SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1097-21

MICHAEL HAND,

Plaintiff-Appellant,

v.

BOROUGH OF
NEW PROVIDENCE,

Defendant-Respondent.

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Submitted October 3, 2023 – Decided October 17, 2023

Before Judges Haas and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3910-20.

Mets Schiro & McGovern, LLP, attorneys for appellant (Leonard C. Schiro, of counsel and on the briefs; Nicholas P. Milewski and Michael S. Henningsen, on the briefs).

Apruzzese, McDermott, Mastro & Murphy, PC, attorneys for respondent (Robert J. Merryman, of counsel and on the brief; Boris Shapiro, on the brief).

PER CURIAM

In this police disciplinary action, plaintiff Michael Hand sought reinstatement to his position as a police officer with defendant Borough of New Providence, lost pay and benefits, and counsel fees following an administrative determination of misconduct resulting in his termination. Plaintiff appeals from a Law Division Order affirming the decision and his termination. Because we conclude the court's decision was supported by substantial credible evidence in the record and neither arbitrary, capricious or unreasonable, we affirm.

I.

We begin by reviewing the relevant authority. Because the Borough is a non-civil service jurisdiction, the statutory framework for disciplinary proceedings against police officers is governed by N.J.S.A. 40A:14-147 to -151. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 343 (2013). That statutory scheme requires the Borough demonstrate "just cause" for any suspension, termination, fine, or reduction in rank. Id. at 354 (quoting N.J.S.A. 40A:14-147). Pursuant to N.J.S.A. 40A:14-147, just cause includes "incapacity, misconduct, or disobedience of rules and regulations."

Our Supreme Court has recognized "misconduct" under N.J.S.A. 40A:14-147 "need not be predicated on the violation of any particular department rule or regulation," but may be based merely upon the "implicit standard of good

behavior which devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct." In re Phillips, 117 N.J. 567, 576 (1990) (quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). Because "honesty, integrity, and truthfulness[] [are] essential traits for a law enforcement officer," the Court has upheld termination where an officer acted in a manner calling those principles into question. Ruroede, 214 N.J. at 362-63; see also State v. Gismondi, 353 N.J. Super. 178, 185 (App. Div. 2002) ("[T]he qualifications required to hold [a law enforcement] position require a high level of honesty, integrity, sensitivity, and fairness in dealing with members of the public.").

Pursuant to N.J.S.A. 40A:14-150, a police officer convicted of any disciplinary charge may seek review in the Superior Court. Ruroede, 214 N.J. at 355. The trial court's review is de novo. Ibid. The court must conduct "an independent, neutral, and unbiased" review of the disciplinary action, making its own findings of fact and "reasonable conclusions based on a thorough review of the record." Id. at 357 (quoting Phillips, 117 N.J. at 578, 580). "Although a court conducting a de novo review must give due deference to the conclusions drawn by the original tribunal regarding credibility, those initial findings are not controlling." Ibid. (quoting Phillips, 117 N.J. at 579).

We exercise a "limited" role in our review of the de novo proceeding. Phillips, 117 N.J. at 579. "[W]e must ensure there is 'a residuum of legal and competent evidence in the record to support'" the court's decision. Ruroede, 214 N.J. at 359 (quoting Weston v. State, 60 N.J. 36, 51 (1972)). "The residuum rule does not require that each fact be based on a residuum of legally competent evidence but rather focuses on the ultimate finding or findings of material fact." Ibid. We do not make new factual findings, but merely "decide whether there was adequate evidence before the . . . [c]ourt to justify its finding of guilt." Phillips, 117 N.J. at 579 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

The court's de novo findings should not be disturbed, absent a finding that "the decision below was 'arbitrary, capricious or unreasonable' or '[un]supported by substantial credible evidence in the record as a whole.'" Ibid. (quoting Henry v. Rahway State Prison, 81 N.J. 571, 580 (1963)). However, we review the trial court's legal conclusions de novo. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 203 (1997) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

II.

With this framework in mind, we turn now to the facts pertinent to this appeal, derived from the record. Plaintiff served as a patrolman, detective, and

corporal of the New Providence Police Department (NPPD) for approximately thirteen years and agreed to follow the rules and regulations set forth in its manual. Section 3:5.7 of those rules and regulations, entitled Intercession, provides "[e]mployees shall not attempt to circumvent, undermine or improperly influence department procedures for determining . . . disposition of disciplinary charges, appeals from department hearings, or related matters." It further explains "[e]xamples of . . . improperly influencing . . . include, but are not limited to, soliciting unauthorized persons to intercede in such procedures, communicating or supplying information in a manner not authorized or permitted under such procedures. . ." Both plaintiff and defendant's briefs interpret the intercession rule to be analogous to criminal witness tampering. Prior to the incidents we document in this opinion, plaintiff had received only one written reprimand.

On May 17, 2019, plaintiff, Sergeant Andrew Diamond, and Patrolman Andrew Lynch were on duty for a 7:00 p.m. to 7:00 a.m. shift.[1] At approximately 10:30 p.m., plaintiff and Patrolman Lynch were requested to

[1] Although the disciplinary charges related to the May 17, 2019 incident are not subject to this appeal, we nevertheless address their factual and procedural background to provide context for the present appeal.

respond to a domestic incident. When the officers received the call, plaintiff was with his wife at a nearby diner on a meal break[2], while Patrolman Lynch and Sgt. Diamond were conducting a motor vehicle stop. Patrolman Lynch immediately proceeded to the location of the call. Plaintiff texted both Patrolman Lynch and Sgt. Diamond asking if they needed him for the call, but neither responded.

Upon observing from his GPS system that plaintiff had not yet left the diner, Sgt. Diamond terminated the traffic stop, proceeded to the domestic call, and communicated he was on his way by radio. Upon arrival, Sgt. Diamond noticed plaintiff was not there, but did not contact him to inquire as to his whereabouts.

At the scene, the two officers immediately learned the call related to a juvenile experiencing a mental health crisis. When the situation began to escalate, Sgt. Diamond contacted plaintiff on the radio, prompting plaintiff to depart the diner and proceed to the call. Plaintiff arrived at the home approximately thirteen minutes after being originally dispatched.

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[2] It is undisputed that officers remain on duty during their meal breaks and are expected to respond to calls.

Ultimately, plaintiff, Patrolman Lynch, Sgt. Diamond, and two officers from Berkeley Heights subdued the juvenile and plaintiff later accompanied the juvenile in the ambulance to a nearby hospital. When plaintiff returned to NPPD headquarters, Sgt. Diamond confronted him regarding his delayed response to the call. Although both disagreed about the call's nature and severity, plaintiff ultimately agreed that going forward he would respond immediately.

After his conversation with Sgt. Diamond, plaintiff addressed Patrolman Lynch, who he "sensed . . . seemed 'pissed.'" Plaintiff stated based on his prior experiences with other sergeants, he perceived the call required only two officers, and that the minimum number of officers required should respond. Plaintiff characterized this as the "old school mentality," "play[ing] defense when your shift is at a minimum, so you can protect the town for the bigger serious calls." Plaintiff also added, in his view, Sgt. Diamond and Patrolman Lynch could have handled the call "if [they] weren't off stopping cars." Patrolman Lynch disagreed about the manpower needed and indicated he believed it was an "all hands[-]on deck call."

Shortly thereafter, Sgt. Diamond submitted an internal affairs (IA) complaint regarding plaintiff's failure to respond to the call in a timely manner. After concluding there was sufficient information to commence an investigation,

Lieutenant Daniel Henn[3] conducted interviews with Patrolman Lynch, Sgt. Diamond, and plaintiff. During his interview, Patrolman Lynch confirmed his initial reaction that he was "pissed and upset" about how plaintiff handled the call and "fully expected" plaintiff to show up at the call.

In June 2019, Lt. Henn concluded plaintiff violated NPPD Rules and Regulations and recommended a twenty-day suspension. Plaintiff appealed Lt. Henn's decision, and the disciplinary hearing was scheduled for December 16, 2019. Prior to the hearing, plaintiff communicated with Patrolman Lynch regarding the incident on numerous occasions in person, text messages and phone calls. These communications constituted the bases for the charges which resulted in plaintiff's dismissal and this appeal.

On July 3, 2019, plaintiff texted Patrolman Lynch, "[twenty] day suspension," and on September 4, 2019 texted him a copy of the IA report. Patrolman Lynch did not respond to either message. Approximately two weeks later, on September 27, 2019, plaintiff again texted Patrolman Lynch about the IA report. He informed Patrolman Lynch he felt the report was inaccurate,

[3] Since the investigation, Lt. Henn has been promoted. We refer to him as a lieutenant as that was his rank at the time of the investigation, intending no disrespect.

claiming "half of that stuff [on page two of the report] was never said." In particular, he disputed that Patrolman "Lynch was angry and upset with [plaintiff]'s response" to the call and that Patrolman "Lynch said [plaintiff] should have responded." Patrolman Lynch did not respond to this message but according to plaintiff's phone records, that same day plaintiff called Patrolman Lynch. On November 19, 2019, plaintiff sent Patrolman Lynch a text message regarding the upcoming hearing, specifically stating "Dec 16 or 18 is hearing date. Should be OT buddy. For u." Patrolman Lynch responded with an animated image which stated, "you da best."

The night before the disciplinary hearing, plaintiff texted Patrolman Lynch the following message, which, based on its contents and the message that followed, appeared to be copied from a message plaintiff contends he received from his attorney:

> Ok, Just to be clear. Under the revised strategy, you're not going to testify and neither is Dennis or your wife. But if they were to call you to testify and [hearing officer H]ayducka allows it, then we will keep it short and sweet and confined only to the incident. And that means we will probably be done this week with the hearing part. Then we will brief it so you [plaintiff] won't get suspended until [J]anuary or [F]ebruary.
>
> I am going to look at [Patrolman] Lynch[']s interview again today or tomorrow so I don't jam him up with something contradictory, I'll let you know. But I do

> know that I want him to say they didn't really need you to come. He and [Sgt. D]iamond could have handled it and he was surprised that [Sgt. D]iamond called you out like that in front of the mother and then on the radio. [Sgt.] Diamond just seemed like he didn't want to make the decision to kick the door.

Following this message, plaintiff also called Patrolman Lynch regarding his upcoming testimony. A few hours later, plaintiff texted him again:

> From my attorney.
>
> Btw. [Patrolman] Lynch said in his interview that they "needed" you there, And he was "kinda pissed". So [n]ever mind what I said the other day. I just want him to explain that he understands the "old school mentality" and upon reflection, it was clearly a miscommunication. Of course [Lt.] Henn omitted [Patrolman] Lynch's comments about the "old school mentality"

Patrolman Lynch did not respond in text to any of the messages plaintiff sent that day.

On the day of the hearing, while the parties were waiting for the proceeding to begin, plaintiff texted Patrolman Lynch a final time and asked "U got this text rigt? [sic] [Two] guys could have handled. [Three] was nice. All [I] did was keep mom back. I barely pushed her lol." Despite the aforementioned calls and text messages, Patrolman Lynch testified at the disciplinary hearing consistent with his statements to IA, that he believed the

May 17, 2019 incident was an "all hands[-]on deck call" and two officers were not enough to address the situation.

The day after the hearing, Lt. Henn initiated a second IA investigation after being made aware of plaintiff's communications with Patrolman Lynch. After "carefully review[ing] the tampering statute," N.J.S.A. 2C:28-5(a), NPPD IA concluded there was probable cause that plaintiff's contact with Patrolman Lynch violated the statute.[4] Lt. Henn contacted the Union County Prosecutor's Office (UCPO) regarding plaintiff's actions and was instructed to interview the involved parties.

In December 2019, Lt. Henn interviewed Patrolman Lynch, who stated plaintiff called him "a few times" over the past few months "to discuss the details of the case," specifically the "lack of a need for the additional officers at the call." According to Patrolman Lynch, he would "[y]es [plaintiff] to death" to end the conversation. Patrolman Lynch felt plaintiff "kept stressing the old school mentality of responding to calls" to persuade Patrolman Lynch to agree with him. Patrolman Lynch stated he believed plaintiff's actions indicated he

[4] N.J.S.A. 2C:28-5(a) provides: "[a] person commits an offense if, believing that an official proceeding or investigation is pending . . . he knowingly engages in conduct which a reasonable person would believe would cause a witness . . . to: (1) [t]estify . . . falsely; or (2) [w]ithhold any testimony . . ."

"was trying to tamper with [Patrolman Lynch's] thought of how he would be a witness." In fact, he "indicated he had no doubt that [plaintiff] was trying to influence his testimony as there was no other reason for [plaintiff] to have called him." When asked why he had not reported plaintiff's conduct, Patrolman Lynch "indicated that he felt one day [plaintiff] could be his boss and that he was concerned that he may retaliate against [him]."

In January 2020, the UCPO informed Lt. Henn that, although "it was [a] close" call, plaintiff's actions more likely constituted a violation of the department's rules and regulations rather than a criminal matter, and NPPD should accordingly address the situation administratively. In February 2020, however, the UCPO informed Lt. Henn it "would be taking a deeper look into the matter," and requested Lt. Henn interview Patrolman Lynch again for clarification on several matters. Ultimately, in March 2020, the UCPO determined it would not pursue criminal charges against plaintiff.

In his second interview, Patrolman Lynch confirmed he confronted plaintiff the night of the call and told him it was "an all-hands-on-deck type of call." It should have been apparent to plaintiff, Patrolman Lynch continued, he was "pissed about the outcome of the call." He conceded, however, that after that night, he "never told [plaintiff] that he disagreed with his opinion."

Patrolman Lynch also agreed he "gave [plaintiff] the impression that he was going to go along with [plaintiff's position that two men were needed]." However, Patrolman Lynch explained, he was "'yes[sing] [plaintiff] to death' so that [plaintiff] would stop asking him to say that they only needed two officers at the call." Patrolman Lynch added plaintiff never requested he lie on plaintiff's behalf.

NPPD filed a Preliminary Notice of Disciplinary Action (PNDA) on April 23, 2020, alleging plaintiff violated NPPD Rules and Regulations Sections 2:1.3(5), Police Officer Conduct; 3:1.1, Standard of Conduct; and 3:5.7, Intercession, and N.J.S.A. 40A:14-147, Conduct Unbecoming a Public Employee, specifically witness tampering.[5]

In April 2020, Lt. Henn interviewed plaintiff. Plaintiff stated Patrolman Lynch "never" believed more than two officers were required for the May 17, 2019 call and thus Patrolman Lynch's testimony at the hearing "shocked" and "confused" him. Although he conceded it was possible Patrolman Lynch was

[5] Section 2:1.3(5) provides "[p]olice [o]fficers shall conduct themselves in accordance with high ethical standards, on and off-duty" and Section 3:1.1 provides "employees shall conduct their private and professional lives in such a manner as to avoid bringing their department into disrepute."

placating him when he previously agreed about the required manpower, plaintiff maintained he never pressured Patrolman Lynch.

At one point in the interview, plaintiff analogized his communications with Patrolman Lynch to similar contacts a former police chief had with him at a disciplinary hearing he testified at years prior. Plaintiff reasoned he did not feel the communications between him, and Patrolman Lynch were inappropriate or that he overstepped in sending them, based on these past experiences and also because he "was merely relaying a message from his attorney." Plaintiff explained the messages he had sent the night before the hearing were copied and pasted from messages his attorney had sent him.

With respect to the messages sent the day of the hearing, plaintiff stated he sent them at his attorney's direction to confirm Patrolman Lynch's receipt of the messages from the night before and that "they were in agreement with the manpower needs of the night of the call." Plaintiff believed those messages were not inappropriate because the hearing had not begun when he sent them.

Lt. Henn also conducted interviews with Sgt. Diamond and Patrolman Nick Guerriero, who each indicated they were "aware" of the text messages and communications between plaintiff and Patrolman Lynch and found them concerning but had not actually seen the messages.

After considering the interviews and evidence, Lt. Henn concluded plaintiff violated NPPD Rules and Regulations, Sections 2:1.3(5), Police Officer Conduct; 3:1.1, Standard of Conduct; and 3:5.7, Intercession, and recommended a six-month suspension. Regarding Section 2:1.3(5), Lt. Henn determined plaintiff's conduct "disregarded" the ethical standards the department mandated from its officers. As to Section 3:1.1, Lt. Henn concluded "the impression that an officer may be attempting to improperly influence the direction of any case or hearing" not only provides a negative impression of the department but possessed "the potential to sully the reputation of the agency." Finally, regarding Section 3:5.7, Lt. Henn determined plaintiff's actions violated the rule, regardless of whether he was acting at his attorney's direction. Plaintiff "clearly attempted to influence" Patrolman Lynch's testimony, Lt. Henn found, which was "at minimum, inappropriate and . . . borderline criminal."

Despite Lt. Henn's recommendation of a six-month suspension and demotion, the NPPD terminated plaintiff. The disciplinary hearings regarding his removal occurred on June 19, 2020, and August 14, 2020 before South Brunswick Chief of Police Raymond J. Hayducka, acting as hearing officer. Both parties were represented by counsel.

At the proceeding, Lt. Henn, Patrolman Lynch, and then-current Police Chief Theresa Gazaway testified. Plaintiff did not testify or present witnesses on his behalf.

Lt. Henn testified it was "concerning" plaintiff sent the IA report to Patrolman Lynch, as it was a confidential document, but he did not consider it to be "the catalyst or the most important issue." Instead, he stated he was most troubled by plaintiff's text message to Patrolman Lynch on the day of the hearing, stating it was inappropriate and "on its face improper" as Patrolman Lynch was about to testify. Lt. Henn affirmed, based on his interviews, that he felt Patrolman Lynch had no intention of testifying in plaintiff's favor and instead "was yessing [plaintiff] to death" to end the earlier communications and conversations.

Patrolman Lynch testified plaintiff contacted him multiple times about the May 17, 2019 incident, beginning on July 3, 2019. With respect to plaintiff's contact with him the day before the hearing, Patrolman Lynch stated, in addition to the text messages, plaintiff called him to discuss his testimony. Although Patrolman Lynch conceded he understood the text messages that day were from plaintiff's attorney, he believed the message plaintiff sent him the morning of the hearing was an attempt "to influence his testimony" and to "to persuade

[him] to tell [the hearing officer] that [the call] only needed two cops." However, Patrolman Lynch also noted he never "t[old] [plaintiff] [he] would testify in a manner that would help him with the charges against him" or that he would "testify that only two officers were needed at the scene."

Police Chief Theresa Gazaway, the then-current chief of NPPD, testified she agreed with plaintiff's removal because his "conduct was a serious violation of his oath of office and even though the [UCPO] declined charges, [she] felt that all of the elements of the [witness tampering] statute were met." Further, she stated that if plaintiff were to remain with NPPD, there would be "an issue with Brady/Giglio[6] matters and . . . [plaintiff] could become a non-testimonial officer for [the department]."

After considering the testimonial and documentary evidence, Chief Hayducka concluded that plaintiff attempted "to influence . . . [Patrolman] Lynch's testimony" by convincing him to "testify that only two officers were needed at the dispute call," in contradiction to Patrolman Lynch's prior statement

[6] Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that, in a criminal matter, the prosecution's withholding of exculpatory evidence material to guilt or punishment violates due process); Giglio v. United States, 405 U.S. 150, 153-54 (1972) (holding prosecution's withholding evidence affecting credibility of witnesses whose reliability may be determinative of guilt also violates due process).

to IA and NPPD standard operating procedures. Chief Hayducka also found plaintiff violated NPPD Rules and Regulations Sections 2:1.3(5), Police Officer Conduct; 3:1.1, Standard of Conduct; and 3:5.7, Intercession; and that plaintiff's behavior constituted misconduct for purposes of N.J.S.A. 40A:14-147. For these violations, Chief Hayducka recommended plaintiff be terminated.

Chief Hayducka explained because plaintiff was an experienced officer with supervisory experience, plaintiff was aware his conduct was improper and the only "logical reason" for plaintiff to contact Patrolman Lynch in the way he did was to attempt to influence Patrolman Lynch's testimony. He found plaintiff's claim that there was simply a miscommunication about the number of officers required "not credible" as there was nothing to support it in the record. Chief Hayducka also found plaintiff's actions extended beyond contacting witnesses in preparation for his defense. He reasoned plaintiff's attorney could have contacted Patrolman Lynch directly, and "[a]t a minimum, [plaintiff] should have questioned the appropriateness of the text messages." By "trying to get . . . Patrolman Lynch to lie for him," he concluded, plaintiff's credibility was brought into question.

On November 18, 2020, defendant issued its Final Notice of Disciplinary Action (FNDA) sustaining each of the charges and terminating plaintiff. That

same month, plaintiff filed his notice of appeal pursuant to N.J.S.A. 40A:14-150, contesting the disciplinary charges and his termination. Plaintiff argued defendant's decision to terminate him "was not for just cause in violation of N.J.S.A. 40A:14-147," or "alternatively, the penalty [was] too severe in violation of West New York v. Bock, 38 N.J. 500 (1962) . . ." He sought dismissal of the disciplinary charges, lost pay and benefits, and attorneys' fees.

In response, defendant argued plaintiff failed to assert a claim which relief could be granted, his claim was barred by the doctrine of unclean hands, and any damages resulted from his own negligent or improper actions. Defendant further contended plaintiff's termination was for cause in accordance with the applicable law, and his actions were not related to "the lawful exercise of police powers in furtherance of his official duties." Defendant requested the court dismiss plaintiff's complaint with prejudice and affirm his termination. It also asked for attorneys' fees.

On June 30, 2021, the court held a hearing. Plaintiff testified he believed he was not required to respond to the May 17, 2019 call since Patrolman Lynch and Sgt. Diamond were responding, and he understood that only the minimum number of officers required by NPPD standard operating procedures—two—

were needed.[7] Plaintiff also stated he approached Patrolman Lynch that night to explain "the way [he] was trained, the old school way, is if it's a two-man call . . . two guys show up." He characterized the conversation as "not argumentative" and that following it, he and Patrolman Lynch appeared "cool."

Plaintiff further testified he "probably told half of the department," including Patrolman Lynch, about his twenty-day suspension because "[s]o many guys were wondering what my discipline was gonna end up being." Plaintiff indicated that he and Patrolman Lynch "would talk like cops do," that Patrolman Lynch would "ask what's going on" and was "very supportive of [plaintiff's] side of the story . . . that two cops could have handled [the call]." Because of this, plaintiff concluded Patrolman Lynch was "favorable."

Plaintiff explained he forwarded the text messages from his attorney to Patrolman Lynch the day before the hearing at his attorney's direction to "confirm with [Patrolman Lynch] everything he's been telling [plaintiff]." He sent the text message the morning of the hearing because Patrolman Lynch had

[7] At the disciplinary hearing before Chief Hayducka, Lt. Henn stated NPPD standard operating procedure (SOP) provides "domestic violence calls minimally should have two officers dispatched." (emphasis added). Additionally, the relevant policy, SOP 310, was introduced as an exhibit at the December 16, 2019 hearing. Neither party has included the written policy in the record, but a portion of it was read into the record at that hearing.

not responded the night before, and plaintiff's attorney requested he confirm Patrolman Lynch had received those messages.

Plaintiff stated he was unaware his interactions with Patrolman Lynch were potentially problematic until he received the IA notice from Lt. Henn in March 2020. Finally, plaintiff added he had never received any NPPD training regarding intercession or witness tampering.

On cross-examination, plaintiff acknowledged the IA report detailed Patrolman Lynch's belief the call required more than two officers and Patrolman Lynch testified consistently with that report. Nonetheless, plaintiff stated he understood Patrolman Lynch to be "yessing" IA because there were "a lot of issues with [IA] in New Providence." Plaintiff added when he questioned Patrolman Lynch about such inconsistencies, Patrolman Lynch purportedly responded IA "misconstrued what [he] said."

After considering the administrative record, testimonial evidence, and the parties' submissions, the court affirmed NPPD's decision to terminate plaintiff and detailed its reasoning in a written opinion. It first rejected plaintiff's argument that he had no reason to attempt to alter Patrolman Lynch's testimony, noting Patrolman Lynch maintained the call required more than two officers throughout his IA interviews and testimony. Although Patrolman Lynch

conveyed the contrary to plaintiff by "yessing" him in their discussions about the incident, plaintiff was aware from the IA report this was not how Patrolman Lynch felt. The court further determined it was "abundantly clear" plaintiff's repeated contacts made Patrolman Lynch uncomfortable as he was asked to testify regarding a superior's behavior and did not want to "make waves for himself."

The court was also unpersuaded by plaintiff's claim that his communications were only sent at his attorney's request. Even assuming plaintiff's attorney gave him any misadvice, the court determined plaintiff remained responsible for his own actions and stated, "there is no conceivable way that his communications could be construed simply as trying to ascertain what the witness was going to say." It further determined plaintiff's actions were an attempt to convey a specific narrative to Patrolman Lynch which would assist in defeating the charges against him.

The court concluded defendant had proven by a preponderance of the evidence that plaintiff violated NPPD Rules and Regulations Sections 2:1.3(5), 3:1.1, and 3:5.7, and plaintiff's behavior was misconduct, establishing just cause for his termination under N.J.S.A. 40A:14-147. As to N.J.S.A. 40A:14-147, the court explained the statute permitted "an officer [to] be disciplined for 'just

cause,' including 'misconduct' and 'discipline of the rules and regulations' of the department." As the court explained, "[p]laintiff was facing departmental charges and knowingly and repeatedly attempted to influence the testimony of a witness against him, [which is] the very essence of witness tampering [pursuant to N.J.S.A. 2C:28-5(a)]."

Next, the court addressed NPPD Rules and Regulations Section 3:5.7, Intercession, holding there was "no question" that plaintiff had "sought to undermine the disposition of disciplinary charges" by "attempting to influence . . . [Patrolman] Lynch's testimony." Further, the court found plaintiff's attempts to influence Patrolman Lynch departed from the standards of NPPD Rules and Regulations Sections 2:1.3(5) and 3:1.1.

Finally, the court concluded termination was an appropriate remedy. Although it recognized "an employee's past record should be considered when deciding the punishment for an offense" under Bock, 38 N.J. at 523, it noted "if the underlying conduct is of an egregious nature, the imposition of a penalty up to removal is appropriate, regardless of an individual's disciplinary history." The court found although plaintiff lacked a prior disciplinary record, his actions were sufficiently "egregious" and caused his credibility as an officer to "forever be in question." The court explained plaintiff "sought to undermine the integrity

of a disciplinary hearing" and "leaned on a younger and lower ranked officer to attempt to engineer a favorable ruling for himself." The court issued an order upholding the disciplinary charges and termination and this appeal followed.

III.

Before us, plaintiff reprises his arguments made during the administrative hearing and subsequent appeal. He first argues his conduct did not violate NPPD Rules and Regulations and specifically asserts speaking to a witness before a disciplinary hearing is not intercession as defined in Section 3:5.7. In support, plaintiff notes police officers are entitled to due process in a disciplinary hearing, and due process and fundamental fairness require that he have an opportunity to interview witnesses and prepare his defense. It is unfair, he claims, for defendant to have "ample opportunity" to prepare its witnesses while he faces disciplinary charges for merely speaking to one witness to confirm his testimony. In this regard, plaintiff contends his communications with Patrolman Lynch were intended only to prepare Patrolman Lynch to testify, not to improperly influence him and the text messages were sent at the direction of his attorney and contained no threatening or coercive language. He also notes Section 3:5.7 defining intercession prohibits only influence which is improper, but "improper influence" is not further defined.

Plaintiff analogizes intercession to witness tampering as provided in N.J.S.A. 2C:28-5(a) and 18 U.S.C. § 1512(b)(1),[8] and highlights the UCPO's decision not to prosecute him. Plaintiff construes "knowingly" in both statutes to require, "as a result of the actor's conduct, false testimony will likely be provided at the hearing." Plaintiff further argues "improper influence" as used in Section 3:5.7 means "influencing a witness, with knowledge the witness will likely give false testimony because of said influence." Plaintiff maintains he did not request Patrolman Lynch to testify falsely as to any fact because the number of officers needed at a call was a matter of opinion. He also stresses because Patrolman Lynch agreed with plaintiff's perception that the call only required two officers in multiple conversations, his actions cannot be construed as a "knowing attempt to elicit false testimony" because he reasonably believed Patrolman Lynch thought only two officers were needed.

Finally, plaintiff contends intercession was not meaningfully defined by NPPD, nor has it explained its interpretation of the rule. He also notes he received no training as to what is appropriate when an officer facing a

[8] 18 U.S.C. § 1512(b)(1) provides: "[w]hoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . influence, delay or prevent the testimony of any person in an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both."

disciplinary hearing interacts with witnesses and there is no established practice or unwritten policy on which he could rely. We disagree with all of these arguments.

As noted above, our role in reviewing the de novo proceeding before the trial court is "limited." Phillips, 117 N.J. at 579. We ensure the court's decision is supported by "a residuum of legal and competent evidence in the record" but make no new factual findings. Ruroede, 214 N.J. at 359 (quoting Weston, 60 N.J. at 51); Phillips, 117 N.J. at 579. We do not disturb the court's findings unless they are "'arbitrary, capricious or unreasonable' or '[un]supported by substantial credible evidence in the record as a whole.'" Phillips, 117 N.J. at 579 (quoting Henry, 81 N.J. at 580).

We are satisfied the court's decision was not "'arbitrary, capricious or unreasonable' or '[un]supported by substantial credible evidence in the record as a whole.'" Phillips, 117 N.J. at 579 (quoting Henry, 81 N.J. at 580). The court considered testimony from plaintiff and reviewed the transcripts and evidence submitted at the disciplinary hearing before Chief Hayducka, at which Lt. Henn, Patrolman Lynch, and former Chief Gazaway testified. The court determined the charges against plaintiff had been proven by a preponderance of the evidence, based on the "uncontroverted [evidence] that [Patrolman] Lynch felt

that more than two officers were needed at the call," plaintiff's knowledge of Patrolman Lynch's position, and plaintiff's repeated communications with Patrolman Lynch "to get [him] to change his statement that he already made to [IA]" and "to influence his testimony." We see no basis in the record to disturb that finding.

While plaintiff focuses his argument on the intercession charge, the court found his conduct also violated NPPD Rules and Regulations Sections 2:1.3(5), Police Officer Conduct, and 3:1.1, Standard of Conduct, as well as N.J.S.A. 40A:14-147, Conduct Unbecoming a Public Employee. Having found plaintiff attempted to undermine the disposition of his disciplinary charges, the court found it logical that such behavior also violated the ethical standards of Sections 2:1.3(5) and 3:1.1. This finding is also fully supported by the record. Additionally, the court found plaintiff had engaged in misconduct, establishing just cause for his termination under N.J.S.A. 40A:14-147. As discussed above, misconduct under N.J.S.A. 40A:14-147 "need not be predicated on the violation of any particular department rule or regulation." Phillips, 117 N.J. at 576.

We are satisfied the record supports the finding that plaintiff's actions constitute misconduct for purposes of N.J.S.A. 40A:14-147. We agree with the court's finding plaintiff's repeated attempts to persuade Patrolman Lynch to

testify to something he did not believe to be true falls under the purview of misconduct and witness tampering. We reject plaintiff's argument that he was simply confirming Patrolman Lynch's testimony. The court found "the evidence [wa]s uncontroverted that [Patrolman] Lynch felt that more than two officers were needed at the call," and Patrolman Lynch was "yessing" plaintiff because he was "uncomfortable being placed in the situation [plaintiff] was putting him in and is a 'go along to get along' type person." We agree with the court's finding "there is no indication . . . to suggest [Patrolman Lynch] agreed with the testimony being suggested by [p]laintiff." Rather, as the court characterized plaintiff's actions, he attempted to "rely on the so-called 'thin blue line' by having one officer in need convey to another how he was expected to come to his aid." Again, all of these findings are amply supported by the record warranting our deference.

Plaintiff's contention that "knowingly" as used in N.J.S.A. 2C:28-5(a) means "as a result of the actor's conduct, false testimony will likely be provided at the hearing" misstates the law. We specifically rejected this interpretation in State v. Speth, 323 N.J. Super. 67, 87 (App. Div. 1999), where we concluded "[a] definition of 'knowingly[ ]' which requires the actor to be 'practically certain that his conduct will cause such a result[ ]' is not an element of the offense and

is incompatible with the crime of witness tampering, as it would put undue weight on whether or not the defendant's attempt was likely to succeed." Accordingly, the more appropriate reading of 'knowingly' requires only that the actor is aware of the nature of their conduct. Ibid.; see also State v. Bryant, 419 N.J. Super. 15, 28 (App. Div. 2011) (discussing Speth and noting "a defendant need only be aware of the nature of his conduct to support a conviction [for witness tampering].")

Here, the court reasonably determined as an experienced police officer, plaintiff was aware that his repeated attempts to persuade Patrolman Lynch that only two officers were needed constituted witness tampering by a preponderance of the evidence. We find no basis to disturb that finding and the fact the UCPO did not prosecute plaintiff is not determinative. See Phillips, 117 N.J. at 575 (quoting Sabia v. City of Elizabeth, 132 N.J. Super. 6, 12 (App. Div. 1974)) (holding "the absence of a [criminal] conviction . . . bars neither prosecution nor finding of guilt for misconduct . . . in [related] disciplinary proceedings.").

The record also supports the court's finding that plaintiff violated the rule against intercession by seeking to undermine the disposition of the disciplinary charges against him. Specifically, the court determined plaintiff's relentless communications with Patrolman Lynch were intended to ensure he characterized

the May 17, 2019 incident in a manner favorable to plaintiff. We agree the contacts between plaintiff and Patrolman Lynch, when placed in the proper context we describe below, clearly demonstrate plaintiff's attempts to ensure Patrolman Lynch's testimony was favorable for him. As the court found, plaintiff repeatedly contacted Patrolman Lynch about his testimony in the months leading up to the hearing and the "only logical reason" for those communications "was to influence [Patrolman] Lynch's testimony so it would be more favorable to [plaintiff.]"

First, plaintiff repeatedly attempted to engage with Patrolman Lynch about the incident even though plaintiff was clearly aware of Patrolman Lynch's adverse feelings regarding the required manpower. As the record reflects, on the night of the incident, Patrolman Lynch and plaintiff had a conversation about the call where plaintiff "sensed" Patrolman Lynch "seemed 'pissed'" and, as Patrolman Lynch confirmed, he told plaintiff he thought more than two officers were needed. Plaintiff also read the IA report detailing Patrolman Lynch's interview with Lt. Henn. We also conclude the record fully supports the court's finding that Patrolman Lynch was "put in a difficult position by a supervisor with a great deal of experience." Plaintiff's superior rank and experience, compared to Patrolman Lynch's relatively new career in law enforcement,

contributed to the influence plaintiff sought to hold over Patrolman Lynch through their communications.

Finally, we agree the timing of plaintiff's text messages the day before and the morning of the hearing demonstrates an attempt to influence Patrolman Lynch's testimony. The night before the hearing, plaintiff texted Patrolman Lynch regarding his anticipated testimony. Following that unanswered message, plaintiff called Patrolman Lynch, and then, hours later, sent him another message. Again, Patrolman Lynch did not respond. Plaintiff followed up with a final text message the morning of the hearing, just minutes before it began. We agree with the court's finding those communications, viewed in context, are not reflective of mere witness preparation. Rather as the court found, plaintiff conveyed the narrative he wanted Patrolman Lynch's testimony to confirm during his testimony.

Even if we were to accept plaintiff's contention that all his communications with Patrolman Lynch were at the explicit direction of his lawyer, we remain unpersuaded the court's decision should in any way be modified. As the court correctly noted, "[p]laintiff is still responsible for his own conduct." NPPD Rules and Regulations Section 1:5.2, The Law Enforcement Code of Ethics, which NPPD officers are required to read and

abide by, provides: "I know that I alone am responsible for my own standard of professional performance . . ." Further, police officers are held to a higher standard of conduct than civilians. Phillips, 117 N.J. at 577.

In this regard, we also reject plaintiff's contention that he did not know his conduct was prohibited by the intercession rule because it had not been previously interpreted. The "primary duty" of police officers "is to enforce and uphold the law." Phillips, 117 N.J. at 576-77 (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965)). Lt. Henn, defendant, and even plaintiff characterize intercession as analogous to criminal witness tampering. As an officer with over a decade of law enforcement experience, plaintiff reasonably should have known that repeatedly contacting a witness about his testimony with "an intention to convey . . . a narrative, and one which would help [p]laintiff defeat the charges" was improper, particularly when plaintiff was aware the witness disagreed with the position plaintiff proposed.

Finally, plaintiff's claim that the disciplinary charges violated his constitutional rights to due process, and fundamental fairness is similarly unpersuasive as his contentions are simply belied by the record. He was afforded every opportunity to mount a proper defense, and defendant followed the necessary requirements set forth in N.J.S.A. 40A:14-147. Nothing in the

rules or defendant's interpretation of them stops an officer from interviewing a witness. Indeed, that is not what happened here. As the hearing officer noted, plaintiff "went beyond contacting [Patrolman] Lynch" and instead "attempted to coach and influence his testimony." Thus, we agree with the court's finding that plaintiff did not simply speak to Patrolman Lynch to prepare his defense, but tried to tell him how to testify, in a "clear[] attempt to influence and contradict [Patrolman Lynch's] previous statement to internal affairs." This determination, again, is amply supported by the record.

IV.

Additionally, plaintiff argues his termination was excessive and contrary to progressive discipline principles as his "alleged conduct [wa]s not severe, . . . unbecoming to the employee's position, [and] does not render [him] unsuitable for continuation in the position, nor . . . [is it] contrary to the public interest." Pointing to his lack of disciplinary record, plaintiff argues "minor discipline in the form of . . . training and counseling . . . to educate [him] as to the proper standard of conduct when conferring with witnesses prior to an administrative hearing" would be a more appropriate punishment. He should not be terminated, plaintiff concludes, for acting "solely at the behest of his attorney." Again, we disagree.

Progressive discipline "generally requires a progression of steps to address the employee's deficiencies before removal." Klusaritz v. Cape May Cnty., 387 N.J. Super. 305, 312 (App. Div. 2006). While an officer's past record cannot prove a current charge not based upon habitual misconduct, it may present "guidance in determining the appropriate penalty for the current specific offense." In re Carter, 191 N.J. 474, 484 (2007) (quoting Bock, 38 N.J. at 522-23). Progressive discipline is not necessary, however, "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Stallworth, 208 N.J. 182, 196-97 (2011) (quoting In re Herrmann, 192 N.J. 19, 33 (2007)).

To determine whether a disciplinary sanction is appropriate, we assess whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." Herrmann, 192 N.J. at 28-29 (quoting In re Polk, 90 N.J. 550, 578 (1982)). Our Supreme Court has warned "courts should take care not to substitute their own views of whether a particular penalty is correct for those of the body charged with making that decision." Carter, 191 N.J. at 486.

Courts routinely eschew progressive discipline and terminate police officers for severe misconduct. See, e.g., McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 397 (App. Div. 2008) (finding progressive discipline "need not be imposed" for officer's continued refusal to patrol as instructed); Cosme, 304 N.J. Super. at 207 (holding termination warranted for officer who took unauthorized vacation); Ruroede, 214 N.J. at 362-63 (positing termination appropriate for police officer who displayed a weapon during an off-duty altercation and made dishonest and "inconsistent statements during the course of the internal affairs investigation"). Further, actions "that subvert good order and discipline in a police department 'constitute conduct so unbecoming a police officer as to warrant dismissal.'" Herrmann, 192 N.J. at 35 (quoting Cosme, 304 N.J. Super. at 205-06).

In considering whether the imposed penalty is appropriate, we note police officers are "constantly called upon to exercise tact, restraint and good judgment in [their] relationship with the public" and "must present an image of personal integrity and dependability in order to have the respect of the public." Armstrong, 89 N.J. Super. at 566. Police officers are held to a higher standard as "one of the obligations [they undertake] upon voluntary entry into the public service." Phillips, 117 N.J. at 577 (quoting Emmons, 63 N.J. Super. at 142).

Here, the court determined termination was the only appropriate discipline for plaintiff because his actions aimed to disrupt the integrity of an official proceeding. Having reviewed the record, we do not find this penalty "so disproportionate to the offense . . . as to be shocking to one's sense of fairness." Herrmann, 192 N.J. at 28-29 (quoting Polk, 90 N.J. at 578). Although we acknowledge plaintiff had only one prior infraction, the court determined that plaintiff's conduct was sufficiently severe as to warrant termination without progressive discipline. We have no reason to disagree with that finding as it was supported by the record, and we are not charged with substituting our own views of whether a particular penalty is appropriate "for those of the body charged with making that decision." Carter, 191 N.J. at 486.

We also note plaintiff consistently refused to accept any accountability for his actions, at times attempting to explain his own misconduct with the past inappropriate actions of others. Indeed, the crux of several of plaintiff's arguments below and before us rest on his contention that he was only acting on the request of his attorney. Such statements illustrate plaintiff's failure to acknowledge his own oath of office, as well as the higher standard expected of him as a police officer. See Phillips, 117 N.J. at 577. We are satisfied there is no basis to disturb the court's finding that plaintiff's conduct was "sever[e]" and

"extreme," his credibility as an officer would "forever be in question," and therefore, the principles of progressive discipline were not appropriate.

To the extent we have not addressed any of plaintiff's arguments, we conclude they lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.