijuana and Percocet pills). [Pa101]. Upon finding out what happened, Appellant "figured [DL] was getting pulled over and she didn't have a license or [JM-W] didn't have a license, whatever the case may be". [5T43:17-19]. However, Appellant never reported this incident to TPD despite knowing that two (2) people were arrested in his personal vehicle and eventually finding out they were arrested for possession of CDS. [5T42:17 – 5T43:19].

On May 2, 2018, "TN" (sister of DL and aunt of Appellant's son), was arrested for operating Appellant's vehicle without a license, for having outstanding warrants, and for possession of CDS. [Pa101]. Appellant was issued a motor vehicle summons, was charged under New Jersey Statutes Title 39, and was required to appear in Ewing municipal court in connection with the May 2, 2018 arrest. [5T83:22 – 5T84:3]. Despite knowing he was personally charged

with a violation of State law and having to personally appear in court for same, Appellant never reported this incident to TPD. [5T45:12-13].

The Investigation further uncovered that on November 29, 2018, "MW" was arrested for operating Appellant's vehicle without a valid driver's license. [Pa119]. Appellant never reported this incident to TPD. [5T41:1-3]. During the OAL Trial, Appellant testified that MW was a family friend. [6T88:8-13]. However, while being interviewed under oath by Internal Affairs, Appellant stated that he hardly knew who MW was and had trouble even remembering MW's name. [6T90:4-7]. Appellant testified that the reason he didn't report the MW vehicle incident was "just because your car is pulled over . . . and someone is driving it without a license, it's pretty much ridiculous to call them for something so minute. They're busy enough." [5T41:12-15].

Appellant also testified that for the Vehicle Incidents, "[i]n each and every one of those cases I physically asked them if they had a license, like joking around, and they produced a license, and there is no way of me to know that their license was not good."[3] [5T83:11-15]. Appellant specifically testified "[i]f they didn't show me a license . . . I would have never let them use the car." [5T83:15-17]. However, while being interviewed under oath by Internal Affairs,

[3] Appellant is a police officer, one of the few careers that would absolutely give him ways to know if someone's license was valid.

Appellant admitted the only person who actually showed him a license was MW, and in the other instances, Appellant just took their word for it. [6T91:22-92:4]. Appellant then testified that he did not actually remember if MW ultimately produced her license or not. [6T92:7-12]. It is also not possible for MW to have shown Appellant a driver's license, because MW only had a learner's permit when she was pulled over on November 29, 2018. [Pa120]. The FNDA found that Appellant violated the Performance of Duty Policy and the Neglect of Duty Policy by failing to report the Vehicle Incidents. [Pa93-Pa95].

Appellant's Failure to Report the July 21, 2018 Incident

On July 21, 2018, Officer Fornarotto was dispatched to Appellant's residence in response to a 911 call wherein Appellant reported a person ("TL") having difficulty breathing. [Pa132]. Appellant immediately requested "the stuff to revive" TL as soon as Officer Fornarotto arrived at Appellant's residence. [4T51:13-17]. Officer Fornarotto was rightfully skeptical since Appellant reported someone having trouble breathing, not an opioid overdose. [Pa104]. However, Officer Fornarotto quickly realized that Appellant was referring to Naloxone ("Narcan"), which is only used to revive victims suffering from opioid overdoses. [4T51:13-17]. Appellant flat out admits that he requested Narcan immediately upon Officer Fornarotto's arrival because "I know what Narcan is,

I know what it revives." [4T133:1-2]. The record is absent of any evidence that would indicate Appellant believed TL could have been overdosing on marijuana, or that marijuana caused Appellant's overdose.

Officer Fornarotto entered Appellant's residence and located TL, who was laying on the floor unresponsive and suffering from an apparent overdose. [Pa104]. Officer Fornarotto attempted to question Appellant about what caused TL's overdose, but Appellant was evasive and gave inconsistent answers. [Pa104-Pa105]. At first, Appellant told Officer Fornarotto that TL had only been drinking. [4T68:11-23]. Appellant changed his story, eventually stating that TL may have taken pills, then conclusively stated that TL took oxycodone. [Pa104; 4T68:11-23]. It is important to note that Appellant specifically referenced oxycodone, not any general opioid, because this coincides with Appellant refilling his oxycodone prescription on July 16, 2018, a mere five (5) days before the Incident. [Pa104, Pa115; 4T68:11-23].

However, Appellant's "evolving theory" is inconsistent with Appellant demanding "the stuff" immediately upon Officer Fornarotto's arrival [4T51:13-17], and Appellant's self-admitted knowledge that he knows exactly why Narcan is used. [4T133:1-2]. During this time, Appellant was sweating profusely, had pinpointed pupils, and had impaired speech, specifically stumbling over his words and slurring. [Pa104-Pa105; 4T76:2-4]. Appellant testified that he only

took his medication as prescribed when he was off duty. [6T11:3-5]. However, on the night of the Incident, Appellant told Officer Fornarotto that he had not taken anything and that he was "on the job", which is vernacular for being employed as police officer. [4T76:16-21].

Officer Fornarotto administered the first dose of Narcan to TL. [Pa104]. The first dose of Narcan failed to revive TL; subsequently, EPD Officer Daniel Banister ("Officer Banister") and members of the Ewing Emergency Medical Services arrived at Appellant's residence to provide further assistance to the unresponsive TL. [Pa132]. Officer Banister administered a second dose of Narcan to TL approximately five (5) minutes after the first dose had been administered. [Pa132]. The second dose of Narcan was sufficient to revive TL. [Pa132].

Appellant wanted to keep the Incident "on the low" and informed Officer Fornarotto he did not want to get in trouble. [4T59:6-8]. Appellant admits that he struggled with the decision to call 911 because he had to weigh trying to save TL's life with his own fear of being embarrassed at work. [4T128:12 – 4T129:3]. Appellant also admits his reluctancy to save TL's life because he was "worried about my job, my job's going to find this out, you know, it looks bad. Okay. I didn't want - - that was one of the reasons why I didn't want to call 911[.]" [4T130:10-13]. The FNDA concluded that Appellant violated the Performance

of Duty Policy and the Neglect of Duty Policy by failing to report the Incident to TPD. [Pa93-Pa94].

TPD Rules and Regulations 3:13.5 (the "Truthfulness Policy"), states that "Employees are required to be truthful at all times whether under oath or not." [Da1]. The FNDA also found that Appellant violated the Truthfulness Policy by giving inconsistent and/or false and/or incomplete information during the Incident. [Pa97].

Appellant's Multiple Sick Leave Policy Violations

Third Sinus Surgery/Sick Leave Policy Violation

On August 31, 2018, Appellant was placed on stress leave as a result of a newspaper story being published about the Incident. [5T13:1-8]. Stress leave is considered to be a form of paid sick leave. [1T106:21-25]. Appellant never returned from stress leave, as he was suspended without pay on April 11, 2019 [Da33], and ultimately terminated on April 18, 2019. [Pa82]. TPD General Order 74-2, Amended September 29, 2015, was the TPD policy that governed sick leave at the time Appellant was on stress leave (the "Sick Leave Policy"). [Da5-Da24]. The Sick Leave Policy clearly states:

> Sworn personnel while on sick leave or IOD status shall not leave their residence during their scheduled tour of duty without the permission of the Administrative Desk Supervisor. For each scheduled tour of duty a police officer is not in residence, a police officer is subject to multiple charges. Each scheduled tour of duty away

> from his residence while on sick leave or IOD status is a separate offense.
>
> Sworn personnel may request permission from the Police Director to be excused from the sick leave residence restriction in certain circumstances. Those personnel requesting to be excused form the sick leave residence requirement shall make the request in an administrative report forwarded to the Police Director through the chain of command. Permission to be excused from the sick leave residence requirement may only be received through the express **written** consent of the Police Director. The decision to grant the request or deny it shall be made by the Police director or his designee within 2 days of receiving the request.

[Da12] (emphasis in original document). The Sick Leave Policy also clearly states:

> Members desiring to leave their sick leave residence for the purposes of a physician's appointment(s), re-habilitation appointments, religious services, funeral services or family emergencies shall obtain permission from the Administrative Desk Supervisor. The member shall provide the specifics of the absence (location, estimated times, specific reasons) to the Administrative Desk Supervisor and shall promptly telephone the Administrative Desk Supervisor upon their return.

[Da13]. The Sick Leave Policy does not make any reference whatsoever to the terms "systemic" or "non-systemic." [Da5-Da24].

Appellant had two (2) prior sinus surgeries, with the first occurring on April 3, 2014, and the second occurring on December 1, 2016. [4T172:4-12; Pa152; Pa154]. On September 11, 2018, Appellant had his third sinus surgery,

which occurred while he was out on stress leave. [4T171:18-20]. Appellant provided TPD with a note from his sinus doctor dated September 5, 2018, advising that Appellant would be able to return to work on October 30, 2018. [Pa149]. Appellant provided TPD with a note from his sinus doctor dated October 16, 2018, advising that Appellant would be able to return to work on November 15, 2018. [Pa148]. Appellant provided TPD with a note from Dr. Chung advising that Appellant would be able to return to work on November 20, 2018. [Pa150].

Appellant knew that written permission to leave his residence was required to be obtained pursuant to the Sick Leave Policy because Appellant provided TPD with a written request to leave his residence for each of his first two (2) sinus surgeries. [4T172:11 – 4T177:8]. However, Appellant never provided TPD with any written request to leave his home for his third sinus surgery. [Pa151; Pa153]. Appellant admits to leaving his home after his third sinus surgery without receiving permission from TPD. [4T177:1-5]. Appellant also admits that he did not request permission from TPD to be excused from his home residency requirement in connection with his third sinus surgery. [6T49:2-5].

Appellant Attends Inpatient Rehabilitation/Sick Leave Policy Violation

Appellant checked himself into the Florida House drug rehabilitation facility ("Florida House") in Florida on October 22, 2018, while out on sick leave for his third sinus surgery. [Pa155]. Appellant did not request permission from TPD to attend inpatient drug rehabilitation, and did not inform TPD he attended Florida House on October 22, 2018 through November 12, 2018, because he was "embarrassed" and felt "entitled" to keep it a secret. [Pa155; 4T190:17 – 4T191:10]. Appellant could not get his story straight when asked about why he attended Florida House, initially alleging he did not feel like he needed to go to rehab at all [4T169:10-12] and that he went voluntarily to detox from his medication. [4T187:6-8]. Appellant then stated he went while out on sick/stress leave after the third sinus surgery to "kill two birds with one stone" and get it over with in time before he was supposed to report back to work [4T, 188:11-21]. Appellant then stated that the reason he went was because TPD "was going to send me anyway most likely" [4T188:23-24]. Appellant again changed his answer, stating that he "wanted to go there and get the help that I thought I needed, and I didn't want them [TPD] to know about it" [4T191:6-7]. The FNDA found that Appellant violated the Performance of Duty Policy by failing to inform TPD about attending Florida House [Pa94] and violating the Sick Leave Policy by attending Florida House. [Pa98].

Appellant Lied About His Location

On November 19, 2018, Appellant received a Fitness for Duty Psychological Examination (the "FFD Exam"), which was conducted by Dr. Matthew Guller, J.D., Ph.D., ABPP, who is a licensed psychologist in the States of New Jersey and New York ("Dr. Guller"). [Pa192]. The purpose of the FFD Exam was to "determine the presence, if any, of emotional, psychological or intellectual characteristics that would detrimentally affect [Appellant's] performance in the role of a Police Officer." [Pa192]. Dr. Guller administered multiple psychological tests, and also conducted an hour-long interview of Appellant as part of the FFD Exam. [Pa193]. Dr. Guller summarized the results of the FFD Exam in a report dated November 29, 2018 (the "FFD Report").

During the FFD Exam, Appellant informed Dr. Guller that "he really did not need the medicine (i.e., the opiates)" and that he was taking opiates "three to four times a week tops" and denied that he was taking them three times a day, as prescribed. [Pa196]. Appellant also outright admitted he was aware of the TPD drug reporting policy during the FFD Exam. [Pa196]. The FFD Report concluded that Appellant was not viewed as fit for duty. [Pa199].

On Thursday, November 29, 2018, TPD Sargent Guy Ponticiello ("Sgt. Ponticiello"), contacted Appellant and requested that Appellant report to TPD Internal Affairs ("IA") to pick up a copy of the FFD Report. [3T20:6-22:15]. Sgt. Ponticiello contacted Appellant via telephone; TPD Detective Lieutenant

Doyle and TPD Detective Portia Aames were present for the entire phone call and were able to hear the entire conversation because Sgt. Ponticiello made the call on speaker phone. [3T20:22 – 3T21:1, 3T23:3-6]. Upon being informed to report to IA, Appellant informed Sgt. Ponticiello that Appellant was in Florida. [3T22:4-15]. Sgt. Ponticiello asked if Appellant had informed anybody about being in Florida, and Appellant responded that he did not inform anybody. [3T22:4-15]. During this same call, Appellant informed Sgt. Ponticiello that Appellant was in Florida to attend his stepfather's funeral, and would be back in New Jersey on Saturday, December 1, 2018. [3T22:16-24]. The Sick Leave Policy applies to "[m]embers desiring to leave their sick leave residence for . . . funeral services" and also requires written permission to be obtained before leaving. [Da13]. Sgt. Ponticiello told Appellant to come to IA the following Monday, December 3, 2018 instead. [3T22:13-15].

However, the following day, Friday, November 30, 2018, Appellant texted Sgt. Ponticiello and requested that Sgt. Ponticiello call Appellant. [3T23:7-14]. Appellant changed his story and claimed that he was not actually in Florida, but rather had only been driving to Florida, and turned around and came back to New Jersey. [3T23:14-19]. Appellant claimed he could report to IA that day, Friday, November 30, 2018, but Sgt. Ponticiello advised Appellant that he should report to IA on Monday, December 3, 2018, as previously stated.

[3T23:10-22]. Sgt. Ponticiello credibly clarified that there was no chance Appellant may have said that Appellant was actually on his way to Florida, and that Appellant outright stated, "I'm in Florida." [3T60:19-22]. Judge Rabin concluded that Sgt. Ponticiello was a credible witness. [Pa30].

Sgt. Ponticiello found Appellant's behavior to be so odd and evasive that Sgt. Ponticiello felt it was necessary to inform Detective Snyder about this interaction as part of the Investigation. [3T25:3-22]. Sgt. Ponticiello specifically believed that Appellant was being deceptive and not telling the truth. [3T26:4-11]. Even if Appellant's version of this event is true (alleging he was only on his way to Florda, not actually in Florida, and turned around and returned to New Jersey), Appellant still admits to violating the Sick Leave Policy because he neither requested nor received written permission to attend his stepfather's funeral. [Da13; 3T23:14-19]. The FNDA also found that Appellant violated the Truthfulness Policy by lying to Sgt. Ponticiello about Appellant's location on November 29, 2018. [Pa97].

The Irrelevant Facebook Incident

On April 1, 2019, Appellant posted an online response to a Facebook news article about a private company that wanted to bring jobs to the City of Trenton. [5T24:13-20]. In his comment, Appellant stated that most of those jobs would not go to people from Trenton, because "a lot of people from Trenton are lazy"

and "[t]hey'd rather wait for the 1st of the month, get their check every month and by the 5th day of the month they're broke." [5T24:22 – 5T25:3]. Appellant felt compelled to make this comment "because I see it every day . . . Nobody wants to work. Everybody is just sitting around waiting for the 1st of the month and, you know, the first couple of days of the month all hell breaks loose, and that's why I made my statement" and that "Trentonians . . . They like to sit at home, sit on the porch and sit on their rear end." [5T24:8-18]. Appellant's comment elicited a response from Trenton Councilman Jerell Blakeley ("Councilman Blakeley"), which resulted in Appellant and Councilman Blakeley exchanging their thoughts on Appellant's comment (the "Facebook Incident"). [5T25:23 – 5T26:18].

The Facebook Incident was not part of the Investigation. [Pa100-Pa131]. Neither the PNDA nor the FNDA make any charge against Appellant relating to the Facebook Incident. [Pa64-Pa99]. Judge Rabin's OAL Trial decision does not reference the Facebook Incident. [Pa12-Pa63]. The CSC decision does not reference the Facebook Incident. [Pa9-Pa11]. The Facebook Incident had no bearing on Appellant's termination and is not relevant to the instant matter. [Pa9-Pa131].

The OAL Trial & Civil Service Commission Appeal

On March 6, 2023, Judge Rabin found that Appellant lacked credibility based on the OAL Trial testimony. [Pa35]. Judge Rabin found that Appellant provided no notice to the department regarding his medications and had not been excused from his residency requirement during the time of his third sinus surgery. [Pa38]. Judge Rabin also made the following conclusions: Appellant was required to report, and failed to report, his knowledge of or involvement regarding the Incident; Appellant was required to report, and failed to report the Vehicle Incidents, which included charges against individuals for possession of a CDS in Appellant's vehicle; that Appellant should not have entrusted his vehicle to persons who were either unlicensed or driving with a suspended license on three (3) separate occasions in 2018; Appellant provided knowingly false information to police and EMTs responding to the Incident; Appellant did not report his opioid use or opioid prescriptions to his department, or to the responders on the night of the Incident; Appellant failed to disclose to TPD that he had been prescribed and was taking prescription medication capable of impairing his abilities; while on restricted sick leave, Appellant left New Jersey without the permission of his supervisor, a violation of the Sick Leave Policy; Appellant knowingly provided false information to the department in that he took sick leave for three (3) months to recover from his third sinus surgery but

went to Florida to enter a drug rehabilitation program during that time; Appellant lied about his whereabouts when questioned by Sgt. Ponticiello on November 29, 2018; Appellant made false statements in his IA investigation interviews, and; Appellant's opioid use was improper, and he was not forthcoming about his drug use during his IA interviews. [Pa41].

Judge Rabin correctly concluded that Appellant was required to report the Incident to TPD pursuant to the Rules and Regulations, failed to do so, and gave inconsistent and untruthful statements on the night of the Incident. [Pa43]. Judge Rabin also correctly concluded that Appellant was untruthful regarding his prescriptions and opioid use. [Pa50]. Judge Rabin further concluded that Appellant was required to report the Vehicle Incidents to TPD pursuant to the Rules and Regulations but failed to do so. [Pa50-Pa52]. Judge Rabin also concluded that Appellant was required to request and receive approval before leaving his home while on sick leave and violated the Rules and Regulations by failing to do so, and that Appellant also violated the Rules and Regulations by making misrepresentations about his whereabouts while out on sick leave. [Pa53-Pa54]. All of these findings were supported by credible record evidence.

On May 3, 2023, the CSC adopted Judge Rabin's Finding of Facts and Conclusion, as well as his recommendation to uphold Appellant's termination. [Pa9]. The CSC conducted a *de novo* review of Judge Rabin's decision, made an

independent evaluation of the record evidence, and thoroughly reviewed Appellant's Exceptions. [Pa9]. The CSC determined that Judge Rabin's determinations were "substantially based on his assessment of the credibility of the witnesses" and acknowledged that because Judge Rabin "has the benefit of hearing and seeing the witnesses, [he] is generally in a better position to determine the credibility and veracity of the witnesses." [Pa9]. The CSC found that Appellant failed to demonstrate Judge Rabin's credibility determinations, findings, or conclusions, were arbitrary, capricious, or unreasonable. [Pa10]. The CSC upheld Judge Rabin's decision to reject Appellant's testimony as not credible since Judge Rabin found that Appellant offered "rehearsed, prepared answers." [Pa10]. The CSC also found that Judge Rabin sufficiently provided reasoning for each of the proffered charges that were upheld against Appellant. [Pa10]. The CSC found "nothing in the record or the [A]ppellant's [E]xceptions to question those determinations or the findings and conclusions made therefrom." [Pa10].

The CSC also undertook a *de novo* review of Judge Rabin's affirmation of Appellant's termination. [Pa10]. The CSC considered the concept of "progressive discipline" and held that the penalty of removal was neither disproportionate nor shocking to the conscience given the nature of Appellant's numerous infractions and status as a police officer. [Pa10]. The CSC concluded

by holding that Appellant's termination was therefore justified based on the record evidence and Judge Rabin's findings, conclusions, and credibility determinations. [Pa10].

LEGAL ARGUMENT

I. JUDGE RABIN'S FINDINGS ARE SUPPORTED BY RECORD EVIDENCE AND ARE THEREFORE SHOULD BE UPHELD BY THIS COURT.

New Jersey Courts generally apply a very deferential standard when reviewing a final administrative-agency action. In re State & Sch. Emps. Health Benefits Comm'ns' Implementation of Yucht, 233 N.J. 267, 279 (2018). Furthermore, a strong presumption of reasonableness attaches to an agency decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.), certif. denied, 170 N.J. 85 (2001). With respect to factual findings, the findings of an Administrative Law Judge "are considered binding on appeal, when supported by adequate, substantial and credible evidence." In re Taylor, 158 N.J. 644, 656 (1999) (quoting Rova Farms Resort Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

The choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal. See In re Application of Howard Sav. Bank, 143 N.J.

Super. 1, 9 (App. Div. 1976) (citations omitted). These "credibility findings . . . are often influenced by matters such as observations of the character and demeaner of the witnesses and common human experience that are not transmitted by the record." Taylor, 158 N.J. at 644 (quotation omitted). Reviewing Courts consider whether the agency acted arbitrarily, capriciously, or unreasonably, specifically whether the agency's decision "conforms with relevant law," is supported by "substantial credible evidence in the record as a whole," and reaches a conclusion based on a correct application of "the relevant law to the facts." In re Yucht, 233 N.J. at 279-80.

In reviewing an agency's decision to determine whether it is supported by substantial credible evidence and is not arbitrary, unreasonable or capricious, there must be a clear statement from the administrative agency as to the basis for its decision. See St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 29-30 (App. Div. 1977). The policy of our Courts in reviewing Civil Service decisions has been that the Courts will not upset the action of the Civil Service Commission in the absence of an affirmative showing that it was arbitrary, capricious, or unreasonable, or not supported by the evidence, or that the Commission disregarded or failed to recognize the legislative policies enunciated in the Civil Service Act. Greco v. Smith, 40 N.J. Super. 182, 184-85 (App. Div. 1956).

As previously stated, final administrative action is given a strong presumption of reasonableness, and the findings of an Administrative Law Judge are binding on appeal when supported by substantial and credible record evidence. See In re Taylor, 158 N.J. at 656 (quotation omitted); In re Carroll, 339 N.J. Super. at 437. Judge Rabin's choice to reject Appellant's testimony was reasonably made, and is therefore conclusive on appeal, as set forth at length below. See In re Howard Sav. Bank, 143 N.J. Super. at 9.

Judge Rabin's legal argument and conclusion begins by reciting the applicable legal standard – whether the employer has met their burden of proof, demonstrated by a fair preponderance of the competent, relevant, and credible evidence, that Appellant committed the charges listed in the FNDA. [Pa39]. Judge Rabin proceeded to cite the correct statutes, regulations, and precedent to support this legal standard. [Pa39]. Judge Rabin specifically cites to State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted) (defining "fair preponderance of the evidence" as the greater weight of credible evidence in the case, meaning the evidence which carries the greater convincing power to our minds); Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457 (2005) (applying this standard to a wrongful termination). [Pa40].

Judge Rabin found that based on the relevant statutes, regulations, and TPD policies, Appellant was required to report, and failed to report, the Incident,

the Vehicle Incidents, and his opioid prescriptions. [Pa41]. Judge Rabin found that Appellant also violated the Sick Leave Policy on multiple occasions. [Pa41]. Judge Rabin further found that Appellant made false statements on the night of the Incident, during his sick leave, and during his Internal Affairs interviews, which were conducted under oath. [Pa41].

A. Judge Rabin's Conclusions About the Incident Are Supported by the Record and Should be Upheld.

When discussing the Incident, Judge Rabin cited to the specific TPD Rules and Regulations which Appellant violated, the location in the record of the Rules and Regulations, and Judge Rabin's specific reasons based on testimony and record evidence as to why he reached the conclusions that he did. [Pa43-Pa46]. Judge Rabin went step by step through Appellant's testimony and discussed why it was not credible. [Pa43-Pa46]. Judge Rabin acknowledged that Appellant did not call the Incident in to 911 as a possible drug overdose, but rather as a person having difficulty breathing. [Pa44]. This is undisputed. [4T50:12-15, 4T129:7-11].

Judge Rabin discussed the inconsistencies in Appellant's "evolving theory" that started with Appellant stating he had no idea what TL ingested, then suggesting TL's overdose could have been caused by alcohol, then eventually saying it could have been pills, and ending with the conclusive statement that it was oxycodone. [Pa44; 4T52:20-24, 4T134:11-21]. Judge Rabin knew this did

not harmonize with Appellant immediately requesting Narcan as soon as Officer Fornarotto arrived. [4T61:14-24, 4T132:17-25]. Judge Rabin also knew Appellant was lying about initially believing TL only ingested alcohol because Appellant outright admitted in his Internal Affairs interview that "you don't get that way by being drunk" and that TL "didn't appear intoxicated to me." [6T14:7-10]. There is no logical way to reconcile this with Appellant's "evolving theory" beginning with TL only consuming alcohol or with Appellant immediately requesting Narcan. [4T52:20-24, 4T61:14-24, 4T132:17-25, 4T134:11-21]. Accordingly, Judge Rabin found that Appellant's statements were inconsistent and appeared to be given in a manner as to protect himself from liability. [Pa44]. Judge Rabin correctly concluded that the Incident constituted an "unusual emergency event," which Appellant was required to report to TPD but failed to do, and cited the specific TPD Rules and Regulations that Appellant violated. [Pa45-Pa46]. Judge Rabin also correctly concluded that Appellant was required to report the Incident to TPD but never did, which is undisputed by the parties and the record. [Pa45-Pa46].

B. Judge Rabin's Conclusions About Violations of the Medication Policy Are Supported by the Record and Should be Upheld.

When discussing Appellant's opioid use and failure to report same, Judge Rabin correctly found that Appellant never reported his opioid use to his immediate supervisor, which he was required to do pursuant to the Medication

Policy. [Pa46]. Judge Rabin reviewed Appellant's allegation that the opioid medications were disclosed on the September 2015 drug test; however, there was no evidence produced by any party of this alleged disclosure, and even if Appellant had made this disclosure, it was insufficient under the Medication Policy or any of the other Rules and Regulations. [Pa46]. Put another way, even accepting as true that Appellant disclosed his medications on the September 2015 drug test, Appellant still violated the Medication Policy because the 2015 drug test does not count as "immediately notify[ing] their immediate supervisor as to the medication". [Da4]. Therefore, Appellant's violation of the Medication Policy is undisputed by the record evidence and should be upheld.

C. Judge Rabin's Conclusion About Opioid Abuse is Supported by the Record and Should be Upheld.

Judge Rabin's finding that Appellant abused his opioid medication was also based on record evidence and a reasonable credibility determination and should be upheld. [Pa49]. Judge Rabin reviewed Appellant's testimony about his opioid use and found it to be dishonest. [Pa49]. Appellant testified that he only received oxycodone from Dr. Chung on one (1) occasion because Dr. Goswami was not available. [4T111:9-23]. However, Judge Rabin correctly noted that Appellant filled a prescription for oxycodone from Dr. Goswami on March 1, 2018, filled prescription for oxycontin from Dr. Goswami on March 2,

2018, and filled a prescription for oxycodone and codeine syrup from Dr. Chung on March 4, 2018. [Pa49, Pa114].

Judge Rabin also did the math for Appellant's opioid prescriptions and found that the numbers did not add up. [Pa47]. Appellant received a total of 789 pills between January 8, 2018, through July 16, 2018, a number that Judge Rabin calculated by using Detective Snyder's Report and Appellant's prescriptions, which were entered into the OAL Trial record as Exhibits R-15 and R-17 respectively. [Pa47, Pa113-Pa116]. If Appellant had only taken the prescribed amount of three (3) pills a day, it would have amounted to 636 pills, leaving an excess of 153 pills. [Pa47]. Judge Rabin recognized that Appellant had given contradictory testimony during his Internal Affairs investigation, initially stating that he only took the pills as needed, and whatever he did not take, he flushed down the toilet [Pa125], but then changed his story saying he disposed of his pills in September or October of 2018. [Pa130].

Appellant also contradicted himself by testifying that he only took the pills three (3) times a day only on days he was not working [4T103:22-104:3], but also that he was taking them as needed which was less than three (3) times a day. [6T10:11-20]. Appellant testified that he took oxycodone as directed on the bottle, "three times a day, that's usually [when] I took the medicine, three times, never more or [sic] than three times a day" and that "[i]f I worked I did

not take them when I was working . . . I would wait until I come home." [4T103:22 - 4T104:5].

Appellant once again gave contradictory testimony by claiming he never took pills while working, but also stated to Internal Affairs while under oath that he took three (3) pills a day pretty much whether he was working or not. [6T11:15 - 6T13:8]. Judge Rabin correctly concluded that Appellant had been untruthful regarding his prescriptions and opioid use. [Pa50]. Accordingly, Judge Rabin's determination that Appellant abused his opioid medication and attempted to conceal same was supported by credible record evidence and should be upheld.

D. Judge Rabin's Conclusion About the Vehicle Incidents is Supported by the Record and Should be Upheld.

Judge Rabin begins by citing N.J.S.A. 39:3-10, which states in relevant part, "No person shall drive a motor vehicle on a public highway in this State unless the person is . . . in possession of a validated permit, or a probationary or basic driver's license issued to that person". [Pa50]. Judge Rabin also discussed how TPD Rules and Regulations 8-7, which requires that any motor vehicle incident must be reported to a TPD officer's superior officer, was applicable to the instant matter. [Pa50]. Judge Rabin discussed how Appellant never reported any of the five (5) incidents involving Appellant's vehicle, which occurred on October 13, 2014, January 25, 2015, April 19, 2018, May 2, 2018, and

November 29, 2018. [Pa50-Pa51]. Judge Rabin correctly concluded that Appellant was required to report the aforementioned vehicle incidents and failed to do so. [Pa50-51]. Judge Rabin's conclusion about the Ewing Vehicle Incidents and the Vehicle incidents was based on uncontroverted record evidence [1T53:6-9; 5T41:1-3, 5T42:17 – 5T43:19, 5T45:12-13], and should not be disturbed.

E. Judge Rabin's Conclusion About Sick Leave Policy Violations is Supported by the Record and Should be Upheld.

Judge Rabin also found that Appellant knowingly violated the Sick Leave Policy on multiple occasions, using Appellant's two (2) written requests for permission from Appellant's first two (2) sinus surgeries as the foundational evidence for this conclusion. [Pa52]. Judge Rabin discussed how Appellant failed to request or obtain written permission prior to his third sinus surgery, failed to request or obtain written permission to attend Florida House, and failed to request or obtain written permission to attend his stepfather's funeral in Florida. [Pa52-Pa53]. Judge Rabin's conclusions about Appellant's Multiple Sick Leave Policy violations are supported by credible record evidence, including Appellant's own admissions of neither requesting nor receiving written permission for the aforementioned Sick Leave Policy violations. [3T22:4-15, 3T23:14-19; 4T172:11 – 4T177:8, 4T190:17 – 4T191:10; 6T49:2-

5]. Therefore, Judge Rabin's conclusion that Appellant violated the Sick Leave Policy on multiple occasions should not be disturbed.

F. Judge Rabin's Conclusion that Appellant Made False Statements or Representations is Supported by the Record and Should be Upheld.

As previously stated, Judge Rabin reasonably rejected Appellant's "evolving theory" on the night of the Incident, since Appellant requested Narcan immediately upon Officer Fornarotto's arrival, but initially stated that TL had only been drinking, then maybe TL took a pill, and finally conclusively stating that TL took oxycodone. [Pa54]. These conclusions are based on the record evidence and Judge Rabin's assessment of witness credibility. [4T51:13-17, 4T68:11-23, 4T133:1-2]. Judge Rabin also found that Appellant lied about being under the influence of drugs on the night of the Incident, as Appellant testified that he only took his medication when off-duty, and that Officer Fornarotto observed Appellant in what appeared to be an impaired state. [Pa54]. This is also based on record evidence. [4T76:2-21; 6T11:3-5]. Judge Rabin further found that Appellant gave misleading statements in connection with his third sinus surgery and going to Florida House while Appellant was supposed to be at home on sick leave. [Pa55]. This is based on record evidence. [Pa155; 4T190:17 – 4T191:10]. Judge Rabin also found that Appellant lied to Sgt. Ponticiello about his whereabouts on November 29, 2018 [Pa55], which is supported by record evidence [3T22:4-15, 3T23:14-19].

Judge Rabin correctly found that Appellant was dishonest and made misrepresentations especially in light of the following exchange, where Appellant got caught lying in his OAL Trial testimony:

> **Mr. Trimboli:** Okay. And by the way, during the clip we just heard [Exhibit R-9C at 12:36:30 through 12:38:06], you said that the only person who act - - actually showed you a license was [MW] and other cases you took their word for it. Particularly if it was somebody you knew like, [DL]. Do you recall hearing that?
>
> **Appellant:** If I knew very well, yes. If a - - I know her very well, I should.
>
> . . .
>
> **Mr. Trimboli:** If you recall that's from during your direct testimony you said that in each case, you asked them - - everybody to - - for their driver's licenses and they produced them. In IA you said something different.
>
> **Appellant:** Well [MW], I had - - I did ask for her license. I don't remember if she produced it or not. In some occasions, I mean it's not like you ask somebody for their license every time they drive your car, it would just be kind of silly . . . maybe the first time they - - they drove it I did ask. But not after that.
>
> **Mr. Trimboli:** (Out of microphone range) [] When on direct you testified then that each of the cases that were cited and charges against you, you asked them for their licenses and they produced it, that was not accurate.
>
> **Appellant:** At one point in time they did produce it. Maybe it was not the exact time they took the car. But at one point in time they did.
>
> . . .

Mr. Trimboli: Again, you test - - you told Internal Affairs that in most cases you simply asked and took peoples [sic] word for it, if particularly if you knew them, you heard that test - - that statement that you made (out of microphone range) Internal Affairs?

Appellant: Yes, I did.

Mr. Trimboli: On direct testimony, when you were asked about the charges pertaining to allowing unlicensed or suspended drivers to use your vehicle, your testimony was that in each of those cases you asked for licenses and they showed them to you?

Appellant: Correct.

. . .

Mr. Trimboli: Were you being untruthful to Internal Affairs or were you being untruthful to Judge Rabin?

Appellant: Neither, sir.

. . .

Mr. Trimboli: All right. Even though you told them diametrically different things, you were being truthful to both of them?

Appellant: That's correct.

[6T91:22 – 6T94:19]. Accordingly, Judge Rabin's credibility determination and determination that Appellant gave false and misleading statements was based on record evidence and is therefore should be upheld.

II. THE DISCIPLINARY CHARGES AGAINST APPELLANT WERE SUPPORTED BY CREDIBLE RECORD EVIDENCE.

As previously stated, we respectfully request that this Court take Judicial Notice of the fact that the COVID-19 global pandemic coincided with the relevant timeframe of the instant matter. Accordingly, as the New Jersey Judiciary was undoubtedly dealing with an unprecedented and devastating occurrence, any arguments about issues regarding the length of time when issuing the OAL Trial decision should be disregarded.

A. There is Competent Record Evidence to Support the Finding That TL Suffered a Drug Overdose.

Doctor Harry Brundavanam ("Dr. Brundavanam") was the doctor who treated TL on the night of the Incident after she was taken to the hospital. [4T10:2-5]. Dr. Brundavanam confirmed that Narcan is only used to treat opioid overdoses, and that it is not used for alcohol or marijuana. [4T21:8-12]. Upon admission, TL was placed on a Narcan drip in addition to previously receiving two (2) doses of Narcan while at Appellant's residence. [Pa132, 4T22:7-10]. This is clear evidence of an opioid overdose, as Narcan only revives victims suffering from opioid overdoses and would not have any effect on someone overdosing on alcohol or marijuana. [4T34:4-9]. Dr. Brundavanam also explained that "we see it all the time, patients are taking a lot of narcotics and

their urine drug screen is not positive typically for opioids . . . we see this happen [] more frequently than not." [4T24:14-22]. Dr. Brundavanam also confirmed that if TL's overdose had been primarily caused by alcohol, this would have been indicated in the "present illness" section of TL's hospital admission form (Exhibit R-8 in the OAL Trial), and that it was not. [4T41:17-22]. Therefore, the conclusion that TL suffered from an opioid overdose is supported by record evidence.

However, Appellant misses the point. Even if this Court finds insufficient evidence to determine the exact cause of TL's overdose, Appellant still failed to report the Incident to TPD. This is undisputed by the record evidence. Accordingly, this Court need not make any conclusive determination about the cause of TL's overdose, since the real issue is that Appellant never reported the Incident, which occurred at Appellant's residence, and required TL to be administered two (2) doses of Narcan, transported to the emergency room, and to be placed on a Narcan drip. Any attempt to argue about the specific substance that caused the overdose is an attempt to distract from the real basis of discipline, which is Appellant's failure to report the Incident to.

B. The Finding of Appellant's False Statements is Based in Fact.

The OAL Trial transcripts are littered with Appellant's misrepresentations and outright lies. Appellant attempts to cause unnecessary confusion by alleging

that self-perceived inconsistencies, taken out of context, should be sufficient to overturn Judge Rabin's credible determinations. Appellant asks this Court to completely disregard his "evolving theory", which started with an immediate demand for Narcan, then his story changed by saying that TL only drank, then changed again when he said TL had maybe taken pills, and finally evolved into a presumptive admission that TL took oxycodone. [Pa44; 4T52:20-24, 4T134:11-21].

Appellant cites to the OAL Trial decision in an attempt to discredit Judge Rabin based on one (1) sentence – "Yet when asked what T.L. might have taken, appellant did not mention opioids." [Pb24]. Appellant uses this partial reference to create the perception that Judge Rabin misstated the facts because Appellant did in fact eventually state that TL took opioids. [Pb24]. However, the full context of the quote vindicates Judge Rabin:

> During the Incident, appellant greeted the responding police officer by requesting "the stuff" to revive his houseguest, taken to mean Narcan. Yet when asked what T.L. might have taken, appellant did not mention opioids. At first appellant said T.L. had been drinking. When Officer Fornarotto requested more information, he then said T.L. took something. Then he said T.L. had previously admitted using marijuana and pills. Only after those evasive responses did appellant state that T.L. took oxycodone. Appellant told IA the reason for the various responses was because he was using process of elimination. But appellant knew what T.L. took, knew that he had oxycodone in his home, and was

> familiar with the effects of opioids, enough so that he initially requested Narcan from Fornarotto.

[Pa54]. This was a step-by-step analysis of Appellant's "evolving theory," not a misstatement of fact. Appellant's attempt to obfuscate the decision ultimately reveals the real issue, which was Appellant's evasiveness and failure to be forthright on the night of the Incident. It does not matter how much time elapsed before Appellant admitted he believed TL was suffering from an oxycodone overdose because Appellant made multiple misrepresentations prior to finally admitting same. [Pa44; 4T52:20-24, 4T134:11-21]. Neither this Court nor Judge Rabin needs conclusive evidence of exactly how long it took Appellant's story to fully evolve, because nothing will change the record clearly showing Appellant's attempts to mislead Officer Fornarotto. [4T52:20-24, 4T134:11-21]. Dr. Brundavanam also provided a credible explanation of why opioids did not show up on TL's drug screen, which was a very common occurrence, and therefore TL's overdose is also based on record evidence. [4T24:14-22].

Appellant cannot have it both ways by saying his sweating, erratic behavior, slurred speech, and pinpointed pupils on the night of the Incident cannot be attributed to his opioid use [Pb26-Pb27], but also claims Appellant was being honest when stating he only took opioids on his days off. [4T103:22 – 4T104:3]. This is yet another example of Appellant's dishonesty. Judge

Rabin's conclusion that Appellant lied about being "on the job" on the night of the Incident was not the only reason Appellant's testimony was rejected and therefore does not impact Judge Rabin's conclusion that Appellant was not a credible witness.

Judge Rabin correctly relied on the credible testimony of Sgt. Ponticiello when concluding that Appellant lied about his whereabouts on November 29, 2018. Judge Rabin held that Sgt. Ponticello was a credible witness, as he testified in a knowledgeable manner, exhibited a great deal of experience, remained stoic, unemotional and organized throughout his testimony, and was calm and thorough during cross-examination. [Pa30]. Judge Rabin held that Appellant offered what appeared to be rehearsed, prepared answers, often beginning his answers telling stories about other unrelated people, often proffering third-hand hearsay before addressing the question itself, and concluded that Appellant's testimony was self-serving and lacking credibility. [Pa34-Pa35].

As previously discussed, this credibility decision should not be disturbed. Even if it was, Appellant has no evidence to support his allegation that he told Sgt. Ponticello he was driving to Florida, and not actually in Florda. Even if Appellant did have this nonexistent evidence, Appellant still admits to violating the Sick Leave Policy because Appellant neither requested nor received written

permission to go to Florida. [3T22:4-15, 3T23:14-19]. Therefore, even if Appellant was telling the truth about his location, he was still violating the Sick Leave Policy.

Appellant was also deceitful about attending Florida House by failing to ever request or receive written permission to attend. Appellant admits he never requested permission to attend Florida House because he felt entitled to keep it a secret from TPD. [Pa155; 4T190:17 – 4T191:10]. This is another example of Appellant's self-admitted attempts to conceal his Sick Leave Policy violations. It is irrelevant whether Appellant told Dr. Guller after the fact because Appellant never requested permission to attend Florida House before going, and his after the fact disclosure does not satisfy the Sick Leave Policy requirements. [Da12-Da13; 4T190:17 – 4T191:10].

Evidence of Appellant's violative behavior is further found in the note from his sinus doctor dated October 16, 2018, advising that Appellant would be able to return to work on November 15, 2018, and the note from Dr. Chung advising that Appellant would be able to return to work on November 20, 2018. [Pa148, Pa150]. However, instead of being at home recovering from surgery, Appellant instead attended Florida House. [Pa155]. Therefore, it is immaterial that Appellant told Dr. Guller about Florida House well after completing his treatment, because the record evidence shows Appellant violated the Sick Leave

Policy and concealed his actions through the use of doctor's notes. Judge Rabin correctly found that Appellant's actions were untruthful.

C. The Record Supports a Finding of Concealment and Narcotics Abuse.

As previously discussed, Judge Rabin correctly concluded that Appellant abused his opioid medication and attempted to conceal same. Appellant misstates Judge Rabin's finding, wrongly claiming that Judge Rabin found Appellant's drug abuse justified Appellant's termination. [Pb29]. This is immediately contradicted by the ensuing block quote from Judge Rabin's decision, which concluded that Appellant's use and abuse of prescription drugs constituted misconduct as a police officer under N.J.S.A. 40A:14-147, conduct unbecoming of a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6), neglect of duty pursuant to N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12). [Pa50].

There is sufficient record evidence to show that Appellant abused his medication. Appellant testified that he only received oxycodone from Dr. Chung on one (1) occasion because Dr. Goswami was not available. [4T111:9-23]. However, Judge Rabin correctly noted that Appellant filled a prescription for oxycodone from Dr. Goswami on March 1, 2018, filled prescription for oxycontin from Dr. Goswami on March 2, 2018, and filled a prescription for oxycodone and codeine syrup from Dr. Chung on March 4, 2018. [Pa49, Pa114].

The overlapping prescriptions are evidence of Appellant's opioid abuse and concealment.

Judge Rabin also calculated that Appellant received a total of 789 pills between January 8, 2018, through July 16, 2018, finding that if Appellant had only taken the prescribed amount of three (3) pills a day, it would only amount to 636 pills, leaving an excess of 153 pills. [Pa47, Pa113-Pa116]. Even if Appellant only took pills three (3) times a day when off duty, this would have resulted in Appellant having even more than the aforementioned excess of 153 pills. Appellant also contradicted himself by testifying that he took the pills three (3) times a day only on days he was not working [4T103:22 – 4T104:3], but also that he was taking them as needed which was less than three (3) times a day. [6T10:11-20], but also stated to Internal Affairs while under oath that he took three (3) pills a day pretty much whether he was working or not. [6T11:15 – 6T13:8]. Appellant's own admission to IA disproves Appellant's allegation that "there is no competent evidence that [Appellant] ever took the medication while on duty or was impaired while at work." [Pb30].

It is immaterial whether Appellant tested positive on a random drug test or only filled his prescriptions as prescribed, because as previously discussed, there is competent record evidence that Appellant abused and concealed his opioid medications, never disclosed his opioid use to TPD, and was dishonest in

his OAL Trial testimony and Internal Affairs interviews (conducted under oath) about overlapping prescriptions with Dr. Goswami and Dr. Chung, and the frequency with which Appellant took his medication. [4T103:22 – 4T104:3, 4T111:9-23; 6T10:11-20, 6T11:15-13:8; Pa49; Pa114]. Judge Rabin correctly concluded that this evasive and dishonest behavior was consistent with addiction, and this finding should not be disturbed because it is based on record evidence. Even if it rejected and this Court finds insufficient evidence for addiction, it still doesn't change the fact that Appellant violated the Medication Policy by never disclosing his medications to TPD.

D. Judge Rabin Did Not Rely on Dr. Guller as an Expert Witness in Substance Abuse.

Judge Rabin specifically acknowledged Dr. Guller in his capacity as a clinical psychologist, not as an expert in substance abuse. [Pa17]. Judge Rabin held that he would not accept Dr. Guller as an expert in substance abuse but would look at the totality of Dr. Guller's testimony and all of the evidence and give it the appropriate weight when making decisions and writing the opinion. [2T36:12-18]. The block quote provided by Appellant [Pb32; Pa48-Pa49] is merely a recitation of Dr. Guller's OAL Trial testimony, not the basis of Judge Rabin's decision. Judge Rabin stated the following as the basis for his conclusion:

> The fact that he [Appellant] received opioid prescriptions mere days apart, and then went to get codeine syrup from his regular doctor days later, evidenced that appellant was dealing with an opioid addiction and had been searching for extra drugs from various doctors to be filled at various pharmacies. On March 1, 2018, Dr. Goswami prescribed forty-five oxycodone pills to be taken three times per day for fifteen days. The next day, March 2, 2018, Goswami prescribed forty-five OxyContin pills to be taken three times per day for fifteen days. On March 4, 2018, Dr. Chung prescribed ten oxycodone pills and codeine syrup for appellant, even though he had just gotten prescriptions from Goswami.
>
> **With no proof that he ever advised his employer about these medications, and because of the Incident that unfolded, all indications were that appellant had been attempting to cover-up his opioid addiction.**

[Pa49] (emphasis added). It is abundantly clear that Judge Rabin did not rely on Dr. Guller's testimony when concluding that Appellant abused opioids, but rather relied upon Appellant's behavior and misrepresentations. Judge Rabin's conclusion regarding Appellant's opioid abuse stands on its own even if every reference to Dr. Guller is entirely eliminated. Appellant's uncited and unsupported allegation that Judge Rabin "egregiously relied heavily upon this inadmissible evidence to sustain the disciplinary charges" against Appellant [Pb34], is expressly contradicted by Judge Rabin's conclusion that the lack of medication disclosure and because of how the Incident unfolded were the reasons for sustaining Appellant's disciplinary charges. [Pa49]. Therefore,

Appellant's arguments regarding Dr. Guller must be rejected, as Judge Rabin did not rely on Dr. Guller as a substance abuse expert when forming his conclusions.

III. APPELLANT'S TERMINATION WAS JUSTIFIED.

The New Jersey Supreme Court has held it is well established that when underlying conduct is of an egregious nature, the imposition of a penalty up to and concluding removal would be appropriate, regardless of the individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). Additionally, the seriousness of the infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. Id. The New Jersey Supreme Court also held that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question" but rather it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007).

The penalty of termination is appropriate for those "infractions that went to the heart of the officer's ability to be trusted to function appropriately in his position." In re Hermann, 192 N.J. 19, 36 (2007). Police officers are held to a higher standard of conduct than ordinary citizens or other public employees because of the sensitive nature of the position they occupy. Moorestown v.

Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966); Moore v. Youth Corr. Inst. at Annandale, 230 N.J. Super. 374 (App. Div. 1989).

As an initial matter, it is extremely inappropriate for Appellant to imply that the charges against Appellant related to impairment on the job were "abandoned by the City prior to trial due to lack of evidence." [Pb34, n.5]. The record evidence is completely devoid of any reasoning for the withdrawal of the aforementioned charges, and Appellant should be admonished for this unfounded insinuation.

Appellant's attempt to compare the unbinding case of In re Eugene Collins, OAL Docket No. CSV 03776-08, 2009 WL 145165 (May 15, 2009) [Pa238] is equally unfounded. The In re Collins OAL Judge found that there was no prior pattern of psychological problems which would have supported the appellant's unfitness for duty. Id. at 13 [Pa248]. This is readily distinguishable from the instant appeal, as Appellant has a history of failing to report unlicensed or suspended licensed drivers who use his personal vehicle, cause vehicular accidents, and get arrested, as demonstrated by the Ewing Vehicle Incidents, and the subsequent Vehicle Incidents.

Additionally, the In re Collins OAL Judge found that the appellant's prior disciplinary record was absent of any sustained charges, excluding the present

charges. Id. at 14 [Pa249]. This is vastly different from the instant matter, where Appellant's prior disciplinary is anything but unblemished. Appellant's disciplinary history includes a minor rule infraction on April 25, 2004, a minor rule infraction for attention to duty on September 8, 2007, a minor rule infraction on November 15, 2007, failure to appear for personal court matter on August 21, 2009, a serious rule infractions resulting in a 7 day suspension on May 6, 2011, a minor rule infraction for obedience to laws and rules on May 23, 2011, a rule violation **specifically for failure to list medication** on December 14, 2014, a violation for absence from duty on October 11, 2015, a rule violation on July 15, 2015, a rule violation **specifically for violation of sick leave policy** on October 13, 2015, and a rule violation on December 3, 2015. [Da25-Da26]. These are only the charges sustained against Appellant that do not relate to the instant appeal and does not include the charges against Appellant that were administratively closed or "complete". [Da25-Da26]. In light of Appellant's aforementioned history, it is almost surprising that Appellant cites to Town of W. New York v. Bock, 38 N.J. 500 (1962), holding that an employee's past record should be considered when deciding the appropriate level of discipline. [Pb37]. Respondent agrees with this position. Clearly, termination was appropriate.

The In re Hermann Court held that the single act of a Division of Youth and Family Services ("DYFS") employee (which has since become the Division of Child Protection & Permanency) of waving a lit lighter near a five-year-old child's face was independently sufficient to justify the employee's termination. In re Hermann, 192 N.J. at 21, 26-27. The In re Hermann Court stated that "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." Id. at 34-35 (citations omitted).

It is unclear why Appellant believes his conduct did not cause any risk of harm to persons or property [Pb38], when the record evidence shows that the Ewing Vehicle Incidents resulted in two (2) vehicular crashes and subsequent arrests, two (2) of the Vehicle Incidents (April 19, 2018, and May 2, 2018) resulted in arrests for possession of CDS while operating Appellant's personal vehicle, and the third Vehicle Incident (November 29, 2018), occurred because Appellant allowed MW to operate his vehicle despite MW only having a learner's permit. [Da29-Da31; Pa101, Pa119-Pa120]. Appellant also placed TL's life at risk by not immediately calling 911, instead delaying the call because he did not want to get in trouble at work, and by giving misleading statements to Officer Fornarotto about TL's condition on the night of the

Incident. [Pa104; 4T68:11-23, 4T128:12 – 4T129:3, 4T130:10-13]. Appellant's actions clearly placed the public at risk.

The In re Hermann Court upheld the termination because the employee's conduct "had so utterly rendered her devoid of the trust that DYFS must place in its field workers" and the agency's decision "should not be lightly second-guessed." Id. at 34. This is similar to the instant matter, where Appellant failed to report his medication for over three (3) years [Pa109; 5T148:9-12], his lies about why he received overlapping opioid prescriptions [Pa114; 4T111:9-23], his hesitation to call 911 because he was more concerned about his job than saving a friend's life on the night of Incident [4T68:11-23, 4T128:12 – 4T129:3, 4T130:10-13], his inconsistent statements about always checking driver's licenses before letting people use his vehicle being contradicted by his admission that he had not checked in most instances [5T83:11-15; 6T91:22 – 6T92:4], lying to Sgt. Ponticiello about his location on November 29, 2018 [3T22:4-24, 3T23:14-19], and intentionally violating the Sick Leave Policy after his third sinus surgery by attending Florida House. [3T22:4-15, 3T23:14-19; 4T172:11 – 4T177:8, 4T190:17 – 4T191:10; 6T49:2-5].

Any one of these alone would render Appellant "so utterly devoid of the trust" that must be placed in police officers, especially considering that police officers must be held to a higher standard of conduct. In re Hermann, 192 N.J.

at 34; Moorestown, 89 N.J. Super. at 560; Moore, 230 N.J. Super. at 374. Each of the aforementioned violations "went to the heart of the officer's ability to be trusted to function appropriately in his position." In re Hermann, 192 N.J. at 36. This is especially true for Appellant's behavior on the night of the Incident. Reasonable minds must agree that Appellant's termination is not "so disproportionate to the offense . . . as to be shocking to one's sense of fairness." Id. at 28-29.

Finally, Appellant's issues with substance abuse are intertwined with Appellant's concealment of his opioid prescriptions, use and concealment of same. It has already been substantially discussed above why Judge Rabin's findings of Appellant's opioid abuse, TL's drug overdose, and Appellant's myriad lies are supported by credible record evidence. Appellant was a danger to himself and others during his time as a police officer; his termination was the exclusive result of his many bad decisions and his attempts to hide same, and the decision to terminate Appellant was proportionate and based on credible record evidence.

IV. ANY REMAND ORDER SHOULD NOT BE ASSIGNED TO ANOTHER ALJ.

Appellant's allegations of "inordinate delay" ignore the dire reality of the COVID-19 pandemic. It is borderline inappropriate for Appellant's attorney to suggest that delays in the instant matter would somehow call into question Judge

Rabin's integrity and impartiality. Any "reasonably objective fully informed" person would undoubtedly understand that COVID-19 would cause substantial delays. State v. Dalal, 221 N.J. 601, 606 (2015) (citation omitted). This conclusion is supported by the fact that the Chief Judge of the Administrative Law Division granted fifteen (15) *nunc pro tunc* extensions, something that would only be done if appropriate.

Appellant's attorney most certainly knew that the pandemic impacted every aspect of litigation practice especially considering that the OAL Trial occurred via the Zoom virtual meeting platform. As previously discussed at length, Judge Rabin's decision to sustain the charges against Appellant and his stern but fair criticism of Appellant's selfish and deceptive behavior is supported by credible record evidence. These allegations of bias or the appearance of impropriety are baseless and should be disregarded by this Court.

CONLCUSION

Respondent respectfully requests that this Court uphold Appellant's termination and dismiss the instant Appeal in its entirety.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

AMENDED REPLY BRIEF ON BEHALF OF APPELLANT MICHAEL PALINCZAR

Docket No. A-002777-22

December 5, 2023

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex, CN 006
25 W. Market Street
Trenton, New Jersey 08625

RE: **In the Matter of Michael Palinczar,**
Trenton Police Department
Sat Below: Civil Service Commission
Docket No. CSR06311-2019S

Honorable Judges:

Please accept this letter Reply Brief on behalf of Appellant, Michael Palinczar ("Appellant) in reply to the opposition of Respondent, City of Trenton Police Department ("Respondent").

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Court is respectfully referred to Appellant's initial brief for a detailed procedural and factual history of this matter.

LEGAL ARGUMENT

I. THE ALJ IMPROPERLY RELIED UPON THE OPINION OF DR. GULLER ON ISSUES RELATING TO OPIOID ABUSE AFTER EXPLICITLY REJECTING HIM AS AN EXPERT ON THAT SUBJECT

Respondent's counsel asked Dr. Guller "Do you have any professional observations based upon your experience and training with regard to the volume and frequency of these medications (opioids)?" T2 23-25. Upon Appellant's counsel's objection that Dr. Guller had not been called as an expert witness, Respondent's counsel argued "his experience with substance abuse issues" should allow him to provide opinions as to whether a "person using the medication was using them in an abusive or excessive way." T2 16-20.

In response to Appellant's counsel's objection that Dr. Guller was neither a medical doctor nor authorized to prescribe medications the ALJ explicitly ruled "I am not going to accept Dr. Guller as an expert in substance abuse..." T2 34:21-22 and T2 36:12-13. Notwithstanding this ruling, the ALJ, confusingly, further ruled "...but I am going to allow the questioning to move forward and looking at this totality of this testimony and all the evidence I will

give it the appropriate weight at the time I make my determination and write the decision". T2 36:14-18. By "partially overruling" the objection to Dr. Guller's purported expert testimony as to the use and abuse of opioids, the ALJ has created a circumstance where it is, to a substantial degree, unknown to what extent the ALJ relied upon Dr. Guller's opinions in the Decision's multiple references to opioid use and abuse. T3 36:20-22.

The ALJ makes specific references to Dr. Guller's testimony in this regard. In relevant part, the Decision states:

> Dr. Matthew Guller found appellant's opioid abuse to be an extension of his alcohol abuse. He determined that appellant was taking very high dosages of opioids three times per day, although opioids should only be used "as needed". He indicated that a person taking opioids three times daily would be an indication that the person was in constant pain; however, appellant was not in pain when examined by Dr. Guller...Dr. Guller indicated that a person having prescriptions filled for high doses of opioids but not needing them or using them was an indication that the person was sharing his prescription drugs with other people...Dr. Guller stated that opioids were highly addictive and, for that reason, opioid use should end thirty to sixty days after the use commenced. Dr. Guller indicated that one of the prescribing doctors, Dr. Goswami, should have been suspicious about appellant using more than one kind of opioid, and about appellant travelling great distances and using many doctors and pharmacies to obtain drugs which were indications of a person "doctor shopping" in order to receive additional drugs.

Pa48-49.

In addition to neither being a medical doctor nor having the authority to prescribe medication, Dr. Guller also conceded that he had no information as to

the basis for Appellant being legally prescribed opioids. T2 48:16-52:6, T2 71:16-73:25 and T2 48:10-25. Nevertheless, the ALJ relied upon Dr. Guller's opinions in reaching a variety of conclusions regarding Appellant's opioid use when, based upon the ALJ's own ruling, those opinions should have been disregarded.

Respondent would prefer to ignore the ALJ's problematic treatment of Dr. Guller's testimony and suggests the Decision can stand even if all references to Dr. Guller are eliminated (R-31)[1]. Even a cursory review of the Decision reveals Respondent's position to be untenable as it is rife with references to Dr. Guller's testimony.

The Decision initially references Dr. Guller in the context of summarizing the testimony of all witnesses. Notably, the ALJ fails to reference his rejection of Dr. Guller as an expert in substance abuse or provide any explanation as to what parts of Dr. Guller's testimony was being either rejected or accepted upon being viewed in its "totality". Pa017-018. Instead, the Decision specifically references testimony directly relating to the issue of substance abuse including Dr. Guller's finding that "his (Appellant's) opioid abuse to be an extension of his alcohol abuse" that Appellant stating he was minimally using oxycodone

[1] References to Respondent's brief are identified by the letter "R" and relevant page number.

"would then indicate appellant was sharing his prescription drugs, which might explain a woman at his house overdosing"; that "(o)ne cannot work safely as a LEO when taking opioids three times daily. Police and firefighters should not be on active duty when taking opioids" and that "Dr. Goswami should have been suspicious about appellant using more than one kind of opioid, and about appellant traveling great distances to obtain drugs; this appearing to be appellant 'doctor shopping'." Pa-018.

The Decision moves forward to a section analyzing the credibility of the respective witnesses. Therein, the ALJ describes Dr. Guller as a "knowledgeable" and "persuasive" witness. This portion of the Decision, once again, lacks any reference to the rejection of Dr. Guller as an expert witness in the field of substance abuse providing additional support for the conclusion that the ALJ improperly relied upon Dr. Guller's opinion testimony as to opioid abuse.

Respondent's argument that the ALJ did not rely upon Dr. Guller's "expert" testimony regarding substance abuse claims and that the block quote from the Decision in Appellant's initial brief "...is merely a recitation of Dr. Guller's OAL Trial testimony, not the basis of Judge Rabin's decision" is simply incorrect. (R-31) The referenced block quote is, in fact, located in the "Findings" section of the Decision. Pa035-Pa038. That the referenced testimony

of Dr. Guller in the Decision's "Findings" essentially repeats that set forth in the "Testimony" section, amply demonstrates that Dr. Guller's "expert" opinions were improperly credited and relied upon by the ALJ. Pa017-018 and 037-038.

The ALJ's improper reliance on Dr. Guller's "rejected" expertise is also found in the Decision's "LEGAL ARGUMENT AND CONCLUSION" section. Pa039-055. In the subsection titled "Appellant's Substance Abuse", the Decision repeatedly references Dr. Guller's (unqualified) opinions as to both Appellant's use of opioids and the prescription and use of opioids in general. Pa046-050. In most relevant part, the Decision relies upon Dr. Guller's testimony as follows:

> Dr. Matthew Guller found appellant's opioid abuse to be an extension of his alcohol abuse...Dr. Guller indicated that a person having prescriptions filled for high doses of opioids but not needing them or using them was an indication that the person was sharing his prescription drugs with other people. Dr. Guller indicates that a person could not work safely as a LEO when taking opioids. Dr. Guller stated that opioids were highly addictive and, for that reason, opioid use should end thirty to sixty days after the use commenced..."

Pa048.

The Decision even expanded Dr. Guller's unqualified opinions by finding, without attribution to any testimony or evidential support in the record, that opiate abuse may be equated to untruthfulness such that "appellant's history of

opioid and alcohol abuse indicate that he used poor judgment and displayed a lack of truthfulness." Pa050. As discussed infra, the Decision exacerbated its erroneous reliance on Dr. Guller's unqualified expert opinion by also, essentially, finding Appellant guilty of the withdrawn charges of being under the influence while on duty. As the Decision, in substantial part, is based on the improperly accepted "expert" testimony of Dr. Guller it must be vacated and the matter remanded for a new trial.

II. THE ALJ IMPROPERLY FOUND APPELLANT GUILTY OF BEING IMPAIRED BY OPIATES WHILE ON DUTY DESPITE THOSE CHARGES HAVING BEEN WITHDRAWN AT THE INITIATION OF THE TRIAL

The Final Notice of Disciplinary Action ("FNDA") sustained each of the fifty-eight (58) charges issued against Appellant. Pa0157-Pa0174. Arguably the most serious of those charges were, no. 4, 25, 51 and 53, which, respectively, found Appellant guilty of conduct unbecoming a public employee, other sufficient cause and misconduct for being in an impaired condition while on duty. Pa0160, Pa0165 and Pa0171.

During colloquy among counsel and the ALJ wherein the charges and potential witnesses were being discussed prior to the initiation of trial, Respondent explicitly advised that all charges alleging impairment while on duty were being withdrawn. Respondent's counsel explained "I can - - since the

issue has come up now, the charges related to impairment on the job are charges 4, 25, 51 and 53 and those should be deemed withdrawn". T1 11:17-20.

Based upon this advisement, Appellant, understandably, neither called witnesses nor presented other proofs or arguments to rebut or dispute the withdrawn charges. Nevertheless, the ALJ made specific findings that Palinczar was under the influence of opioids while on duty as follows:

> I FIND that appellant's history of opioid and alcohol abuse indicated that he used poor judgment and displayed a lack of truthfulness. I FIND that appellant's numerous doctors, pharmacies and prescriptions, and his untruthfulness regarding his prescription and opioid use, ***indicated that appellant had been abusing prescription drugs, and in a manner that could affect his judgment and performance while conducting his job duties as a Trenton Police Officer***. I CONCLUDE that appellant's use and abuse of prescription drugs showed that he engaged in misconduct as a police officer under N.J.S.A. 40A-147, and displayed conduct unbecoming of a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6) ***I FIND that appellant's daily use of high doses of opioids put himself at risk as well as members of the public whom appellant was sworn to protect and CONCLUDE that this behavior constituted a neglect of duty*** under N.J.A.C. 4A:2-2.3(a)(7) and Other Sufficient Cause pursuant to N.J.A.C. 4A:2-2.3(11).

Pa0050. (Emphasis added)

Respondent's response to this issue is to argue that "(t)here is sufficient record evidence to show that Appellant abused his medication" (R-29) and that the ALJ "...correctly concluded that this evasive and dishonest behavior (referencing Appellant being prescribed and using opioids) was consistent with addiction..." (R-30).

Respondent's argument misses the point. The ALJ specifically found that Appellant's opioid use impacted his performance "...while conducting his job duties as a Trenton Police Officer" and further "...put himself at risk as well as members of the public whom appellant was sworn to protect..." notwithstanding the withdrawal of all charges alleging impairment while on duty.

It is axiomatic that a determination of guilt on withdrawn charges is arbitrary, capricious, or unreasonable. See, Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). While the ALJ did not specifically reference the withdrawn charges of being impaired while on duty, there was also no specific reference by number or description as to which charges the above quoted findings applied. Certainly, the findings reference to Appellant's opioid use "...while conducting his job duties" and of "put(ting) himself at risk as well as members of the public whom appellant was sworn to protect" creates a reasonable inference that the ALJ's findings related to impairment while on duty. As the seriousness of such a finding is self-apparent, it becomes impossible to disentangle those findings from other sustained charges and the penalty of termination. Accordingly, the matter should be remanded for a new trial.

III. TERMINATION AS TO ANY SUSTAINED CHARGES IN THIS MATTER CONSTITUTES EXCESSIVE DISCIPLINE

Termination constitutes excessive discipline in this matter. As noted, the most serious charges issued alleging impairment while on duty were withdrawn

prior to the initiation of the trial.[2] T1-9:15-17; T1 11:13-20. Nevertheless, as discussed supra, the Decision made findings that Appellant was impaired while on duty and/or otherwise abused opioids based upon the improperly credited "expert" testimony of Dr. Guller. As these determinations are inextricably intertwined with the Decision's other findings the matter, if not remanded for a new trial, must be remanded for reimposition of an appropriate penalty.

The concept of progressive discipline has long been recognized as a bedrock principle of civil service jurisprudence. See, Town of West New York v. Bock, 38 N.J. 500 (1962). An imposed penalty shall be rejected as arbitrary or unreasonable wherein it is "so disproportionate to the offense...as to be shocking to one's sense of fairness." In re Stallworth, 208 N.J. 182, 193 (2011), citing In Re Herman, 192 N.J. 19, 28-29 (2007).

Respondent's argument that Appellant's prior disciplinary history justifies the ultimate punishment of termination is incompatible with the facts. (Pa33-34) The totality of Appellant's disciplinary history over the course of an almost twenty (20) year career shows a handful of minor rule infractions

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[2] Respondent complains that Appellant should be "admonished" for the insinuation that these charges were withdrawn based upon a lack of sufficient evidence. While it is true that the basis for the withdrawal is unstated, the Respondent's observation that was done because the charges could not be proven is reasonably inferred by that action. If there was another reason for the withdrawal of the most serious charges sustained by the FNDA, it remains unidentified by Respondent.

resulting in the issuance of counseling, a single written reprimand and a sole serious rule infraction dating back to 2011 for which Appellant served a four day suspension with an additional three days held in abeyance. Da25-26.

Respondent takes pains to note that two of Appellant's minor discipline involved, respectively, a failure to list medication and violation of sick leave policy. While Respondent is correct that these charges have similarity to charges at issue in this matter, it is more noteworthy that the previously imposed penalty was merely a written reprimand. While it is understood that a subsequent violation of the same rule may justify imposition of "harsher" discipline, the jump from the most minor form of discipline to termination is unjustified.

In any event, the Decision did not rely upon the concept of progressive discipline or Appellant's prior disciplinary record in imposing the penalty of termination. Instead, the Decision concludes that the totality of the sustained charges constituted a sufficient basis for the termination. Pa055-059.

Notably, the Decision lacks any analysis or determination as to whether the finding of guilt as to either any particular charge, or combination of charges, in and of itself, would justify termination. Accordingly, any determination that any charge was improperly sustained must also result in either a reduction or reevaluation as to penalty.

Further, the Penalty section of the Decision places emphasis on the discredited narrative that Appellant either abused or permitted abuse of opioids. As a primary example, the Decision justifies Appellant's termination in stating that:

> "...a police officer with an opioid addiction covering up an overdose in his home, was a matter of concern that went beyond the police department. Appellant valued his own personal concerns over those of his houseguest, T.L. and, therefore, over the public at large." Pa058. And further that:
>
> "...Having a cache of various pills at his home might have given T.L. the impetus or the opportunity to take an overdose of drugs." Id.

As to T.L., there is insufficient evidence to conclude that her medical event resulted from an opioid overdose. T.L.'s drug screen was negative for opioids. T4 23:13-22, 24:7-10, 24:11-25:3, 145:3-13. T.L. also self-reported to have taken 2 Percocet pills which would be insufficient to cause an overdose. T4 26:11-20, 29:17-70.

As to Appellant's involvement, there is no evidence (or charge) that he maintained "a cache of various pills at his home." Instead, Respondent's witnesses affirmed there was nothing illegal or improper as to Appellant having been prescribed pain medication for his job related injury. T1 164:8-14; T2 52:3-6, 67:5-68-1. Also, no competent evidence was adduced that Appellant

improperly obtained, abused or shared his medication. T1 164:8-14; T2 52:3-6, 67:5-68:1; T1 164:8-165:5.

As noted, the Penalty section of the Decision includes a determination that Appellant suffered from an "opioid addiction". It also references findings that "Appellant had been abusing prescription opioids" and that "Appellant's daily use of high doses of opioids put himself at risk as well as members of the public." Pa-057. Once again, the ALJ's determinations are both unsupported by competent evidence and improperly stray from the pursued charges. As previously noted, all charges alleging that Appellant was impaired while on duty were withdrawn by Respondent at the trial's commencement. There is no evidence that Appellant either took his medication while on duty, was impaired while at work or tested positive for any drug test. T4 104:17-19; T1 161:18-23; T4 149:12-150:5.

Further, the source of the Decision's conclusion that Appellant had an "opioid addiction" and/or used "high doses of opioids" or was "abusing prescription opioids", while unattributed, was, presumably, Dr. Guller. As the ALJ explicitly rejected Dr. Guller as an expert in the field of substance abuse, there is no proper evidential basis for these conclusions.

It is apparent that Appellant's termination was substantially based upon the erroneous, insufficiently supported and uncharged determinations that he

abused his opioid medication as described supra. These erroneous findings and conclusion are inextricably intertwined with the Decision's other findings resulting in Appellant's termination. Accordingly, this Court, to the extent it upholds any findings of guilt as to Appellant, must remand this matter with appropriate instructions for the redetermination of an appropriate penalty.

IV. ANY REMAND ORDER SHOULD DIRECT ASSIGNMENT OF THIS MATTER TO ANOTHER ADMINSTRATIVE LAW JUDGE

The FNDA terminating Appellant's employment was issued on April 18, 2019. Pa82. The remote trial of this matter began on October 19, 2020 and concluded on November 10, 2020. The record was closed on May 12, 2021. By rule, the Decision was due by June 28, 2021. Pa034. The Decision was not issued until March 6, 2023. Pa012.

This inordinate delay had no effective impact on Appellant as it had, functionally, already obtained the result it desired. It presented a much different circumstance for Appellant who had already been separated from his career and sole means of supporting his family for over two years by the trial's conclusion.

As a result, it was left to Appellant's counsel to repeatedly contact the trial court seeking a status on the delayed Decision. Upon receiving no response, Appellant's counsel was compelled to contact Chief ALJ Moscowitz as to the inordinate delay. Ultimately, Judge Moscowitz entered an Order of Extension ***Nunc Pro Tunc*** extending the time for decision for fifteen (15) forty-five (45)

periods (i.e. 675 days). The Order of Extension stated the ALJ's failure to request an extension (for almost two years) resulted from "inadvertent oversight" and that the almost two year delay was justified due to the ALJ's "voluminous caseload". Pa034.

Respondent describes Appellant's position that remand should be directed to another ALJ is "borderline inappropriate" because any reasonable purpose would understand that the COVID-19 pandemic would cause "substantial delays". R36. Respondent's argument is meritless in that Judge Moscowitz' Order of Extension makes no mention of COVID-19 but, instead, references the ALJ's "voluminous caseload".

Respondent's argument that Appellant should have expected such a delay because the trial occurred via Zoom as a result of COVID-19, in fact, undercuts its position. As the trial had concluded in November, 2020 and the record closed on May 12, 2021, it is entirely unclear and unexplained by Respondent how COVID-19 would have prevented the ALJ from issuing the Decision in a reasonably timely way.

Even more to the point, however, is the lack of any reasonable basis for the ALJ's failure to communicate, either directly to counsel, or by making the necessary request for an extension to the Chief Judge of the ALJ's need for additional time. It is this failure which, ultimately, compelled Appellant's

attorney to contact the Chief Judge. Certainly, it is not unreasonable for Appellant to be concerned as to the impartiality of an ALJ whom his attorney reported to the ALJ's administrative supervisor for what can fairly be described as a dereliction of responsibility. This concern is heightened in a matter such as this wherein Appellant's own character is a primary focus of the Decision.

A judge should not sit in any matter wherein "a reasonable, fully informed person (would) have doubts about the judge's impartiality[.]" State v. Dalal, 212 N.J. 601, 606 (2015) (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)). To this end, even an appearance of impropriety or impartiality compels recusal. See, DeNike, supra 196 N.J. at 514. A litigant need not "prove actual prejudice on the part of the (judge) to establish an appearance of impropriety; an 'objectively reasonable' belief that the proceedings were unfair is sufficient." DeNike, supra 196 N.J. at 514 (quoting State v. Marshall, 148 N.J. 89, 279 (1997).

It is respectfully suggested that any "reasonable person" would have concerns as to potential bias (even if implicit) of a judge whose failure to follow rules had been complained of by one litigant's attorney to that judge's administrative supervisor. Accordingly, basic fairness dictates that any remand of this matter be directed to a different ALJ.

DATED: December 5, 2023

Respectfully submitted,

CAMMARATA, NULTY & GARRIGAN, LLC

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