



STATE OF NEW JERSEY

In the Matter of Kevin Norton,
Wanaque, Police Department

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2023-104
OAL Docket No. CSV 06232-22

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ISSUED: FEBRUARY 28, 2024

The appeal of Kevin Norton, Police Sergeant, Wanaque, Police Department, 45 working day suspension and demotion, on charges, was heard by Administrative Law Judge Nanci G. Stokes (ALJ), who rendered his initial decision on February 7, 2024. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ’s initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on February 28, 2024, adopted the ALJ’s Findings of Facts and Conclusions and her recommendation to uphold the 45 working day suspension and demotion.

In this matter, upon its *de novo* review of the ALJ’s meticulously thorough, comprehensive and reasonable initial decision, as well the exceptions and reply filed, which do not require extensive comment, the Commission agrees with the ALJ’s findings regarding the charges and finds nothing in the appellant’s exceptions to demonstrate that the ALJ’s findings on the charges were arbitrary, capricious or unreasonable. The Commission does note that the ALJ found, based on a review of the testimonial and video evidence, that the proffered charges were supported.

Additionally, the Commission agrees that the ALJ’s recommended penalty imposed for the infractions is appropriate. In this regard, similar to its assessment of the charges, the Commission review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety

of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). Even when a law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant the penalty of removal where it is likely to undermine the public trust. In this regard, the Commission emphasizes that a Police Officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990).

In this matter, the ALJ, noting Norton's prior minor disciplinary record, performed a detailed analysis of the penalty to be imposed, ultimately finding:

. . . Norton should have understood that he did not have authorization to pursue the violators and engaged in an extended high-speed chase that put himself, the motorcyclists, and uninvolved motorists at risk. Given the department's small size, Norton was often the OIC, possessing the authority to terminate the pursuit of an officer he supervised when there was inadequate authorization for the pursuit or where the risk outweighed the need for apprehension. Thus, I **CONCLUDE** that Norton did not demonstrate he has the necessary judgment and skills to act in that capacity.

Accordingly, I **CONCLUDE** that Norton's demotion and forty-five-day suspension are appropriate penalties under the circumstances and are not so disproportionate to the offense to shock one's sense of fairness.

The Commission agrees with the ALJ's penalty analysis. The upheld misconduct is extremely serious and worthy of a severe sanction, especially given the appellant's status as a supervisory law enforcement officer. His improper actions posed serious safety concerns and demonstrated a sizable lack of judgment, a quality imperative for a supervisor. Accordingly, the 45 working day suspension and demotion imposed serve as a clear message to the appellant as to the inappropriateness of his actions, properly strip him of his supervisory duties, and signify that any future misconduct will result in more severe disciplinary action, up

to removal from employment.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and demoting the appellant was justified. The Commission therefore upholds those actions and dismisses the appeal of Kevin Norton.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 28TH DAY OF FEBRUARY, 2024



Allison Chris Myers
Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 06232-22

AGENCY DKT. NO. 2023-104

**IN THE MATTER OF KEVIN NORTON,
BOROUGH OF WANAUKE, POLICE
DEPARTMENT,**

Amie E. DiCola, Esq. on behalf of appellant (Fusco & Macaluso, LLC, attorneys)

Sean Dias, Esq. on behalf of respondent (Dias Law, LLC, attorneys)

Record Closed: January 5, 2024

Decided: February 7, 2024

BEFORE Nanci G. Stokes, ALJ:

STATEMENT OF THE CASE

On May 2, 2021, Kevin Norton, a Wanaque police sergeant, engaged in an extended high-speed vehicular pursuit, even though the motorcyclists he followed committed only traffic violations and later eluded his attempts to stop them. Should Norton be disciplined? Yes. Wanaque's departmental policy does not authorize pursuits

for motor vehicles or eluding offenses absent the risk of immediate harm and requires pursuit termination when there is an unreasonable danger to the public or the officer.

PROCEDURAL HISTORY

On June 30, 2021, Wanaque served Norton with a Preliminary Notice of Disciplinary Action (PNDA). In its notice, Wanaque charged Norton with incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). Wanaque also charged Norton with violations of the Attorney General Vehicular Pursuit Policy (AG Policy) and Wanaque's Rules and Regulations regarding vehicular pursuit policy (Wanaque Policy) and conduct unbecoming.

The PNDA specifies that Norton conducted a high-speed chase on May 2, 2021, driving eighty-four miles per hour (MPH) on a thirty-five MPH roadway to catch up to motorcyclists. Norton's vehicular pursuit was improper, having acknowledged that the motorcyclists he pursued committed only motor vehicle offenses, and his actions created an unnecessary risk of harm to the public, the motorcyclists, and himself.

Specifically, his actions included:

- Reaching a speed of 123 miles per hour.
- Being within several feet of the motorcyclists at speeds of over a hundred miles per hour.
- Passing multiple uninvolved motorists at high speeds while on the right shoulder.

Further, Wanaque charged Norton, then a sergeant, for failing to exercise proper judgment in starting the pursuit and not terminating it per the Wanaque and AG Policy.

Norton requested a departmental hearing, which Wanaque conducted on March 15 and April 26, 2022.

On July 8, 2022, Wanaque sustained the charges and specifications in a Final Notices of Preliminary Disciplinary Actions (FNDA) relative to Norton's vehicular pursuit on May 2, 2021, suspending Norton for forty-five days and demoting him from Sergeant to a police officer. On July 13, 2022, Norton filed an appeal.

On July 20, 2022, the Civil Service Commission transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. On July 26, 2022, the OAL filed the appeal and assigned the case to me. The parties focused on another disciplinary case first, delaying the hearings.

On August 1 and 16, 2023, I conducted hearings at the OAL.¹

The parties requested transcripts and agreed to submit post-hearing submissions thirty days after receipt.

On December 27, 2023, I received Wanaque's summation. Because petitioner had technical problems, I accepted petitioner's summation on January 5, 2024, and the record closed.

FINDINGS OF FACT

Based on the testimony provided and my assessment of its credibility, together with the documents submitted and my evaluation of their sufficiency, I **FIND** the following as **FACT**:

Background

Norton served as a police sergeant for Wanaque for seven months before the vehicular pursuit on May 2, 2021. Before his promotion, Wanaque employed Norton as

¹ I designate the hearing transcript from August 1, 2023, as T1 and from August 16, 2023, as T2.

a police officer since June 2013. In 2019, Norton became a detective, involving investigative work, but returned to patrol duties as a sergeant.

Before working in Wanaque, Norton served as a Passaic County Sheriff's officer for approximately eight months from September 2011 until he began working as a patrol officer for the Clifton Police Department in May or June 2012. Norton remained in that role until Wanaque hired him

As a sergeant, Norton has supervisory duties. Given the department's smaller size, Norton could be the highest-ranking officer on a shift. Generally, Wanaque had one sergeant supervising three officers. Norton also had training duties, including first aid, CPR, and firearms instruction. Notably, Norton is a veteran and served as an Army combat medic with a one-year deployment overseas.

Norton received prior minor discipline from Wanaque: a five-day suspension in April 2017, a three-day suspension in 2016, and a two-day fine in 2014. However, these penalties did not involve vehicular pursuits.

Training

As a police officer, Norton must undergo vehicular pursuit training. Norton received such training while an officer in Clifton. Wanaque similarly provided in-house vehicular pursuit training and had its officers attend training at the police academy. Norton attended this training at the Passaic County Police Academy in 2014, 2018, and 2019, which covered the AG Policy. (T-2 40:7-13, R-9).

In 2019, Police Chief Spillane became the training officer after his promotion to the rank of lieutenant. In this role, he ensured that vehicular pursuit training took place. Before Spillane changed this training by adding more instruction, Wanaque gave patrol officers folders containing tests and answers about the pursuit policy. However, in 2019, Wanaque distributed its vehicular pursuit policy, which a higher ranking officer reads to

the officers, and they take a different test, absent the answers. Once an officer submitted a completed test, Spillane would grade the tests and discuss any issues or incorrect test answers with the individual officer.

Today, Spillane has greater instructional involvement and meets with each shift regarding Wanaque's policy. Spillane acknowledges that test questions could have different interpretations. However, if an officer answered incorrectly, he would discuss the question and answer with the officer, like with Norton. (P-2 and P-3). Spillane began his police career in Wanaque in 2002, reaching the rank of Acting Police Chief in June 2023.

Still, Norton did not receive situational training, so he relied on his "knowledge of the policy to be able to fill in the blanks of whatever you're dealing with at the time." (T2 44:25-45:21). Still, in response to internal affairs' questions, Norton acknowledged the necessary criteria for a vehicular pursuit. (R-3, questions forty-two, sixty-three, and sixty-four.)

Further, Norton admits to receiving Wanaque's vehicular pursuit department rules and regulations, the Wanaque Policy. Thus, Wanaque expected Norton to review and understand the Wanaque and AG Policies. The exact number of vehicle pursuit training sessions Norton attended is unknown, given the absence of sign-in sheets. Still, I **FIND** that a preponderance of the evidence supports that Norton received information and training on vehicular pursuit policies, which he understood. Thus, I also **FIND** that Wanaque justifiably expected Norton to follow them.

The Pursuit

Much of the May 2, 2021, incident is undisputed and supported by vehicular camera footage from the Mobile Video Recorder (MVR), which captures video and audio, tracks speed, and monitors when a patrol officer operates the police vehicle's sirens, brakes, and flashing lights. (R-7.) Indeed, Spillane relied heavily on the MVR in the

internal affair investigation of the pursuit, an assignment he received from Captain Angelo Calabro.

On May 2, 2021, at 7:30 p.m., Norton was on solo patrol in a marked 2020 Chevy Tahoe. On that date, Norton was the only sergeant on duty. Indeed, he was the Officer in Charge (OIC), the only supervisor, and the highest-ranking officer in charge of the patrol shift. Specifically, Norton was in patrol unit 562, equipped with lights, sirens, and an in-car recording system, the MVR. Norton's vehicle was stationary and perpendicular to Ringwood Avenue across from Whisler Place. The posted speed is thirty-five miles per hour (MPH) at this location. The subject pursuit involved three motorcyclists. Based on their appearance on the MVR screen, the parties designated the motorcyclists as one, two, and three, based on their appearance on the vehicular video. Each motorcycle had one operator and no passengers.

At 7:30:37 p.m., motorcycle one enters the MVR screen, whose operator is standing on the motorcycle's pegs with his hands on the handlebars, wearing a red shirt or sweater and black vest with light-colored pants. His helmet appears multicolored. The motorcyclist exits the video in this position, still traveling southbound on Ringwood Avenue a few seconds later.

Next, at 7:30:42 p.m., motorcycle two can be seen on the video screen. Its seated operator is dressed in all black. Motorcycle two is multicolored, with orange, white, and red colors visible. Motorcyclist three enters the video view at 7:30:44 p.m. in a seated position, wearing all black, including his helmet. Motorcycle three is red. The operator's lower arm is visible, and the skin color is white or pale.

Norton estimated the motorcyclists' speed at fifty MPH, whereas Spillane believed it was closer to the posted speed limit. Given the patrol unit's position, Norton performed no mechanical speed assessment. None of the motorcyclists displayed or secured their license plates as required, causing the plates to flap up during operation and making them unreadable.

Norton pulled the patrol vehicle out of its stationary position at 7:30:55 p.m., nearly ten seconds after the motorcyclists left his MVR's view, and turned onto Ringwood Avenue toward the motorcyclists. During his attempt to "close the gap" to the motorcyclists, Norton reached eighty-four MPH for approximately three seconds, or nearly fifty miles over the speed-limit for Ringwood Avenue.

When Norton reaches Ringwood and Union Avenue, he activates his vehicle's sirens. As he catches up to the motorcyclists, they are at the light, in the left turn lane for the exit ramp to I-287 northbound, and Norton decreases his speed to thirty-seven MPH. Motorcycle three is the closest motorist to Norton's vehicle. Upon activating his sirens, motorcyclist three appears to look downward to the right to the sideview mirror.

Norton activates his sirens twice as he and the motorcyclists turn onto the exit ramp. Upon turning onto the ramp, motorcyclist three decreased their speed and pulled the motorcycle slightly to the right side of the lane onto the fog lane. Motorcyclists one and two continued up the ramp towards I-287 North, a three-lane highway.

At 7:31:44, motorcyclist three accelerated away from Norton into the entrance ramp lane, following motorcyclists one and two, eluding Norton's attempt for a motor vehicle stop. When motorcyclist three pulls away, the vehicular pursuit begins.

Motorcyclist three passes motorcyclist two, and the two motorcyclists accelerate while operating in the far left lane. As motorcyclists two and three approach a black SUV in the fast lane, they switch lanes into the middle and slow lane. The motorcyclists returned to the fast lane when they approached a cluster of vehicles in the middle and slow lanes. In the fast lane, they come upon a dark SUV with its right blinker activated and brakes applied. Norton and the two motorcyclists pass this vehicle on the right side. During the pass, the SUV moves further left near the lane mark, and Norton's speed reaches 96 MPH. (R-7, 7:32:31 p.m.) Norton's vehicle is only a few feet away from the rear wheel of motorcyclist two. Norton's speed increased to 101 MPH only seconds later at 7:34:34 p.m.

Motorcyclists two and three move to the slow lane and pass the pickup truck operating in the middle lane.

At 7:32:47, motorcyclist two travels in the middle lane, and motorcyclist three is in the slow lane. They move into the fast lane, passing vehicles on their right. In the slow lane, Norton approaches an uninvolved motorcyclist. To pass that motorcyclist, Norton enters the right shoulder at 112 MPH. (R-7 at 7:32:52-57). Norton felt this maneuver was safer than making a pass on the left that would be too dangerous because of the distance of another uninvolved vehicle from him. Further, Norton did not believe his actions caused a threat to other motorists. (T2 74:4-75:13.) Notably, motorcyclist one is "far gone" now. (T2 116:1-7.) After passing the motorcyclist on the right shoulder, Norton proceeds across lanes of traffic to reach the fast lane on the left and then back to the slow lane behind motorcyclist two. During this action, Norton passes fourteen uninvolved vehicles and reaches a top speed of 123 MPH while trying to close the growing distance between him and the violators. (T2 76:24-78:19). The video depicts a number of these uninvolved motorists applying their brakes while driving at highway speeds as Norton approaches with activated emergency lights traveling at far greater speeds.

Norton and motorcycle two, then in the middle lane, pass several vehicles in the fast lane and then switch to the fast lane, where they pass several other cars in the middle lane. While in the fast lane, motorcyclist two approaches several vehicles, including an SUV, and switches to the middle lane. The SUV in the fast lane activates its right blinker to switch lanes, but motorcyclist two passes the SUV on the right side. Meanwhile, Norton was operating in the fast lane behind motorcyclist two, reaching speeds of 115 MPH with lights and sirens activated.

At 7:34:03, Norton comes up behind the SUV, whose driver applies the vehicle's brakes, then abruptly moves into the middle lane. Norton felt the driver recognized his approach and intended to yield, and he slowed his unit down. Norton did not feel this was an immediate threat to the SUV's safety and that he was not required to end his pursuit. (T2 81:17-83:16.) Indeed, Norton felt he possessed adequate situational awareness,

including anticipating what other motorists were doing, to allow him to discontinue the pursuit if necessary. (T2 139:2-20.) Numerous uninvolved motorists that Norton passes throughout the pursuit applied their brakes or moved quickly into other lanes while traveling at highway speeds.

At 7:34:35, Norton and motorcycle two are traveling in the fast lane. Norton again comes within several feet of motorcyclist two at a speed of 101 MPH, passing several vehicles. Norton applies his brakes, slowing down slightly. Norton and the motorcyclists approach an SUV in the fast lane while a white passenger vehicle is in the middle lane at a similar speed to the SUV. Motorcyclist two switches from the fast lane to the slow lane while accelerating—the distance between Norton and motorcyclist two increases. Motorcycle two passes vehicles in the middle lane while traveling in the slow lane. Norton similarly passes the cars in the middle lane while traveling in the fast lane. Motorcyclist two continues to increase the distance between itself and Norton's vehicle until it is no longer visible. Near Summit Avenue, Norton turns off his lights and sirens. Norton continues onto Route 208 in the fast lane, traveling from 77 to 105 MPH and passing several motorists in the center lane. Norton exits Route 208 at Russell Avenue in Wyckoff, terminating the pursuit.

At times, Norton acknowledges the danger that the involved motorcyclists and high-speed pursuits pose to the public. (T2 113:23-114:7, T2 139:2-20.) Yet, he generally perceived no danger with his speeds because of his situational awareness and abilities, including his capabilities, the patrol unit's capabilities, the driving skills of the involved motorcyclists, and the roadway's condition. (T2 67:22-68:16, T2 71:7-24.)

With the internal affairs (IA) investigation, Spillane asked Norton to complete an eighty-eight-question form. Norton completed that form and added a one-and-one-quarter-page explanation of his actions regarding the pursuit wherever he felt he needed more space to provide an answer. While Norton testified that he felt constrained to answer the questions he thought IA designed to allow Norton to conclude that his actions violated the pursuit policy and that he did not get to explain his actions, this testimony is

disingenuous. (T2 99:7-100:8.) Instead, Norton added a detailed description of his actions beyond the eighty-eight questions, and nothing precluded him from adding more or asking for clarification. Further, Spillane relied on the vehicle's undisputed camera and speed recording to reach his conclusions, which Norton, Spillane, and Norton's union representative watched together.

Speeding and the failure to display plates on a motorcycle are motor vehicle violations. The video depicts cyclist one as standing on the motorcycle pegs, which is a permissible maneuver while operating a motorcycle. Outside the MVR's view, Norton states that this operator stood fully up on the seat of the bike for "a short time." (R-3, question eight.) Notably, the initial draft of Norton's investigation report states that motorcyclist one stood on the pegs. (R-5a.) However, his revised report and the IA questionnaire state that the operator stood on the bike's seat. (R-5b.) Norton explained that he considered the first report a draft, which he changed to reflect his observations regarding motorcycle one's actions more accurately after his IA interview. (T2 124:4-131-14.)

During the pursuit, Norton advised dispatch over the radio that the motorcyclists were wanted for "traffic." Indeed, Norton never advised dispatch that the motorcycles were operated "to pose an immediate threat to the safety" of another person. Norton's pursuit incident report and testimony consistently confirm traffic violations as the reason for pursuing the motorcyclists. (T2 at 140:20-24.) Norton acknowledges that although he later reported that motorcyclist one engaged in "reckless driving" when standing on the seat for a short time, this too is a traffic violation. Norton also did not believe that the motorcyclists committed a first or second-degree crime or an Appendix A offense. (R-3, questions sixty-three and sixty-four, T2 140:10 to 141:13.)

Authorization for Pursuit

In 2009, the Attorney General revised its police vehicle policy to "secure a balance between the protection of the lives and safety of the public and police officers, and law

enforcement's duty to enforce the law and apprehend violators." (R-4.). The AG Policy recognizes that vehicular pursuit decisions are critical choices police officers make "quickly and under difficult, often unpredictable circumstances." Id. at p.3. Officers choosing not to engage in a vehicular pursuit or terminating a pursuit because of the risk involved cannot be criticized or disciplined. Id. Further, "police officers who conduct pursuits consistent with this policy will be strongly supported by the law enforcement community in any subsequent review of such actions." Id.

The Attorney General formulated this policy, in effect at the time of this pursuit, "to provide minimum statewide requirements to direct law enforcement activities in the very critical area of police practice." However, the AG Policy importantly recognizes that police department characteristics vary among communities and that the Attorney General expected local law enforcement agencies "to develop individual standard operating procedures" to account for such variation consistent with the AG Policy.

The Attorney General's guidelines address when a police officer has authorization for a vehicular pursuit:

I (A) — Authorization to Pursue

1. A police officer may only pursue

- a. When the officer reasonably believes that the violator has committed an offense of the first or second degree, or an offense enumerated in Appendix A of this policy, or
- b. When a police officer reasonably believes that the violator poses an immediate threat to the safety of the public or other police officers.

2. Pursuit for motor vehicle offenses is not authorized under the above criteria unless the violator's vehicle is being operated so as to pose an immediate threat to the safety of another person.

Wanaque's guidelines differ slightly, but also address when a police officer has authorization for a vehicular pursuit:

III. Authorization to Pursue

A. A police officer may only pursue:

1. When the officer reasonably believes that the violator has committed an offense of the first or second degree; or
2. Has committed any crime or offense listed below [listing all Appendix A crimes noted under the Attorney General's pursuit policy]
3. When a police officer reasonably believes that the violator poses an immediate threat to the safety of the public or other police officers.
 - a. Eluding the police where the actor creates a risk of death or injury to another generally constitutes a 2nd degree crime; but the fact that an actor is eluding the police does not provide personnel with the automatic authority to pursue. Therefore, a 2nd degree eluding, without any other authorizing criteria should not be undertaken.
 - b. Pursuit for motor vehicle offenses is not authorized under the above criteria unless the violator's vehicle is being operated so as to pose an immediate threat to the safety of another person.

Here, Wanaque provided greater explanation to its officers regarding their authority to initiate a vehicular pursuit. Instead of referring an officer to an "Appendix" of charges that could authorize the pursuit if "reasonably known," Wanaque opted to list the ten offenses in its policy.

Wanaque's "eluding" language also restricts those circumstances when an officer may initiate a vehicular pursuit within its borders. In other words, the AG Policy might allow Norton to initiate a pursuit because eluding is a second-degree offense, but Wanaque's pursuit policy does not. Still, the AG Policy similarly cautions against vehicular pursuits for motor vehicle offenses.

Norton's police pursuit incident report asserts no other authorizing criteria but motor vehicle offenses and eluding. However, Norton says he continued the pursuit

because the motorcyclists "posed a risk to the motoring public." (R-3, questions twenty-six and sixty-five.)

Regardless of an authorization requirement under section A of the AG and Wanaque Policies, an officer should not automatically undertake a pursuit. Instead, an officer and shift commander must still consider other factors under section B of the Wanaque and Attorney General's Policies before pursuing a vehicle, including the likelihood of success of apprehension, the degree of risk concerning the pursuit to the volume and speed of traffic, the roadway's type, whether pedestrian traffic is present, and environmental factors. Further, police officer characteristics such as driving skills, road familiarity, and police vehicle condition are other factors to consider. Here, Norton was an experienced driver familiar with the highway and his vehicle; no adverse environmental factors were present, such as construction, weather, or darkness. Undeniably, Norton controlled his patrol unit during the pursuit with the skills and abilities he learned and gained from his training and driving experience. However, numerous vehicles were traveling on I-287 and Route 208 at highway speeds.

Spillane concluded that Norton violated the Attorney General and Wanaque's Policies because Norton did not have the authority to initiate or continue the pursuit and failed to communicate information about it required by the Policy. Specifically, motor vehicle offenses do not allow an officer to initiate a vehicular pursuit. Further, an officer must weigh the need to immediately apprehend the violator against the degree of risk to which the officer and others are exposed because of the pursuit. This consideration applies to both the initiation and the continuation of a pursuit. Here, Spillane focuses on the extended high speeds Norton drove while passing dozens of uninvolved motorists, including traveling on the shoulder, and switching lanes multiple times. Norton also drove at excessive speeds very close to motorcyclist two.

Once an officer initiates a vehicular pursuit, that officer must notify communications with specific information about the pursuit. Here, Norton did not broadcast the reason for his pursuit ("traffic") until 2.3 miles, nearly halfway through his pursuit. Norton also

incorrectly broadcast the pursuit as occurring on Route 208 North when he was traveling on Route 208 South. Still further, Norton failed to apprise communications of the motorcyclists' speed during the pursuit.

Still, Spillane was not responsible for determining the charges against Norton. The FNDA concluded that Norton not only lacked authority to pursue the motorcyclists in violation of the pursuit policy, but Norton also violated the vehicular pursuit policy by failing to terminate the pursuit when he should have. Yet, Wanaque did not include Norton's communication omissions during the pursuit in its specifications.

Notably, any pursuit requires an officer to "immediately activate emergency lights, audible device, and headlights." (R-4 at p.7, R-10 at section V), which Norton did as he approached the ramp to I-287. Still, to diminish the likelihood of a pursuit, officers seeking to stop a violator are authorized to close the distance (gap) "without creating a substantial threat to the public safety." (R-10 at section V, R-4 at p.8). Here, Norton drove 84 MPH on a 35 MPH roadway in his attempts to stop motorcyclists for motor vehicle violations before arriving at the ramp to I-287 North. I **FIND** that this was excessive under the circumstances.

Motorcyclist three's actions on the ramp can be "eluding," but motorcyclist one no longer stood on the seat. Norton traveled directly behind the motorcyclists at thirty-seven MPH, slightly above the posted limit. Violators committing traffic offenses or eluding actions must first pose an immediate threat to the safety of another person before pursuing under Wanaque's Policy. Norton also acknowledges that "absent any other criteria, a pursuit should not be automatically undertaken for a second-degree eluding." (R-3, question forty-two.) When Norton begins the pursuit on the ramp, nothing about the motorcyclists suggests an "immediate threat to the safety of another." Indeed, Spillane highlighted that the pursuit should never have gotten past the ramp. Thus, I **FIND** a preponderance of evidence demonstrating that Norton was not authorized to pursue the three motorcyclists when he did under Wanaque's Policy.

Undeniably, the motorcyclist operators drove recklessly during the pursuit on I-287 and Route 208. Still, Norton must first have the authority to initiate the vehicular pursuit, which Wanaque maintains he did not. Therefore, the motorcyclists' reckless actions after an improperly initiated pursuit cannot justify it.

Although different sections within the Attorney General and Wanaque Policies address the pursuit's initiation, continuation, and termination, the concerns are the same. Indeed, all aspects of the vehicular pursuit require the officer to consider the danger involved.

During the pursuit, Norton was within several feet of the motorcyclist at speeds near 100 MPH twice. Norton highlights that he applied his brakes. However, he remained well above the speed limit and was very close to the motorcyclist, who had no bumper like a car would. Wanaque's Policy requires that pursuing officers "maintain a safe distance from the violator's vehicle [to] have adequate time to facilitate evasive maneuvers and reduce the potential of a rear-end collision . . ." (R-10 at section V.) Here, I **FIND** a preponderance of evidence exists to support that Norton did not maintain a safe distance from the violator.

In sum, I **FIND** that Spillane's conclusions that Norton had no authority to pursue the motorcyclists or to continue the pursuit and that he did not maintain a safe distance from the violators were credible and consistent with the Wanaque Policy. In contrast, Norton's justifications for the pursuit were not.

Termination of the Pursuit

Under the Wanaque and AG Policies, a police officer should terminate a pursuit when instructed by the shift commander, when the officer believes that the danger to the officer or the public outweighs the necessity for immediate apprehension, when the pursued vehicle's location is no longer known, or the distance between the officer's vehicle and the violator's vehicle becomes too great making the pursuit futile, or where

there is a clear, present, and unreasonable danger to the police officer or public. The policy further specifies that such a danger exists when the pursuit requires the vehicle to travel at excessive speeds, against traffic flow, or in a manner that exceeds the performance capabilities of the pursuing vehicle or the pursuing police officer.

The AG and Wanaque Policy delineate the OIC or supervisor's additional role regarding the pursuit's termination. (R-4 at p. 11, R-10 at section VIII.) A supervisor or OIC must consider whether there is authorization for the pursuit to allow its continuation. Further, the OIC must terminate a pursuit if the danger to the pursuing officer or the public outweighs the necessity for immediate apprehension of the violator or if the "pursuit is of a protracted duration." Notably, a supervisor must ensure that "all officers follow this policy and agency procedures "during the pursuit. (R-4 at p. 12, R-10 at section VIII). Here, Norton was the only supervisor aware of the pursuit and could have terminated it.

Here, Norton initially believed he could apprehend the motorcyclists, but the distance between his vehicle and them became too great to see. Further, motorcyclist one was well beyond Norton's sight soon after the pursuit began. Undeniably, Norton's speed throughout the pursuit was well above the posted speed limit, and I **FIND** his speed was excessive. At those high speeds, Norton passed dozens of vehicles, moved in and out of lanes, was within feet of the motorcyclist, and traveled on the shoulder to pass an uninvolved vehicle. Thus, I **FIND** that the dangerous situation Norton's extended pursuit caused is evident from the video, and braking at times to reduce his speed or his driving capabilities does not adequately diminish the risk. In other words, I **FIND** that a preponderance of the evidence exists to support that Norton should have terminated the pursuit earlier than he did under the Wanaque and the AG Policies and that he had a more significant duty as a supervisor to do so.

CONCLUSIONS OF LAW

Charges

A civil service employee who commits a wrongful act related to their duties or for other just cause may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. Indeed, “[t]here is no constitutional or statutory right to a government job.” State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Under N.J.A.C. 4A:2-1.4(a), in appeals concerning major disciplinary action, the appointing authority bears the burden of proof. That burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing as to both guilt and the penalty is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); West New York v. Bock, 38 N.J. 500 (1962). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). One can describe preponderance as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Wanaque charged Norton with conduct unbecoming a public employee, incompetency, neglect of duty, and other sufficient cause, violating public employee regulations.

“Conduct unbecoming a public employee” is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). Further, misconduct does not require that the employee violates the criminal code, a written rule, or a policy. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The complained-of conduct and its attending circumstances need only “be such as to offend publicly

accepted standards of decency.” Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)).

Significantly, police and corrections officers are held to a higher standard of conduct than other citizens due to their roles in the community. In re Phillips, 117 N.J. at 576-77. They represent “law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.” Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Further, a sergeant, like Norton, is a higher-ranking supervisory law enforcement officer and is held to an even higher standard of conduct. In re Thomas Whitley, CSR 12344-11, Final Decision (April 4, 2012), <http://njlaw.rutgers.edu/collections/oal>; In re Bruce McGarvey, CSV 4360-97, Final Decision (July 21, 1998), 1998 N.J. AGEN LEXIS 1031.

Here, I found that Norton engaged in a vehicular pursuit without necessary authorization, putting himself, the involved motorcyclists, and the uninvolved motorists in danger. He also chose not to terminate this improper pursuit despite the excessive speeds he traveled on a busy highway. Thus, Norton’s conduct adversely affects the public interest. Therefore, I **CONCLUDE** that a preponderance of credible evidence exists to demonstrate that Wanaque sustained its burden on the charge that Norton conducted himself unbecomingly.

Under N.J.A.C. 4A:2-2.3(a)(1), an incompetent employee unable to execute his job responsibility is subject to discipline and termination. See Klusaritz v. Cape May Cnty., 387 N.J. Super. (App. Div. 2006) (upholding removal of an accountant incapable of preparing a bank reconciliation and unsuitable for the job). Here, Norton used poor judgment and did not follow established pursuit policies. While Norton may be capable of performing his officer duties, his incompetency is more readily apparent relative to his supervisory responsibilities for the pursuit. As a sergeant, he verifies that vehicle pursuits

are authorized and must order pursuit termination when appropriate. Here, Wanaque expected Norton to know that motor vehicle offenses, including reckless driving or eluding, did not allow his pursuit under Wanaque's Policy, and he failed to terminate the pursuit appropriately in the face of extended high speeds and multiple passing maneuvers. Thus, I **CONCLUDE** that a preponderance of the evidence exists to sustain Wanaque's charge that Norton was incompetent in his duties.

Generally, "neglect of duty" means that an employee has failed to perform and act as required by the description of their job title. Briggs. v. Dept. of Civil Service, 64 N.J. Super. 351, 356 (1980); In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" intends conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (internal citation omitted). Also, neglect of duty can arise from an omission or failure to perform a task imposed upon a public employee that indicates a deviation from usual standards of conduct. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job. A failure to perform duties required by one's public position is self-evident as a basis for imposing a penalty without good cause for that failure. I found that Norton did not follow Wanaque's Policy and, therefore, breached a duty imposed by the Wanaque and AG's Policy in engaging in an unauthorized pursuit that he did not terminate soon enough. Thus, I **CONCLUDE** that a preponderance of the evidence exists to sustain Wanaque's charge that Norton neglected his duties.

The Civil Service Act's regulations also do not define "other sufficient cause." Other sufficient cause generally encompasses conduct that violates the implicit standard of good behavior for an individual who stands in the public eye. Often, this charge addresses violations of policies and procedures established by the employer. Given my findings of fact concerning Norton's vehicular pursuit on May 2, 2021, and his failure to follow the AG and Wanaque Policy, I **CONCLUDE** that a preponderance of the credible evidence exists to support a violation of N.J.A.C. 4A:2-2.3(a)(12).

Penalty

Progressive discipline requires consideration once it is determined that an employee violated a statute, regulation, or rule concerning his employment. W. New York v. Bock, 38 N.J. 500 (1962). Where the underlying conduct is egregious, however, imposing a penalty up to and including removal is appropriate, regardless of an individual's disciplinary record. In re Herrmann, 192 N.J. 19 (2007). In determining the reasonableness of a sanction, the employee's record and any mitigating circumstances provide guidance. Bock, 38 N.J. 500.

Indeed, the Civil Service Commission may increase or decrease the penalty under progressive discipline. N.J.S.A. 11A:2-19; In re Carter, 191 N.J. 474, 483-86 (2007). Thus, an employee's prior disciplinary record is relevant to determining an appropriate penalty for a subsequent offense, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Ibid. at 483-84 (quoting In re Polk, 90 N.J. 550, 578, (1982) (internal quotes omitted)). Generally, [courts] "accord substantial deference to an agency head's choice of remedy or sanction, seeing it as a matter of broad discretion, . . . especially where considerations of public policy are implicated." Division of State Police v. Jiras, 305 N.J. Super. 476, 482 (App. Div. 1997).

The concept of progressive discipline provides that "discipline based in part on the consideration of past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Hermann, 192 N.J. at 21 (citing Bock, 38 N.J. at 522 (1962)). An employee's record includes "an employee's reasonably recent history of promotions, commendations, and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. 523-524.

Undeniably, a sergeant is a supervisory officer entrusted with additional duties. In In re Walter Zapoluch, CSV 11659-09, Final Decision (September 21, 2010), the Commission increased a penalty against the sergeant, noting that even where a supervisory law enforcement officer is without a prior disciplinary record and an unblemished career, “the seriousness of an offense may nevertheless warrant a severe penalty or removal where it is likely to undermine the public trust.”

In cases where the employer bypasses progressive discipline, “the question for the courts is ‘whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.’” In re Carter, 191 N.J. 474, 484 (2007); Hermann, 192 N.J. at 28-29 (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). Absence of judgment alone can be sufficient to terminate an employee in a sensitive position requiring public trust in that judgment. See Hermann, 192 N.J. at 32 (DYFS worker without prior discipline removed for waving a lit cigarette in the face of a five-year-old).

Although the focus is generally on the seriousness of the current charge and the appellant’s prior disciplinary history, this tribunal must also consider the purpose of civil service laws. Civil service laws “are designed to promote efficient public service, not to benefit errant employees. The welfare of the people, not exclusively the welfare of the civil servant, is the basic policy underlying our statutory scheme.” Gaines, 309 N.J. Super. at 334. Indeed, “[t]he overriding concern in assessing the propriety of [the] penalty is the public good.

Norton maintains that a demotion and forty-five-day suspension is too harsh a penalty. Norton has only a prior minor disciplinary record unrelated to driving or vehicular pursuits. However, Wanaque maintains that Norton’s conduct on May 2, 2021, was egregious and that he failed to appreciate the dangers his actions posed. Wanaque cites various cases that support the penalties it imposed.

In one case, the appellant appealed a suspension of forty-five days and a demotion from lieutenant to correction officer, a demotion two levels in rank. In re Cusick, CSV 5461-10, Initial Decision (November 3, 2010), <http://njlaw.rutgers.edu/collections/oal>.² In Cusick, the County alleged that appellant “was asleep and inattentive while supervising civilian employees,” and the Administrative Law Judge (ALJ) sustained those charges based upon a preponderance of the evidence. In turn, the ALJ determined that a suspension of forty-five days was appropriate. However, the Administrative law Judge concluded that only a single demotion from lieutenant to sergeant rather than a double demotion was the appropriate penalty for appellant’s conduct and adequately served the public’s interest. Id. In assessing the penalty, the ALJ noted that appellant had an unblemished disciplinary record during his more than twenty-three-year career until these charges. Id. Here, Norton has a minor prior disciplinary history and far fewer years of service with Wanaque.

In Lloyd v. Atlantic City Police Dept., 94 N.J.A.R.2d (CSV) 277 (November 16, 1993), 1993 N.J. AGEN LEXIS 1655, the Merit System Board sustained a demotion and ninety-day suspension on charges of “conduct unbecoming,” “other sufficient cause” and “unauthorized absence” for Lloyd’s conduct stemming from two motor vehicle offenses committed on the same day while intoxicated and on sick leave. Lloyd did not challenge the suspension but maintained that he should remain a sergeant. However, the Board upheld the demotion, noting that petitioner did not possess “the leadership ability and other skills necessary to perform adequately as sergeant.” Although Lloyd’s unbecoming conduct was repetitive unlike Norton’s, the case highlights the expectations of higher ranking supervisory officers.

Here, I found that Norton should have understood that he did not have authorization to pursue the violators and engaged in an extended high-speed chase that put himself, the motorcyclists, and uninvolved motorists at risk. Given the department’s

² Although a final decision is unavailable, the March 16, 2011, Commission minutes reflect its affirmation of the Administrative Law Judge’s determination.
<https://www.nj.gov/csc/about/meetings/minutes/031611m.html>

small size, Norton was often the OIC, possessing the authority to terminate the pursuit of an officer he supervised when there was inadequate authorization for the pursuit or where the risk outweighed the need for apprehension. Thus, I **CONCLUDE** that Norton did not demonstrate he has the necessary judgment and skills to act in that capacity.

Accordingly, I **CONCLUDE** that Norton's demotion and forty-five-day suspension are appropriate penalties under the circumstances and are not so disproportionate to the offense to shock one's sense of fairness.

ORDER

Based upon my findings of fact and conclusions of law, I **ORDER** that Norton's appeal be and is hereby **DISMISSED**.

I further **ORDER** that Norton be demoted from sergeant to patrol officer with Wanaque and suspended for forty-five working days.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

February 7, 2024
DATE



NANCI G. STOKES, ALJ

Date Received at Agency:

February 7, 2024

Date Mailed to Parties:

February 7, 2024

ljb

APPENDIX

WITNESSES

For Petitioner:

Officer Kevin Norton

For Respondent:

Police Chief Keith Spillane

EXHIBITS

For Petitioner

- P-1 not in evidence
- P-2 June 26, 2020, vehicular pursuit test
- P-3 November 24, 2020, vehicular pursuit test

For Respondent

- R-1 Preliminary Notice of Disciplinary Action dated June 30, 2021
- R-2 Final Notice of Disciplinary Action dated July 8, 2022
- R-3 Internal Affairs investigation report with attached questions and answers
- R-4 Attorney General Police Vehicular Pursuit Policy
- R-5a Investigation report dated May 2, 2021
- R-5b Investigation report dated May 2, 2021
- R-6 Police Pursuit Incident Report dated May 2, 2021
- R-7 MVICR video of incident
- R-8 Audio of Dispatch regarding the incident
- R-9 Police Academy of Passaic County Certificates of Completion
- R-10 Wanaque Department Rules and Regulations, Pursuit and Forcible Stopping Guidelines
- R-11 Acknowledgment of receipt of Department Rules and Regulations
- R-12 Oath of Office
- R-13 Prior disciplinary actions