

FRED RECK,

Respondent,

v.

MONMOUTH COUNTY
PROSECUTOR'S OFFICE,

Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-0001734-24T4

On Appeal from Superior Court, Law
Division Civil Part, Monmouth County

Hon. Owen McCarthy, P.J.Cv. sat below

Dated: June 12, 2025

**AMENDED BRIEF OF APPELLANT
MONMOUTH COUNTY PROSECUTOR'S OFFICE**

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PRELIMINARY STATEMENT

The Office of the Attorney General (“OAG”) created, updated and administers a process by which complaints against law enforcement officers are investigated, prosecuted and reported. In recent years the OAG has amended those policies in large part, to promote transparency, accountability and to prevent officers who would otherwise be subject to discipline from gaming the system. The Monmouth County Prosecutors Office (“MCPO”), as a subordinate law enforcement agency, enforces the policies as laid out by the OAG.

Fred Reck (“Reck”), was the Deputy Chief of the Marlboro Police Department. He became the subject of allegations of misconduct, which resulted in the filing of an Internal Affairs (“IA”) complaint. In light of his rank in the department, and pursuant to the OAG Directives, the MCPO undertook the investigation of those allegations. After a thorough review, the MCPO produced a memo concerning that investigation, sustaining the allegations against Reck in the IA complaint and referred the matter back to the Marlboro Police Department for further action. Thereafter, without MCPO’s consent or participation, Reck and the Marlboro Police settled the matter with Reck’s resignation and an agreement that the Department would not file misconduct charges against Reck.

Post-retirement, Reck sought to appeal from the findings of the MCPO investigation sustaining the allegations in the IA complaint, including being

untruthful in the investigation. After Reck, through counsel, was advised that the OAG Directives do not provide such redress and learning the collateral consequences of his choices, including being publicly listed on an official website for those with serious sustained charges, Reck now seeks by way of the underlying lawsuit, to compel the MCPO to create and implement an avenue of appeal for him to be able to challenge the findings of the investigation. in order to avoid a collateral consequence to his actions-inclusion in a public listing of officers. A collateral consequence, which is required in the OAG. This despite the fact that the relevant OAG Directives and Policies specifically prohibit his attempt to undo the impact of his retirement after a sustained finding of untruthfulness.

Reck's lawsuit and the orders from the Trial Court to provide Reck with a hearing, in effect compel the MCPO to amend the OAG Directives to create and implement a process prohibited by the OAG's Directives. This appeal seeks to correct that injustice.

PROCEDURAL HISTORY

On August 28, 2023, the Plaintiff, Fred Reck, filed an action captioned Fred Reck v. Monmouth County Prosecutors Office. That complaint, fashioned as an "Action in Lieu of Prerogative Writ," was given docket number MON-L-2684-23. The complaint was served on September 6, 2023.

A Motion to Dismiss pursuant to 4:6-3(e) was filed by the Defendant. That

motion was heard and denied by the Trial Court on February 2, 2023.

Defendant filed a timely answer. The parties engaged in limited discovery as directed by the Trial Court.

Motions for Summary Judgement were filed by both the Plaintiff and the Defendant. Those motions were argued before the Trial Court on September 27, 2024¹. The Court rendered its decision on November 22, 2024. The Plaintiff's Motion for Summary Judgement was granted. The Defendant's motion was denied.² [Pa 27-29]

Defendant sought clarification and reconsideration from the trial court. That application was heard and granted in part on January 17, 2025³. [Pa 30]

Thereafter, the Plaintiff filed a second lawsuit against the Monmouth County Prosecutors Office. Reck v. Monmouth County Prosecutors Office ("Reck II") MON-L-46-25. [Pa 31-43] That lawsuit, again, seeks to compel the MCPO to conduct a hearing concerning the discipline in furtherance of the Trial Court's order.

This appeal follows.

STATEMENT OF FACTS

¹ 1T refers to the argument before the Trial Court on the motions for summary judgement dated September 27, 2024

² 2T refers to the transcript from the decision of the Trial Court on the motions for summary judgement dated November 22, 2024.

³ 3T refers to the transcript from the decision of the Trial Court on the motions for summary judgement dated January 17, 2025.

The Plaintiff, Fred Reck, was employed as Deputy Chief with the Marlboro Police Department. [Pa 1-2; Complaint ¶¶ 1,5]. On or about September 15, 2022, Sgt. Jonathan Gramcko lodged an IA complaint against the Plaintiff. [Pa 3 Complaint ¶ 6].

Because of the Plaintiff's rank as Deputy Chief, the investigation of that I.A. complaint was referred to the Monmouth County Prosecutors Office. [Pa 6, Complaint ¶ 7]

On or about January 18, 2023, MCPO issued a Summary and Conclusions report sustaining the allegations in the IA complaint that Plaintiff had been untruthful as part of the investigation. [Pa 44-46 *Confidential*]

The findings were shared with the Plaintiff. [Pa 3, Complaint ¶ 10]. Thereafter, as a result of negotiations between the Plaintiff and Marlboro Township, Plaintiff elected to retire effective April 1, 2023, rather than contest the sustained findings. Reck entered into a settlement agreement with the Township of Marlboro. [Pa 47-53 *Confidential*]. MCPO was not a party to that agreement, and in fact, advised counsel for Marlboro that the agreement was flawed. [Pa 12-15]

After his retirement the Plaintiff, through his attorney, attempted to obtain “a copy of the formal procedures by which he may challenge the findings of the Summary and Conclusions report. . .” [Pa 4, Complaint ¶ 14]. By letter dated July 10, 2023, Assistant Prosecutor Melanie Falco, Director of the Professional

Responsibility and Bias Crime Unit at MCPO, wrote to Plaintiff's counsel. In that letter, AP Falco advised Plaintiff's counsel that there was no such procedure, that having failed to seek a hearing prior to retirement, he was prohibited from doing it post-retirement. [Pa 54-56].

Presumably in response to that letter, the Plaintiff filed the present lawsuit to create a remedy which did not exist. [Pa 1-12; 31-43]

LEGAL ANALYSIS

I. THE TRIAL COURT WAS INCORRECT IN ITS DECISION TO GRANT SUMMARY JUDGEMENT IN FAVOR OF RECK AND DENY SUMMARY JUDGEMENT IN FAVOR OF THE MCPO (Raised below: T2 & T3)

A. OVERVIEW OF DISCIPLINE PROCESS

In order to evaluate the claims and issues raised in this appeal, it is necessary to have an overview of the discipline process. This process was substantially revised by the Office of the Attorney General (OAG) pursuant to Attorney General Law Enforcement Directive 2020-7 ("Directive 20-7") dated August 28, 2020. That Directive not only revised portions of the Internal Affairs Policy and Procedures ("IAPP"), but additionally, explained the reasons for those revisions. This version of the IAPP became effective on August 31, 2020.

The IAPP was thereafter revised again on November 15, 2022 by the Attorney General Law Enforcement Directive No. 2022-14 ("Directive 22-14"). These

revisions were expressly for the purpose of promoting transparency stating: “Transparency regarding law enforcement internal affairs investigations is necessary to foster strong police-community relationships and public trust, as previous Attorney General Directives and judicial opinions have repeatedly explained in the law enforcement.” *Ibid.*

1. THE AUTHORITY OF THE OAG

It is clear that the authority and responsibility of creating policies and procedures which control law enforcement agencies in the State rests with the Attorney General. “As the chief law enforcement officer of the State, the Attorney General possesses broad authority over criminal justice matters in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State. *N.J.S.A. 52:17B-98*. This authority includes the issuance of the IAPP, which carries the force of law. *N.J.S.A. 40A:14-181. In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. 462 (2021).*” [Pa 71-144; IAPP ¶ 1.0.5]. Those Directives, and the relevant statutes, provide a framework for addressing claims against law enforcement officers.

The Monmouth County Prosecutors Office, to be sure, has significant authority and responsibilities. However, those powers flow from, and are subject to, the dictates of the Attorney General. Recently, the Court in *American Civil*

Liberties Union v. County Prosecutors Association of New Jersey, 474 N.J. Super. 243, 262-263 (App. Div. 2022) *affirmed* 257 N.J. 87 (2024) had occasion to summarize the role and powers of County Prosecutor's Offices writing:

The Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, brought "the county prosecutor more closely within the control and supervision of the executive branch through the attorney general." *In re Ringwood Fact Finding Comm.*, 65 N.J. 512, 530 (1974). The Act requires the Attorney General to consult with, advise, and supervise the county prosecutors "with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State," N.J.S.A. 52:17B-103, obligates the "county prosecutors to cooperate with and aid the Attorney General in the performance of his duties," N.J.S.A. 52:17B-112(a), and empowers the Attorney General to supersede a county prosecutor, N.J.S.A. 52:17B-106, and to call prosecutors into conference to "discuss[] the duties of their respective offices," N.J.S.A. 52:17B-112(c). Thus, "county prosecutors occupy a 'hybrid' role, serving both the county and the State." *Gramiccioni v. Dep't of L. & Pub. Safety*, 243 N.J. 293, 310 (2020) (citing *Wright*, 169 N.J. at 455-56). Nevertheless, the Attorney General "has both the authority and the duty to establish and enforce uniform statewide policies, practices, and procedures to ensure the most efficient and effective use of the law enforcement resources of all other police and prosecuting agencies throughout the State." *Report of the Cnty. Prosecutor Study Comm'n* at 6.

It is the Attorney General who is empowered to create statewide Directives for the operation of law enforcement offices, including discipline. It is the responsibility of the Monmouth County Prosecutors Office to abide by those Directives.

2. THE APPLICATION OF THE DISCIPLINE PROCESS

Complaints of misconduct can be initiated internally, by those in the subject department. They can be initiated from private citizens outside the subject department. [Pa 71-144; IAPP § 5].

When a complaint is made against a high-ranking member of a subject department, additional steps are taken to ensure that the investigation of those complaints are undertaken by another, higher, agency.

Complaints against a law enforcement executive, or a member of the executive's senior management team, may originate from a member of the public or from an employee of the agency. All such complaints shall be documented and referred to the County Prosecutor for review. If the subject of the Internal Affairs investigation is the Police Chief, Police Director, Sheriff or Head of Internal Affairs, the County Prosecutor or the Attorney General's Office shall handle the investigation. [IAPP § 5.1.8](Emphasis added).

In that instance, the IAPP spells out a specific methodology under which that investigation should be conducted.

The investigation may involve any type of alleged employee misconduct, as described in Section 4.1.3, and shall be conducted pursuant to Section 6 (Investigation of Internal Complaints). [IAPP § 5.1.8]

In that instance, the IAPP spells out a specific manner in which the results of that investigation should be reported to the subject agency.

At the conclusion of the investigation, the internal affairs investigator and/or the investigating agency shall make factual findings, summarize the matter, and indicate the appropriate disposition (Sustained, Unfounded, Exonerated, or Not Sustained) as to each allegation of misconduct. See Sections 6.2.3, 6.3.9. [IAPP § 5.1.8]

In that instance, the IAPP spells out the next steps to be taken and by which agency. In all instances, other than an investigation into the Chief of Police, the filing of charges and any resulting discipline procedure is left to the discretion of the subject agency.

In cases involving Police Chiefs, final dispositions and recommendations shall be forwarded to the appropriate authority. While the appropriate authority must make the final decision regarding discipline, the County Prosecutor may make a non-binding recommendation regarding the discipline to be imposed by the appropriate authority. The County Prosecutor or the Attorney General's Office also may determine that it is appropriate to handle other internal affairs investigations of high-level officials in their discretion. [IAPP § 5.1.8]

Regardless of the agency, the process by which the complaint is investigated remains the same. [Pa 71-144; IAPP § 6] The complaint is thoroughly investigated in a timely manner. [Pa 71-144; IAPP §§ 6.1.1 - 6.1.11] That investigation should involve a review of all relevant documents as well as interviews with the witnesses and the officer allegedly involved. [Pa 71-144; IAPP § 6.2.3] The findings of the investigator are submitted in a report which makes specific findings as to each allegation. An allegation may be "sustained," "unfounded," "exonerated" or "not

sustained.” [Pa 71-144; IAPP § 6.2.3].

For those complaints which are “sustained,” the superior officer makes a determination as to the appropriate next steps. [Pa 71-144; IAPP §§ 6.2.5, 6.3.9] This includes the filing of charges. “If the complaint is sustained and it is determined that formal charges should be made, the law enforcement executive will direct either internal affairs or the appropriate commanding officer to prepare, sign and serve charges upon the subject officer or employee.” [Pa 71-144; IAPP § 6.3.11].

Properly understood, the “sustained finding” and Notice of Charges (“charges”) are separate documents. If charges are filed, those charges then move forward. [Pa 71-144; IAPP §§ 6.2.5, 6.3.9].

Upon receipt of the charges, the subject officer may enter a plea of guilty to the charges, a plea of not guilty to the charges or waive his/her right to a hearing. [Pa 71-144; IAAP § 6.3.12]

In the event of a plea of guilty or waives the right to a hearing, the subject officer is allowed to present mitigating evidence prior to the assessment of any penalty. [Pa 71-144; IAAP § 6.3.12]

In the event of a plea of not guilty, the matter will be presented for a hearing. That hearing will be before a designated hearing officer. If, after that hearing, the hearing officer determines that the allegations are sustained by a preponderance of the evidence, then the hearing officer makes a recommendation on discipline. [Pa

71-144; IAAP §§ 6.3.13 – 6.3.15]

Discipline imposed by the supervising authority can take the form of reprimands (formal or informal), fines, suspension without pay, loss of promotion opportunity, demotion and termination. [Pa 71-144; IAAP § 2.2.6]. It is the responsibility of the Chief to determine the discipline imposed. *See, Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75, 105 (2020).

In the context of this case, that is the procedure which was followed. As Reck, then Deputy Chief, was a member of the Chief's management team and high-ranking member of the Marlboro Police Department, the allegations against him were referred to the MCPO. The MCPO investigated, sustained the charges, created a written summary of its findings, and returned the matter to the Marlboro Police Department for further proceedings. The involvement of the MCPO was limited to this narrow, proscribed, function.

In addition to these direct consequences, there are potential collateral consequences which attach to a sustained finding of certain categories of major discipline of which untruthfulness is one. These collateral consequences are tied to an overall goal of transparency and accountability. Many of the revisions set forth in Directive 2022-14 are directly related to these goals and deal directly with these collateral consequences of discipline.

The first collateral consequence involves public reporting of certain categories

of sustained findings⁴ of misconduct.

On a periodic basis, and no later than January 31 of the following year, every agency shall submit to the County Prosecutor and the Attorney General, and publish on the agency's public website, a brief synopsis of all complaints misconduct where an agency member:

- (a) Was terminated;
- (b) Was reduced in rank or grade;
- (c) Was assessed a suspension of more than five days. . . ;
- (d) Had a sustained finding of discrimination or bias . . .
- (e) Had a sustained finding that the officer utilized excessive force. . . ;
- (f) Had a sustained finding that the officer was untruthful or has demonstrated a lack of candor, regardless of the type or severity of discipline imposed;
- (g) Had a sustained finding that an officer has filed a false report or submitted a false certification in any criminal, administrative, employment, financial, or insurance matter in their professional or personal life, regardless of the type or severity of discipline imposed;
- (h) Had a sustained finding that an officer intentionally conducted an improper search, seizure or arrest. . . ;
- (i) Had a sustained finding that an officer intentionally mishandled or destroyed evidence. . . ;
- (j) Had a sustained finding of domestic violence. . . ;
- (k) Resigned, retired, transferred or separated from the agency, regardless of the reason, while any internal affairs investigation or complaint was pending, and the misconduct ultimately sustained falls within categories (d) through (j) above or would have resulted in an action under categories (a) through (c) had the member not separated from the agency; or
- (l) Was charged with any indictable crime . . .

[Pa 71-144; IAPP § 9.11.2]

⁴ The definition of “sustained finding” in this section is found at the end of IAPP §9.11.2 and will be discussed in greater detail below.

The second collateral consequence triggered is what is commonly referred to as “Brady/Giglio” notice. This requirement is based on *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The Brady/Giglio Directives were issued pursuant to the Attorney General's Law Enforcement Directive No. 2019-6, which requires prosecutors to provide criminal defendants with exculpatory evidence as well as material evidence that would bear upon the credibility of prosecution witnesses. [Pa 71-144; IAAP § 9.10.3 & Pa 145-154] *Attorney General Law Enforcement Directive No. 2019-6*].

A Brady/Giglio notice is required to be issued by the prosecuting agency where an officer's discipline history requires such disclosure to the defendant in a criminal case.

Both the public notice requirement and the “Brady Giglio” notice are grounded in the principles of transparency and accountability. Although a sustained finding requiring publication involving a lack of candor can result in the application of either or both of these collateral consequences, they are separate issues and have separate underpinnings.

In the context of the present case, the investigation into Reck led to sustained findings that Reck had violated Marlboro Police Policies involving Truthfulness and Performance of Duty. [Pa 44-46, *Confidential*]. These findings triggered the application of both the public notice requirements and future Brady/Giglio notices.

[Pa 71-144; IAPP §§ 9.6.2(a) & 9.11.2 (f)].

Another feature of the 2022 revisions to the IAPP was the effort to close loopholes which permitted officers who had been accused of misconduct to avoid consequences by retiring or resigning. [Pa 71-144; IAPP §§ 6.0.1, 9.11.2(k)]. To that end, the 2022 revisions closed a loophole that allowed towns to negotiate away sustained findings. [Pa 71-144; IAPP § 9.11.2]

In the context of this case, by retiring and not challenging the sustained finding, Reck triggered application of IAPP § 9.11.2(k). That section applies when an officer has “[r]esigned, retired, transferred or separated from the agency, regardless of the reason, while any internal affairs investigation or complaint was pending, and the misconduct ultimately sustained falls within categories (d) through (j).”

This conclusion that the sustained finding triggers application of these sections of the Directives is found as part of IAPP § 9.11.2 which states: “The reporting and public dissemination requirements of (a) through (j) above become applicable once an officer’s discipline is sustained, as defined above. The reporting and public dissemination requirements of (k) and (l) above become applicable at the close of the reporting period during which they occur.”

B. STANDARD FOR APPELLATE REVIEW OF SUMMARY JUDGEMENT MOTION

This Court must review de novo the grant or denial of a motion for summary

judgment. *Coyne v. State Dep't of Transp.*, 182 N.J. 481, 491 (2005). Summary judgment must be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” R. 4:46–2(c). The judge must decide whether “the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Ins. Co.* 142 N.J. 520, 540 (1995).

The judgement of the trial court was rendered in its oral decision of November 22, 2024. This decision was amplified and clarified in a subsequent decision on January 17, 2025. It is respectfully submitted that the court below misapplied the law and that, upon de novo review, this Court should reverse those decisions.

C. THE COURT WAS INCORRECT IN ITS GRANTING OF MANDAMUS

The trial court correctly identified this application as one for a writ of mandamus, one that seeks to compel the MCPO to take a specific action. [2T. 5-6 to 7-6]. Despite correctly reciting the high standards applicable to actions in mandamus, the Trial Court did not apply those standards properly in this case. There is certainly ambiguity in the details of the Trial Court’s decision. Nevertheless, when that decision is read together with the comments made in connection with the

Motion for Reconsideration [3T: 7-18 to 8-7], and in light of the additional lawsuit, the combined import of the decision is clear. The Lower Court's decision held that the MCPO must create, and then implement, a method by which Reck can have a hearing concerning the sustain findings of the investigation.

The standards involved in the issuance of a writ of mandamus are well established. “The exceptional remedy of ‘[m]andamus is usually appropriate only where the right to performance of a ministerial duty is clear and certain.’” *Failure to Adopt 861 CPT Codes*, 358 N.J. Super. 135, 149 (App. Div. 2003) (quoting, *In Re Matter of Failure by the Department of Banking and Insurance to Transmit a Proposed Dental Fee Schedule*, 336 N.J. Super., 253, 262 (App. Div. 2001). “An official duty is ministerial “when it is absolutely certain and imperative, involving merely the execution of a set tasks, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgement or discretion.” *In re Failure by the Banking, supra* 336 N.J. Super. at 262 (quoting *Case v. Daniel C. MaGuire, Inc.* 53 N.J. Super. 494, 498 (Ch. Div. 1959).

Requiring the MCPO to create an administrative remedy and then to apply that remedy to the Plaintiff's case is well outside the scope of actions that a mandamus covers. Likewise, requiring the MCPO to produce an advisory opinion on what avenues of appeal, if any, would be available to the Plaintiff, is also not the

type of ministerial action that is subject to relief in mandamus.

In the past, the Plaintiff has argued that there is precedent supporting the position that, by the authority of a Prerogative Writ, a Court can compel such an action. However, a closer look at those authorities demonstrates that there is no precedent supporting the extraordinary relief sought here.

The Plaintiff has previously cited cases describing an Action in Lieu of a Prerogative Writ as a mechanism to compel a public entity to enforce an existing law or take an authorized action. That is not the present situation. The Plaintiff can cite to no cases in which an Action in Lieu of a Prerogative Writ has been used to compel a public entity to act outside of its statutory authority and create a policy which is contrary to the mandate of the OAG. A cursory reading of the cases previously cited by Plaintiff demonstrates that they do not apply to the present case.

Plaintiff has previously cited to *Pfleger v. State Highway Department*, 104 *N.J. Super.* 289 (App. Div. 1968). As the Court in *Pfleger* noted, “The sole question presented is whether plaintiff’s action for relief in lieu of prerogative writs, to compel the Department of Transportation to institute proceedings to condemn plaintiffs’ land, should have been brought in the Law Division. . . or the Appellate Division. . .” *Pfleger, supra* at 290. Here, there is no statutory or any other authority allowing a County Prosecutors Office to re-write the Attorney General Directives. In fact, as previously noted, a County Prosecutor’s Office not only has no authority,

it is statutorily mandated to follow the Directives of the OAG.

Plaintiff has also previously cited to *Colon v. Tedesco*, 125 N.J. Super. 446 (Law Div. 1973). That case, in relevant part, sought to compel the enforcement of statutory authority of the Bureau of Migrant Labor. The Law Division granted the requested relief finding that such an action was not discretionary in light of the mandatory, well-defined requirements of the operating statute. Again, the Plaintiff cannot cite to a clear statutory authority mandating that the MCPO supersede the authority of the Attorney General.

The act of creating a policy and then the enforcement of that policy are clearly discretionary acts, far removed from the types of actions to which mandamus could apply. But more than that, the Plaintiff in this case is not seeking to compel the MCPO to exercise its authority based on a clear and well-defined statute that mandates the MCPO to act. The Plaintiff is seeking the opposite of that. Demanding the MCPO use authority it expressly does not have.

It is undisputable that the Plaintiff is seeking, not enforcement of a policy, but the creation of a policy. The Plaintiff request, as part of the remedy sought details the following items:

A. affirming Deputy Chief Reck's right to a procedure by which he may challenge the findings of the Monmouth County Prosecutor's Office's investigation, as set forth in its Summary and Conclusions Report;

B. directing the Monmouth County Prosecutor's Office to establish or identify the procedure by which Deputy Chief Reck may challenge the findings of the Monmouth County Prosecutor's Office's investigation, as set forth in its Summary and Conclusions Report;

C. directing the Monmouth County Prosecutor's Office to provide Deputy Chief Reck with a copy of the formal procedures detailing the particulars and standards for the procedure;

[Pa 1-12, Complaint Count Two]

By the terms of the Plaintiff's request, he acknowledges that no such process exists in the Attorney General Directives. He seeks to compel the Monmouth County Prosecutor's Office to supersede the authority of the Attorney General and create a procedure. A procedure that would be in opposition to the stated goals of the Attorney General and require the re-opening of a loophole that the Attorney General closed. Only the Attorney General could make such a rule, and this action is not brought against that entity.

As the Plaintiff alleges in his complaint: "Deputy Chief reck [*sic*] remains with no avenue of recourse by which he may challenge the Monmouth County Prosecutor's Office's findings against him." [Pa 1-12; Complaint ¶ 17].

In granting Reck's motion for summary judgement and denying the MCPO's motion for summary judgement, the Trial Court created a scenario where it has required the MCPO to create a new internal discipline policy and procedure and then

implement that new procedure. Such a decision is not consistent with the law regarding mandamus. Such a decision is further flawed by the lack of support for that decision.

The trial court based its decision on two grounds. One is a settlement agreement between the Township and Reck. The second is a clause in the IAPP. [2T: 7-7 to 11-14] Properly understood, neither support the relief granted.

1. THE SETTLEMENT AGREEMENT BETWEEN RECK AND THE TOWNSHIP OF MARLBORO DOES NOT SUPPORT THE TRIAL COURT'S DECISIONS

The Trial Court found support in its decision to require the MCPO to create a conduct an avenue of appeal post-retirement for Reck based on a settlement agreement between the Township and Reck. [2T 12-19 to 13-1] Such a finding is not supported by law or fact.

The Settlement Agreement between Reck and the Township has several components which are relevant to this appeal⁵.

The first spells out that Reck will retire and, in exchange, the Township will not pursue discipline charges against Reck. [Pa 47-53]

⁵ None of the specific sections quoted here are expressly confidential.

1. RECK will voluntarily retire from his position with Marlboro Township, effective April 1, 2023.

2. The TOWNSHIP agrees that, in exchange for his decision to retire voluntarily, it will not issue charges against Reck based upon or relating to the sustained allegations outlined in the Summary and Conclusions Report provided by the Office of the County Prosecutor, County of Monmouth, dated January 18, 2023 ("Report"). Upon resignation and retirement, RECK shall be paid, within thirty days (30) of the date of his separation from employment, subject to the terms and conditions of the Township's Personnel Policies and ordinance, for accumulated time, in the amounts set forth herein at Exhibit 1, appended to this Agreement.

The second provision directly relevant to this appeal states as follows:

6. RECK retains the right to challenge the findings made by the Prosecutor's Office relating to the aforementioned investigation. In the event that RECK successfully challenges the findings made by the Prosecutor's Office, and upon notice to the TOWNSHIP of same, the TOWNSHIP shall so amend its records relating to RECK to reflect same. However, the results of said potential challenge shall have no bearing on this settlement agreement or RECK's release of claims. Reck's decision to retire from the Township shall be irrevocable.

At the outset it is clear, that a contract can only bind the parties who sign that agreement. *Morton v. 4 Orchard Trust*, 180 N.J. 118, 129 (2024). The Monmouth County Prosecutors Office cannot be bound by contract it to which it was not a party. Nor can a contract create a right or a remedy outside the control of those with privity of contract. A contract between Reck and the Marlboro Police Department cannot change the operation of the Directives and directives of the Office of the Attorney General. *N.J.S.A. 40A: 14-181*.

The argument that this agreement confers or recognizes some right is particularly troubling in the present case. Counsel for the Township was specifically

advised that failure to seek a hearing prior to retirement would prohibit a future appeal. [Pa 383]. One could argue that permitting such language in the agreement was evidence of fraud which should result in the nullifying of the agreement. If the agreement between Reck and Marlboro Township contains a provision that cannot be enforced, Reck needs to bring that complaint against the Marlboro Township.

For the Trial Court to rely on an agreement between Reck and the Township as having any force or effect against the MCPO is factually and legally flawed.

2. THE IAPP DOES NOT SUPPORT THE TRIAL COURT'S DECISIONS

The Trial Court also relied on a section of the IAPP to find a need to create an avenue of appeal post-retirement for Reck. The Court relied is identified as IAPP § 9.11.2, as amended by Directive 2022-14.

As discussed above, that revision created categories of sustained findings which must be disclosed. In that section is the definition of a “sustained finding.” A sustained finding of one or more of the categories of prohibited conduct trigger the public reporting requirements from which the Plaintiff is seeking redress.

“Sustained finding” refers to any finding where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure, rule or training, following the last supervisory review of the incident(s) during the internal affairs process where the deadline for appeal has passed or following a ruling by a hearing officer, arbitrator, Administrative Law

Judge, Civil Service Commission, or the Superior Court where the deadline for any subsequent appeal has passed. Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee, including where the previous finding has either been vacated, or overturned on the merits in any subsequent action, generally are not considered to be sustained findings subject to the disclosure requirements of this Policy. **On the other hand, if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.**

[IAAP § 9.11.2] (Emphasis added)

The Trial Court read the emphasized sentence above, in the definition of sustained findings, to create a right to a post-retirement hearing. [2T10-8 to 21; 12-19 to 13-1] There are several problems with this. Some are factual, others are more basic.

Obviously, this sentence does not provide a right to a hearing post-retirement or post-settlement. The plain reading of the text demonstrates that. A charge is still considered “sustained” under this definition if the parties negotiate a settlement of the discipline action that results in the dismissal of those charges. Provided that there was sufficient credible evidence to prove the allegation, and the officer did not initiate a challenge the finding and obtain a favorable ruling.

The Plaintiff did not challenge the finding, he did not obtain a favorable ruling. The Summary and Conclusions Report demonstrated that there was sufficient credible evidence to prove the allegation. Therefore, the charge is a “sustained finding” under this definition.

Under this sentence, a finding is still considered “sustained” even in the department and the officer come to a settlement of charges after a hearing on the charges. It covers a scenario, perhaps not as clearly as possible, in which: 1.

Allegations of misconduct are made. 2. An investigation results in one or more allegations being sustained against the officer. 3. Charges are filed. 4. hearing is held on those charges. 5. One or more charges are sustained at that hearing. 6. Then the agency and the officer reach a settlement agreement. 7. Part of that agreement dismisses the charges. If all those things happen, under this definition the charge would still be considered a “sustained finding” under the IAPP.

Factually, most of those steps did not occur in Reck’s case. They did not occur because he and the Township negotiated not to pursue charges. He negotiated away the charges and the risks that they carried. In so doing, he negotiated away the processes that would have been afforded to him as part of that hearing.

As stated above, there are avenues to appeal a disciplinary charge. Sometimes, those appeals result in the parties either negotiating a plea or engaging in a civil or administrative settlement with the employer. Sometimes, those

negotiated settlements result in the dismissal of charges. However, the Attorney General Directives do not allow for the removal of major discipline charges from the public notice requirements unless the officer has received a favorable decision from a “hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.”

In the present case, Reck had his avenue to appeal, but chose to retire instead of challenging the sustained findings. By specifically negotiating that no charges would be filed, he removed all of the risk associated with charges and received all of the benefits of a “clean” retirement. Now, he is seeking to challenge a collateral consequence of his choices – inclusion on a website.

3. THERE ARE SERIOUS UNRESOLVED ISSUES CREATED BY THE TRIAL COURT’S ORDERS

The Trial Court’s ruling also creates logistical problems and does not make any allowances for their correction.

As demonstrated more fully above, the MCPO’s involvement in this case is limited. Limited by its role and constrained by the Attorney General Directives and Policies. However, as a result of the Trial Court’s decision, the MCPO is placed in the position to circumvent those Directives and procedures and institute new ones. All because Reck chose to negotiate a settlement for his benefit.

The Trial Court’s decision leaves open several questions. For example: What

processes should be created? Who should conduct the hearing? Who should pay for the hearing officer? What is the burden of proof at that hearing? What is the standard of proof at that hearing? What appeal process follows?

Another set of concerns involve the interaction between the settlement agreement and the conduct of this hearing. As part of his settlement agreement, Reck negotiated that there would be no charges filed. If charges are filed by Marlboro at the direction of the MCPO, the settlement agreement would be breached.

By moving forward with this request, the Plaintiff is requesting that the settlement agreement be voided. That means a return to the point at which the agreement took place. The agreement would be voided and Reck would withdraw his retirement. Appropriate notice would be given to the Pensions Board and Reck's pension payments would be stopped. It is unclear if the Pension Board would seek to claw back those payments which have been made in the intervening years.

The IAPP required Reck to disclose, at the time of his application for retirement, the charge which was then pending against him. [IAPP § 9.11.4] Given the timing of Reck's retirement and the settlement agreement, he would have been obligated to provide notice at the time his paperwork was submitted. In the event that the MCPO is required to involve itself further in Reck's discipline, steps will be taken to ensure that Reck complied with those directives. In the event that he did

not, we cannot speak to the actions which may be taken by the Pension Board.

CONCLUSION

Reck's choices led him to become involved in the situation that brought about a discipline action. Reck's choices to resolve the discipline matter render him, under the Attorney General Directives, without further recourse. Reck's choice to negotiate a settlement of that discipline action which triggered his application on the public discipline list.

At one point in time, the Plaintiff had a choice to make. He could have availed himself of the architecture of due process rights available to him and dispute the findings against him. He made a choice. Now, apparently having buyer's remorse, he seeks to reverse one collateral consequence of that decision. He would, presumably, like to keep the benefits of voluntary retirement and only seeks to undo the potentially negative aspects of that deal.

Reck sees the lack of further recourse, as a "bug" in the Attorney General's Directives. On the contrary, it appears it is a "feature." The only entity which has the statutory authority to revise the Attorney General Directives is the Office of the Attorney General. No authority exists that would justify the extraordinary request made here or to impose that responsibility on the Monmouth County Prosecutors Office.

As discussed above, the Trial Court's order leaves several questions open. If this case were one where further clarification would lead to a just result, then the

MCPO would be recommending a remand of the case. However, these open questions are some of the unintended consequences of a flawed decision. For those reasons, and the reasons discussed here at length, the MCPO respectfully request that this Court reverse the decision of the Trial Court and grant summary judgment in favor of the MCPO and bring this matter to a close.

Respectfully submitted,

/s/ Sean J. Brennan

Sean J. Brennan

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PRELIMINARY STATEMENT

This brief is brought forth on behalf of Plaintiff-Respondent, Fred Reck, and seeks to resolve one simple question: can a New Jersey law enforcement officer accused of a disciplinary violation that implicates the State's *Brady/Giglio* reporting mandate to contest the findings requiring the *Brady/Giglio* reporting where he or she negotiated a resolution of the employment relationship and no charges were brought? The plain words and meaning of Section 9.11.2 of the Attorney General's *Internal Affairs Policy & Procedures* (Nov. 2022) answer in the affirmative, stating that an officer who "*negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed*" may, in fact, "challenge the finding [to] obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court." If it were otherwise, as Appellant maintains, the language of Section 9.11.2 is nonsensical surplusage.

If the only way to challenge a sustained disciplinary finding is to accept the discipline and challenge *the discipline* via the Civil Service Commission (or whatever other mandated/negotiated avenue of disciplinary redress applies in the particular jurisdiction), just what did the Attorney General mean when stating anything other than "if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge

[*shall*] be considered sustained”? What, then, does the Attorney General mean in stating “*if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court*”?

Again, a plain, common sense reading of all of the words used by the Attorney General lead to one conclusion: an officer may enter in to an administrative or civil settlement with his or her employer, yet still challenge the underlying finding that a disciplinary violation actually did, in fact, occur. This is especially clear where the underlying allegation implicates New Jersey’s *Brady/Giglio* reporting mandate. The officer is free accept the separation of employment, yet still challenge the allegations in order to prevent, or have his name remove from, the public *Brady/Giglio* reporting.

Insofar as the determination to report Respondent on the *Brady/Giglio* list is predicated upon Appellant’s determination alone, where Marlboro chose not to act upon those findings, Appellant is absolutely the appropriate and sole party defendant in this action. Insofar as the Attorney General did not dictate the means

by which such a challenge is to be made, this Action in Lieu of Prerogative Writ is the most appropriate means by which Respondent can find redress.

As such, Plaintiff respectfully requests that this Court affirm the Trial Court's grant of summary judgment in favor of the Respondent and denial of Appellant's Motion for Summary Judgment as a result, and allow this matter to go forward on its merits.

PROCEDURAL HISTORY

Plaintiff-Respondent, Fred Reck, filed an Action in Lieu of Prerogative Writ against Defendant Monmouth County Prosecutor's Office on August 28, 2023. *See* Complaint, at Pa 1. Defendant-Appellant filed a Motion to Dismiss pursuant to New Jersey Court Rule 4:6-3(e), which was denied by the Trial Court on February 2, 2023. Defendant then filed an Answer, and the Parties engaged in limited discovery, as directed by the Trial Court.

During the course of discovery, Defendant requested representation by the Office of the Attorney General, but was denied. *See Monmouth Cty. Prosecutor's Off. v. Office of the A. G.*, 480 N.J. Super. 33, at 37 (*App. Div.* 2024). Defendant unsuccessfully appealed the Attorney General's decision, as the Appellate Division held that his "exercise of legislatively-promulgated discretion to deny [Defendant]'s request for representation in Reck's prerogative writs action was not

arbitrary, capricious or contrary to law.” *Monmouth Cty., supra*, 480 N.J. Super., at 42.

Following that limited discovery, both Parties submitted Motions for Summary Judgment, which were argued before the Trial Court on September 27, 2024. *See* September 27, 2024, Transcript of Argument before the Trial Court on the Motions for Summary Judgment, identified in Defendant’s Opening Brief as 1T.¹ The Trial Court rendered its decision from the bench on November 22, 2024. *See* November 22, 2024, Transcript of the Opinion of the Court, identified in Appellant’s Opening Brief as 2T.² Per that Opinion, the Trial Court granted Plaintiff’s Motion for Summary Judgment and denied Defendant’s Motion for Summary Judgment. *See* 2T and Pa 27-29. Per that Opinion and the subsequent Order granting Plaintiff’s Motion for Summary Judgment, the Trial Court dismissed the case and provided Plaintiff forty-five (45) days within which to file a new complaint to enforce the Trial Court’s Order. *Ibid.*

Defendant thereafter sought clarification and reconsideration from the Trial Court, which was heard and granted in part on January 17, 2025. *See* January 17, 2025, Transcript of Argument before the Trial Court on Appellant’s Motion for

¹ Insofar as Appellant refers to this transcript as “1T” throughout its brief, and as to avoid any unnecessary confusion of the record, Respondent does the same.

² Insofar as Appellant refers to this transcript as “2T” throughout its brief, and as to avoid any unnecessary confusion of the record, Respondent does the same.

Clarification and Reconsideration and the Trial Court's Determination of Same, identified in Appellant's Opening Brief as 3T, and Pa. 30.³

In keeping with the Trial Court's original Order granting Summary Judgment in favor of Plaintiff, a second suit seeking the hearing granted by the Trial Court's November 22, 2024 Opinion and Order was timely initiated against Defendant on January 6, 2025. *See* 2T, Pa. 27-29, 31-43.⁴

This appeal followed and, insofar as the outcome of this appeal will affect further prosecution of Reck II, the Parties submitted a Consent Order to hold the matter in abeyance pending the outcome of this appeal, which was granted by the Trial Court on April 21, 2025. *See* Consent Order, at Da. 01.

STATEMENT OF FACTS

Respondent was employed as Deputy Chief with the Marlboro Police Department. *See* Complaint, at ¶¶ 1, 5, Pa. 1-2. On or about September 15, 2022, Marlboro Police Department Sergeant Jonathan Gramcko notified the Appellant of a complaint against Respondent. *See* Complaint, at ¶6, Pa. 3.

³ Insofar as Appellant refers to this transcript as "3T" throughout its brief, and as to avoid any unnecessary confusion of the record, Respondent does the same.

⁴ Insofar as Appellant refers to this second suit as "Reck II" throughout its brief, and as to avoid any unnecessary confusion of the record, Respondent does the same.

In response, Appellant initiated an administrative investigation into the allegations claimed against Respondent, pursuant to Section 5.1.8 of the Attorney General's *Internal Affairs Policy & Procedure* (Nov. 2022)("IA Policy"). See Complaint, at ¶7; IA Policy, at Sec. 5.1.8, Pa. 3 and 328.

At or around January 18, 2023, Melanie Falco, Director, Professional Responsibility Unit for the Appellant, issued a Summary and Conclusions Report to Marlboro Police Department Chief Peter Pezzullo. See Complaint, at ¶8; Summary and Conclusions Report, Pa. 3 and 47-53 *Confidential*. The Summary and Conclusions Report sustained the two allegations charged against Respondent. See Complaint, at ¶9; Summary and Conclusions Report, Pa. 3 and 47-53 *Confidential*.

At or around January 18, 2023, Chief Pezzullo orally informed Respondent of the Appellant's findings and offered him the opportunity to retire. See Complaint, at ¶10, Pa. 3. No charges were ever issued against Respondent by the Marlboro Police Department, but the "appropriate information" was reported to the Division of Pensions. See Complaint, at ¶13; March 15, 2023 E-mail correspondence between Lou Rainone and Melanie Falco ("March 15 E-mail"), Pa. 4 and 384-85 *Confidential*.

As such, Respondent elected to retire, effective April 1, 2023, as part of a formal agreement with Marlboro ("Agreement"). See Complaint, at ¶11;

Agreement, Pa. 3-4, and 47-52 *Confidential*. Paragraph 6 of the Agreement acknowledges that “RECK retains the right to challenge the findings made by the [Defendant] relating to the aforementioned investigation[, and that i]n the event that RECK successfully challenges the findings made by the [Appellant], and upon notice to the TOWNSHIP of same, the TOWNSHIP shall so amend its records relating to RECK to reflect same.” *See* Complaint, at ¶12; Agreement, Pa. 4 and 48 *Confidential*.

Section 9.11.2 of the IA Policy states “if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, *and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.*” *See* Complaint, at ¶11; IA Policy, at Sec. 9.11.2 (emphasis added), Pa. 3-4 and 261. If left unchallenged or sustained following a challenge pursuant to IA Policy Section 9.11.2, Appellant would be required to post certain details of the Summary and Conclusions Report, identifying Respondent by name, on the internet as part of its compliance obligations pursuant to the IA Policy, *Attorney General Law Enforcement Directive 2019-6* (“AG Directive 2019-6”), and *Attorney General Law Enforcement Directive No. 2022-14* (“AG Directive 2022-14”). *See*

Complaint, at ¶9; IA Policy, at Sec. 9.11.2; AG Directive 2019-6; AG Directive 2022-14, at pp. 1-3, 7-13, Pa. 3, 260, 176, and 268.

After several phone calls to Appellant, counsel retained by Respondent requested, by letter dated June 30, 2023, both a copy of the formal procedures by which he may challenge the findings of Appellant’s Summary and Conclusions Report and a copy of the Appellant’s complete investigation report. *See* Complaint, at ¶14; Letter dated June 30, 2023, from Attorney De Fortuna to Director Falco (“June 30 Letter”), Pa. 4 and 424-25 *Confidential*.

By letter dated July 10, 2023, Appellant responded by claiming that “Section I.E. of Directive 2019-6 makes clear that the method for challenging a sustained finding that implicates Brady/Giglio is for the officer to challenge the finding on the merits through the administrative process and that finding overturned or vacated[.]” yet no particular “administrative process” was identified or provided. *See* Complaint, at ¶15; Letter dated July 10, 2023, from Director Falco to Attorney De Fortuna (“July 10 Letter”), Pa. 4 and 427-29 *Confidential*.

Further, Director Falco erroneously suggested that Respondent decided “to leave his employment while the matter was pending” and that “in and of itself would require public reporting under the IAPP, section 9.11.2(k)[.]” which states that a matter is reportable where the officer “[r]esigned, retired, transferred[,] or separated from the agency, regardless of the reason, *while any internal affairs*

investigation or complaint was pending[.]” See Complaint, at ¶16; July 10 Letter, Pa. 4-5 and 427-29 Confidential.

As Respondent remained with no avenue of recourse by which he may challenge the Appellant’s findings against him, the Complaint was timely filed. *See Complaint, at ¶17, Pa. 5.*

LEGAL ANALYSIS

I. STANDARD OF REVIEW ON APPEAL FROM SUMMARY JUDGMENT

New Jersey Appellate Division courts review a Trial Division court’s grant of summary judgment *de novo*, and employs the same standard of review as the trial court. *See Coyne v. State Dep’t of Trans.*, 182 N.J.481, 491 (2005). Therefore, the Trial Court’s grant of summary judgment is to be affirmed if “the pleadings, depositions, answers to interrogatories[,] and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” R. 4:46-2(c). The judge must decide whether “the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 540 (1995).

II. THE TRIAL COURT PROPERLY DETERMINED THAT THE ATTORNEY GENERAL'S INTERNAL AFFAIRS POLICY & PROCEDURES AFFIRMATIVELY AFFORDS OFFICERS THE RIGHT TO A HEARING ON THE MERITS TO CHALLENGE FINDINGS DECLARED SUSTAINED FOLLOWING A COMPLETED INTERNAL AFFAIRS INVESTIGATION EVEN WHERE THE OFFICER NEGOTIATES A DEAL DISMISSING ANY FORMAL DISCIPLINARY CHARGES AGAINST THAT OFFICER (Raised below 2T, 3T).

While Appellant obscures the fact, the heart of the issue here is whether or not Section 9.11.2 of the Attorney General's *Internal Affairs Policy & Procedures* (Nov. 2020) ("IA Policy"), allows a New Jersey law enforcement officer accused of a disciplinary violation that implicates the State's *Brady/Giglio* reporting mandate to negotiate a civil settlement with his or her employer, yet still contest the findings requiring the *Brady/Giglio* posting. The Trial Court below, finding in favor of the Respondent, properly held that "the administrative regulation [*i.e.*, the IA Policy] is clear on this point[,]” and thereby granted Respondent forty-five (45) days within which to “file an appeal [of the Appellant’s sustained finding] with either a hearing officer, arbitrator, administrative law judge, or the Superior Court.” 2T, at 12-13.

As noted above, Section 9.11.2 of the Attorney General's IA Policy states that an officer who “*negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed*” may, in fact, “challenge the finding [to] obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or Superior Court.” As with

both Minor Discipline and Major Discipline, the IA Policy does not identify or detail any particular *means or procedure* by which such a challenge may be brought. *See* IA Policy, at Sec. 6.2, 6.3, and 9.11.2, Pa. 221-226, 260-62.⁵ Rather, those means are subject to the elections, in part, of the “law enforcement executive” whose determination is being challenged. *Ibid.* In this instance, where no formal charges were ever brought by Respondent’s then-employer, the Marlboro Police Department, and Respondent’s inclusion on the *Brady/Giglio* list is due solely to Appellant’s findings, the “law enforcement executive” at issue is, in fact, the Appellant.

Appellant, however, does not agree. Rather, Appellant proffers essentially two contra-arguments, neither of which is supported by the actual text of the IA Policy.

In the first instance, Appellant suggests that the only means of challenging a sustained finding under the Attorney General’s IA Policy is to demand that charges be filed and challenged via Civil Service. *See* Pb., at 23-24. Secondly, Appellant then claims that the language at issue only applies to instances where an officer “negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed” *after* he or she has already successfully

⁵ To that end, Section 9.11.2 is the only provision of the IA Policy that references any type of post-discipline/post-separation resolution mechanism, as neither Section 6.2, nor Section 6.3 go that far.

challenged the sustained findings and, by extension, the charges are dismissed. Yet these suggested readings of Section 9.11.2 of the IA Policy simply cannot be true based upon the plain language of that provision. As such, these “arguments” should be dismissed out of hand as lacking any type of foundation in support of their purported conclusions, which remain nothing more than an attempt by a “law enforcement executive” to bypass the required due process identified by Section 9.11.2.

Nevertheless, an actual analysis of the structure of the IA Policy provision at issue utterly undermines Appellant’s suggested readings. The resolution of this case revolves around the IA Policy’s definition of the term “Sustained finding.” That definition is divided up into three distinct sections, delineated by sentence, as follows:

“Sustained finding” refers to any finding where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure, rule or training, following the last supervisory review of the incident(s) during the internal affairs process where the deadline for appeal has passed or following a ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court where the deadline for any subsequent appeal has passed. Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee, including where the previous finding has either been vacated, or overturned on the merits in any subsequent action, generally are not considered to be

sustained findings subject to the disclosure requirements of this Policy. On the other hand, if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.

IA Policy, at Sec. 9.11.2, Pa. 261.

The first sentence covers situations where formal disciplinary charges are brought against an officer and he or she either fails to appeal them or they are sustained by “a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court.” IA Policy, at Sec. 9.11.2, Pa. 261.

The second sentence involves situations whereby an officer challenges the formal disciplinary charges and they ultimately cannot be sustained for whatever reason. *See* IA Policy, at Sec. 9.11.2, Pa. 261.

The third sentence involves situations whereby formal charges are brought, and the officer negotiates a deal whereby the charges are dismissed. In this third sentence, it is not the negotiate deal itself that automatically triggers a sustained finding; rather, it is the negotiated deal where “the officer *does not challenge the finding and obtain a favorable ruling* by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court[]” that triggers the sustained finding. IA Policy, at Sec. 9.11.2 (emphasis added), Pa. 261.

The fact that a distinct procedure is in play in this section, as opposed to the disciplinary hearing referred to in the first sentence of this provision, is explicit, not only due to the distinction in scenario sections as very deliberately set forth by the Attorney General, but also due to the separate identification of persons and entities empowered to adjudge the matter in both the first and third section. In other words, this latter determination made by a “hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court[]” *after* the officer has negotiated a deal by which the formal disciplinary charges are dropped cannot be the very same determination made by a “hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court” following the officer’s challenge to the formal disciplinary charges via the procedure referenced in the first sentence.

Likewise, and as suggested above, Appellant’s reading simply cannot be correct in that it suggests that *both* a negotiated deal dismissing the formal disciplinary charges *and* a favorable ruling *in that very same disciplinary action* occur. As stated above, this is non-sensical, contradictory, and an impossibility and, therefore, a clear misinterpretation or misrepresentation of the actual plain language of Section 9.11.2 of the Attorney General’s IA Policy. Said reading, then, simply cannot be sustained. The fact that no formal disciplinary charges were ever brought against Respondent from which he could have challenged them in accord

with the known disciplinary challenge procedures merely amplifies this conclusion.

The fact remains that the IA Policy provision at issue clearly states that where “the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, *the charge would still be considered sustained, if* there was sufficient credible evidence to prove the allegation, *and the officer does not challenge the finding and obtain a favorable ruling* by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.” See IA Policy, Sec. 9.11.2 (emphasis added), Pa. 261. In other words, when an “officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed,” his or her name and a report of the incident are still to be published via the *Brady/Giglio* list *unless* “the officer ... challenge[s] the finding and obtain[s] a favorable ruling” by an appropriate individual or entity. *Ibid.*

A further analysis of the structure of the entirety of IA Policy Section 9.11.2 further bears this out. That Section begins by identifying a number of instances whereby “every agency shall -... publish on the agency’s public website, a brief synopsis of all misconduct[,]” along with the officers’ names, as part of its *Brady/Giglio* reporting. IA Policy, at Sec. 9.11.2, Pa. 260. Among those instances wherein such publication is required are where the officer “[w]as terminated; [w]as

reduced in rank or grade; [and w]as assessed a suspension of more than five days.”

IA Policy, at Sec. 9.11.2(a), (b), and (c), Pa. 260.

Complaints that result in one of these identified outcomes constitute “serious complaints,” and are subject to the rules for investigating and internally adjudicating such matters as set forth in Section 6.3 of the IA Policy. *See* IA Policy, at Sec. 6.3, Pa. 223-226. Section 6.3 is very detailed in how such matters are to be investigated and adjudicated *pre-discipline* only. *See* IA Policy, at Sec. 6.3.13 through 6.3.18 (detailing the *pre-disciplinary procedure, i.e.,* detailing the *Loudermill* hearing only), Pa. 225-26. The IA Policy makes no provision for any type of challenge once the discipline is imposed, however. Nevertheless, it goes without saying that the actual imposition of the discipline constitutes an act of the implementing agency and that the officer is thereafter entitled the right to challenge that imposition in some fashion that is not addressed by the IA Policy.

As Appellant notes, such challenges are routine, but the mechanism for doing so varies depending upon the agency. *See* Pb., at 24-25. The IA Policy’s definition of “[s]ustained finding[,]” provided for in Section 9.11.2, bears this out in its first two sentences, which state that a

“Sustained finding” refers to any finding where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure, rule or training, following the last supervisory

review of the incident(s) during the internal affairs process *where the deadline for appeal has passed or following a ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court* where the deadline for any *subsequent appeal has passed*. Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee, including where the previous finding has either been vacated, or overturned on the merits *in any subsequent action*, generally are not considered to be sustained findings subject to the disclosure requirements of this Policy.

IA Policy, at Sec. 9.11.2 (emphasis added), Pa. 261.

Subsections (d) through (j) of Section 9.11.2 relate to “sustained findings” of various issues “regardless of the type or severity of discipline imposed.” *See* IA Policy, at Sec. 9.11.2(d), (e), (f), (g), (h), (i), and (j), Pa. 260-61. The imposition of Appellant’s understanding of officers’ rights under the IA Policy suggests that any officer who received “sustained findings” following the investigation of a complaint alleging any of the issues identified in subsections (d) through (j), may not challenge said findings unless a certain level of discipline was imposed upon them, despite the fact that their names would still need to be published, along with the allegations, via the County’s *Brady/Giglio* list. This makes no sense, particularly as the definition of “sustained findings” provided by that same provision specifically identifies the ability to challenge the initial findings via an appeal to a “hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court[.]” *regardless of the discipline imposed*. IA

Policy, at Sec. 9.11.2. Clearly, then, the Attorney General’s IA Policy understands, and requires, that initial “sustained findings” are always appealable in some fashion “regardless of the discipline imposed[,]” so as to allow the officer the ability to exonerate himself or herself and prevent his or her name from publication via the County’s *Brady/Giglio* list. *Ibid.* It is the “sustained finding” that is appealable under Section 9.11.2, *not* the discipline imposed as a result of the “sustained finding.”

The final two instances identified as reportable in Section 9.11.2 are where the officer “[r]esigned, retired, transferred or separated from the agency, regardless of the reason, *while any internal affairs investigation or complaint was pending,* and the misconduct *ultimately sustained* falls within categories (d) through (j) above, or would have resulted in an action under categories (a) through (c) had the member not separated from the agency;” and where the officer “[q]w]as *charged* with any indictable crime under New Jersey or an equivalent offense under federal law or the law of another jurisdiction related to the complaint.” IA Policy, at Sec. 9.11.2(k) and (l)(emphasis added), Pa. 261. Again, the application of Appellant’s interpretation of the IA Policy is wanting on a number of levels. In the first instance, Appellant cannot really be suggesting that an officer who needs to be reported to the public via the *Brady/Giglio* list for being “*charges* with any indictable crime” has no recourse to challenge the publication of his name and the

charges on that list if he or she is ultimately exonerated or cleared of the charges is a rather non-sensical result that cannot stand any type of scrutiny. Surely there must be a mechanism for such an officer to compel the removal of his or her name and the charges from the *Brady/Giglio* list under such circumstances.

Secondly, with respect to the officer who resigned, retires, transfers, or separates from the agency before the internal investigation is concluded, we see the use of the term “sustained finding” applicable again. Insofar as the definition of “sustained finding” plainly and clearly speaks of a mechanism by which to challenge such findings before they are truly considered “sustained findings,” it is equally clear that said officer who resigned, retired, transferred, or separated from the agency must be offered the opportunity to avail him or herself of said mechanism before the initial findings can be considered “sustained” under the IA Policy and, therefore, published on the *Brady/Giglio* list. See IA Policy, at Sec. 9.11.2, Pa. 220-61. Again, Section 9.11.2 speaks of a mechanism by which initial “sustained findings” may be challenged, *not* any discipline involved.

That leads to the final sentence of the definition of “sustained findings,” which states that “if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, *if* there was sufficient credible evidence to prove the allegation, *and the officer does not challenge the finding and obtain a*

favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.” IA Policy, at Sec. 9.11.2 (emphasis added), Pa. 261. This final sentence is a catch-all, applicable to initial sustained findings of all kinds that involve a settlement reducing or eliminating the initial disciplinary charges levied against the officer. Noteworthy is the fact that the initial sustained findings remain so *regardless of the ultimate decision of any discipline, only of* “the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.” IA Policy, at Sec. 9.11.2 (emphasis added), Pa. 261. Again, the initial findings are not “sustained findings” unless and until the officer is offered the opportunity to challenge them, “*regardless of the type or severity of the discipline involved.*” *Id.*, at Sec. 9.11.2 (d) through (j)(emphasis added), Pa. 260-261. Again, Section 9.11.2 speaks of a mechanism by which initial “sustained findings” may be challenged, *not* the discipline involved.

Likewise, and as suggested above, Appellant’s reading simply cannot be correct in that it suggests that *both* a negotiated deal dismissing the formal disciplinary charges *and* a favorable ruling *in that very same disciplinary action* occur. As stated above, this is non-sensical, contradictory, and an impossibility and, therefore, a clear misinterpretation or misrepresentation of the actual plain language of Section 9.11.2 of the Attorney General’s IA Policy. Said reading, then,

simply cannot be sustained. The fact that no formal disciplinary charges were ever brought against Respondent from which he could have challenged them in accord with the accepted disciplinary challenge procedures merely amplifies this conclusion.

Finally, Appellant's rather overwrought concern for transparency is belied by the demand that Respondent be prevented from challenging Appellant's findings via an adjudicatory process – the very definition of transparency. No one is trying to hide anything here except for Appellant.

Given the above, the Trial Court was correct in determining that the Attorney General's IA Policy affirmatively affords officers the right to a hearing on the merits to challenge findings declared sustained following a completed internal affairs investigation even where the officer negotiates a deal dismissing any formal disciplinary charges against that officer, and that determination should be affirmed here.

III. THE TRIAL COURT PROPERLY DETERMINED THAT AN ACTION IN LIEU OF PREROGATIVE WRIT IS AN APPROPRIATE MEANS BY WHICH THE HEARING AFFORDED OFFICERS PURSUANT TO THE ATTORNEY GENERAL'S INTERNAL AFFAIRS POLICY AND PROCEDURES CAN BE PROVIDED (Raised below 2T, 3T).

This case remains simply a demand for the ability to be heard on whether Respondent should be publicly identified on Appellant's *Brady/Giglio* list based solely upon its as yet unchallenged Summary and Conclusions Report, in accord

with Section 9.11.2 of the IA Policy, as set forth at length above. Insofar as Appellant has no procedure in place to hear such matters as are specifically envisaged as challengeable by the Attorney General, an action in lieu of prerogative writ is most appropriate. *See Pfleger v. State Highway Dep't*, 104 N.J. Super. 289, 291 (1968)(holding “it is clear that the relief sought is obtainable only by proceeding in lieu of prerogative writs” where plaintiffs sought to compel the Department of Transportation to institute condemnation proceedings against themselves to establish the value of the plaintiffs’ property allegedly taken from them by that Department, where the Department lacked the “administrative machinery ... for itself condemning land, for hearing the arguments for and against seeking condemnation in court, or for deciding whether or not a ‘taking’ has been effected by the Department’s actions.” *Pfleger, supra*, 104 N.J. Super., at 291.

So too, here. Insofar as the employer, Marlboro Township, failed to institute charges against Respondent in this case and, in any event, allowed him to retire before doing so, Respondent maintains the right to have this Court assess whether or not the conclusions determined by and set forth in Defendant’s Summary and Conclusions Report support his inclusion on the *Brady/Giglio* list.

Appellant being an agency with the obligation to conform to the Attorney General’s directives, Respondent does not seek for Appellant to create a *policy* here, as it suggests, but for it to *implement* the policy of the Attorney General a set

forth in IA Policy Section 9.11.2. The Attorney General's policy is clear: the Attorney General's IA Policy affirmatively affords officers the right to a hearing on the merits to challenge findings declared sustained following a completed internal affairs investigation even where the officer negotiates a deal dismissing any formal disciplinary charges against that officer. What Respondent sought below was a means by which he may avail himself of the due process espoused by that policy, and Appellant remains the only appropriate party from whom Respondent may receive that relief.

Appellant, nevertheless, appears to be stuck on Respondent's request for a mechanism by which he may challenge Appellant's findings where no discipline is attached or associated with those findings, ignoring that fact that Respondent requested in the alternative that the Trial Court provide the venue for that mechanism and hear the challenge itself. As such, Appellant focuses on what is provided within the confines of the Attorney General's Policies and Procedures.

To wit, Appellant asserts, without basis, that if there is no mechanism set forth in the IA Policy by which Respondent may challenge the sustained findings, then there can be no such mechanism. *See* Pb. 16-20. Likewise, Appellant claims that IA Policy Section 9.11.2 does not provide a right to a hearing post-separation from employment. Pb. 23. Yet, Appellant fails to recognize that many appeals to an "arbitrator, Administrative Law Judge, Civil Service Commission, or the

Superior Court” occur post-separation from employment.⁶ In fact, *any* challenge to an involuntary separation can only occur *after* that separation, and such challenges happen all the time, despite the fact that neither the Attorney General’s Law Enforcement Directive No. 2022-14, nor his IA Policy provides for a mechanism to do so. The absence of such a mechanism in either of those documents cannot be determinative in the instant case.

The fact remains, therefore, that the existence or absence of any specific mechanism by which an officer may challenge formal disciplinary charges post-separation, especially where the separation is the result of the formal disciplinary charges themselves, is not determinative, as this Court is well within its authority and power to either direct that the charging agency establish such a mechanism or employ a pre-existing mechanism, or provide the mechanism itself.

For example, neither the New Jersey legislature, nor the New Jersey Attorney General provided for pre-termination opportunities to challenge the later imposition of major discipline, the procedure for which is currently set forth in the

⁶ Critically, Appellant’s entire narrative of the “Disciplinary Process” stops at the imposition of discipline and completely ignores the all-important next step: the right of the disciplined employee to appeal the imposition to “an arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court.” *See* Pb. 8-11. This is a clear misunderstanding or misrepresentation of the actual “disciplinary process” available to the law enforcement personnel in the State of New Jersey, and appears to have led to the clear misunderstanding or misrepresentation of the operative language of IA Policy 9.11.2 at issue in this case.

Attorney General's Policies and Procedures Manual at Section 6.3.12 through 6.3.18, until the United States Supreme Court declared such hearings, as perfunctory as they may be, required in cases where separation from employment is a possible outcome. *See Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985). While *Loudermill* involved a different issue, the outcome remains clear: the Courts are empowered to direct the provision of hearings where either the Legislature or the Attorney General failed to so specifically provide.

Further, the New Jersey Supreme Court fairly recently set up a limited hearing mechanism in the Superior Court, Trial Division, whereby former New Jersey police officers who had negotiated both the dismissal of formal disciplinary charges against them *and* were promised complete confidentiality regarding those matters could challenge the merits of the underlying charges when Attorney General Law Enforcement Directives 2020-5 and 2020-6 were implemented, both of which required that all of those former officers' names be published on their respective counties' *Brady/Giglio* lists. *See In re Atty. Gen. Law Enforcement Directive Nos. 2020-5 and 2020-6*, 246 N.J. 462, 502-505 (2021)(holding that "any as-applied challenges" are to be filed "in the Superior Court in the nature of actions in lieu of prerogative writs."). Given the similarity in the nature of the proceedings identified as available to former New Jersey police officers by the New Jersey Supreme Court in the *Law Enforcement Directives* case and that sought by

Respondent, Appellant can proffer no valid reason as to why the Trial Court was incapable of resolving this matter via an action in lieu of a prerogative writ.

CONCLUSION

While Attorney General Law Enforcement Directive No. 2022-14 and the November IA Policy that it spawned sought to eliminate an officer's and his or her employer's ability to negotiate the former officer's name from publication via the *Brady/Giglio* list, it expressly did not eliminate the officer's right to challenge the basis on which his or her name is to be published on that list, whether in the context of a challenge to formal disciplinary charges or following a successfully negotiated deal that resulted in the dismissal of said formal charges. Given that right, and Appellant's lack of an identified mechanism by which its determinations may be challenged, this matter was appropriately brought as an action in lieu of Prerogative Writ. Therefore, and for the foregoing reasons, as well as those set forth in Judge McCarthy's well-reasoned Opinion below, Respondent, Fred Reck,

respectfully maintains that the grant of summary judgment in favor of Respondent, and the denial of summary judgment in favor of Appellant, should be confirmed.

Respectfully submitted,

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FRED RECK,

Respondent,

v.

MONMOUTH COUNTY
PROSECUTOR'S OFFICE,

Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-0001734-24T4

On Appeal from Superior Court, Law
Division Civil Part, Monmouth County

Hon. Owen McCarthy, P.J.Cv. sat below

Dated: September 9, 2025

**REPLY BRIEF OF APPELLANT
MONMOUTH COUNTY PROSECUTOR'S OFFICE**

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PRELIMINARY STATEMENT

At issue in this matter are the interpretation and implementation of Internal Affairs Policies and Procedures (“IAPP”) issued by the Office of the Attorney General (“OAG”) and the Attorney General’s Law Enforcement Directive (the “Directive”) concerning the IAPP. [Pa 71-144]

This case arises out of Respondent’s misunderstanding of the processes set forth in the relevant Guidelines and Directives for the adjudication and reporting of discipline against law enforcement officers established by the OAG, specifically those found in the IAPP. Respondent confuses and conflates key aspects of the IAPP, including (1) the distinction between “findings and “discipline”; (2) the requirements for public reporting of police officer misconduct with a prosecutor’s Brady/Giglio obligations; and (3) the applicable authority and responsibilities of the Marlboro Police Department, the Monmouth County Prosecutor’s Office (“MCPO”) and the OAG.

The Respondent seeks to compel the MCPO to create a new mechanism to appeal sustained findings against a law enforcement officer after said officer has negotiated a settlement of the allegations against him/her. Such a result is not only contrary to the IAPP, but inexplicably shifts the burden and authority to create such rules away from the OAG and on to a subordinate agency—in this case the MCPO. Additionally, Respondent seeks to remove the responsibility for discipline from the

police department that employs the officer, to the MCPO.

The Respondent's legal support for this rests, entirely, on a misreading of one sentence in the definition of "sustained findings" under the IAPP.

Respondent seeks the extraordinary remedy of compelling the MCPO to supersede the OAG and usurp their authority to create a new process by which this individual can seek to undo *some* of the consequences of his voluntary choices. Such a remedy not only wholly unsupported by the OAG's IAPP—it is directly contrary to them. This outcome is untenable and cannot be allowed to remain.

LEGAL ARGUMENT

I. THE RESPONDENT FAILS TO APPRECIATE HOW THE DISCIPLINE PROCESS OPERATES (Raised below 1T)

As more fully set forth in Appellant's initial brief, the OAG's IAPP established a comprehensive system under which allegations of misconduct against law enforcement officers are investigated. The process starts with an Internal Affairs ("IA") complaint, which can be the result of an allegation from within or outside the particular department. The IA complaint is then investigated, and if the investigation leads to sustained findings of misconduct, formal charges are prepared. After those charges are filed against the officer, they are subject to a separate set of procedures depending on whether they are classified as Minor or Major Disciplinary Actions. From there, the process varies depending on the type of discipline sought (Minor or

Major) and the individual's agency's collective bargaining agreement and/or the statutory scheme in place in that police department (civil service v. non-civil service). *See N.J.A.C. 4A:2* (for civil service); *N.J.S.A. 40A:14-147 to 151* (for non-civil service)

In most situations, the filing of an IA complaint, the investigation, the filing of disciplinary charges, if warranted, and the hearing before a hearing officer, all take place within the given police department. In the present matter, because Respondent was the Deputy Chief, this case fell within a narrow exception in the IAPP specifically designed to promote accountability. In order to avoid a situation where the IA Unit is required to investigate their boss, the IAPP provides that, in situations like the present one, the initial investigation of the IA complaint is to be performed by either the county prosecutor's office, here the MCPO, or the OAG. [IAAP § 5.1.8 Pa 94]. The IAPP provides that **only** the initial investigation is to be handled by MCPO or the OAG. The remainder of the process—issuing the Preliminary Notice of Disciplinary Action, selecting a hearing officer, holding a hearing and the imposition of any discipline—all remain entirely within the control of the Marlboro Police Department. [IAAP § 2.3, Pa 83-84]. Pursuant to the IAPP, the investigation was, and should have been, the MCPO's only involvement in this process. At no point in time under the IAPP was MCPO to become involved in the filing of formal charges, providing a hearing or imposing discipline.

In the present matter, the procedures set forth in the IAPP were followed were followed to the letter. An Internal Affairs complaint was filed against Respondent. Because of his rank, that investigation was referred to the MCPO. The MCPO completed that investigation and returned its findings to the Marlboro Police Department. It was only after the investigation was completed that problems arose. At that point, the Marlboro Police Department, armed with a wide array of options available, chose to enter into an agreement with the Respondent to settle the charges against him—an agreement that the MCPO was not a party to. However, the manner in which the agreement resolved the matter created the problems this Court is being asked to resolve. [Pa 47]

The agreement entered into by Marlboro and Respondent specifically provided that no disciplinary charges would be filed. Presumably, this was negotiated by the Plaintiff to attempt to avoid consequences under provisions of the IAPP. However, the agreement itself triggered the application of another provision of the IAPP, which specifically required the public reporting of officers who retired with sustained IA investigations for serious offenses such as here—that the officer was untruthful. This provision of the IAPP was specifically designed and implemented to stop officers from retiring in order to avoid accountability. [IAPP § 9.11.2(k), Pa 139].

To the extent that the lower court found support for this result in the settlement agreement between Marlboro and the Respondent, that support is clearly misplaced. As discussed at length in our initial brief, the MCPO cannot be bound to a contract which it was not a party to.

Beyond that there are reasons to doubt that this contract was entered in good faith by the parties. Counsel for Marlboro was specifically advised by the MCPO that the proposed resolution in which no charges would be filed, would trigger application of IAAP §9.11.2(k) and the public reporting requirements of the IAPP. The MCPO specifically advised Counsel for Marlboro that in order to avoid the collateral consequence of public reporting, Respondent would have to be formally charged and challenge the sustained findings against him. [Pa 384-387]¹ Despite that warning, Marlboro entered into an agreement with Respondent which inexplicably encouraged him to seek a remedy Marlboro was told did not exist. Moreover, by negotiating that no suit could be brought against Marlboro by the Respondent, Marlboro attempted to insulate itself from the repercussions of that contract.

Respondent's claim that he had no avenue to challenge MCPO's sustained findings against him is fallacious. Like any officer who is faced with sustained

¹ The public reporting requirements under the IAPP can overlap with the requirements under Brady Giglio, however, they are different obligations under different requirements and have different impacts.

findings of misconduct, he had the right to have formal disciplinary charges filed against him and contest both the MCPO's findings, and the discipline sought by his agency, at a hearing and, if necessary, the appeals process that follows. Instead, Respondent simply chose to abandon that process in favor of a negotiated result.

The present situation is analogous to a defendant in a criminal case who believes that a search which uncovered evidence against him was flawed. However, rather than file a motion to suppress, negotiates a resolution of the criminal case without reserving their rights. No one would suggest that the defendant can later return to court after having negotiated a favorable result and seek review of the motion they never filed. In that circumstance, this Court would find that the defendant gave up their right and made a conscious choice to forgo remedies to negotiate a result which they determined was in their best interests. This Court would not allow the defendant to have a suppression hearing, having failed to take the necessary steps to protect her rights. Similarly, Respondent here is asking this Court for a hearing after having negotiated away his right to a hearing. Simply put, Respondent had a remedy which would have provided him with a hearing, but he chose to forego that remedy.

Moreover, under the OAG's disciplinary framework described more fully previously, after its initial investigation, the MCPO has *no further role* in the discipline of the Respondent. The decision on what discipline charges, if any, were

to be brought was entirely up to Marlboro. Marlboro would also have had the responsibility to prosecute those charges at a hearing and handle any appeals of that hearing. Members of the MCPO would be witnesses in that hearing to be sure. But that would have been the extent of their involvement. Again, the MCPO was *only* brought in to investigate based on the Respondent's rank. The fact that Marlboro and the Respondent choose to negotiate a settlement agreement, done without MCPO's approval, cannot somehow abrogate the IAPP's requirements or thrust MCPO into the role that Marlboro was designed to have in the disciplinary process.

II. THE RESPONDENT HAS FAILED TO ADDRESS THE LIMITS OF MANDAMUS AND THE AUTHORITY OF THE MCPO (Raised below 1T)

There are fundamental contradictions in the Respondent's Responding brief regarding the remedy sought and the authority of the MCPO. At points, the Respondent argues that he is not seeking to force the MCPO to create a mechanism to appeal. However, this is the exact relief sought in his lawsuit. It is the very relief he is seeking in a subsequent lawsuit which is based on the court below's erroneous ruling. *Reck v. MCPO* MON-L-46-2025. At other points, Respondent insists that he is only seeking to compel the MCPO to utilize a process which he believes clearly exists in the IAPP. However, as discussed at length, no such process exists in the IAPP. In fact, the suggested process is directly contrary to the IAPP. At other points,

the Respondent argues that this Court should create a remedy out of whole cloth. [Rb 25].

The Plaintiff attempts to find support for the proposition that this Court can and should rewrite the IAPP in, *In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6*, 246 N.J. 462 (2021). However, that case, which addressed several challenges to the revision the OAG made to the then existing IAPP, does not support his position. That case created a mechanism by which the courts would deal with specific claims of collateral estoppel that were being raised by a class of officers who had resolved their discipline charges prior to the OAG issuing revised disclosure requirements with the express guarantee that those resolutions would remain confidential and who, because of the changes the OAG made to the IAPP, were now faced with the threat that those confidential resolutions would be made public. Notably, it did not dictate how the Attorney General would handle those cases. The Court's decision simply implemented a special master system for how the courts would handle those claims going forward.

As stated more fully in the Appellant's initial brief, the MCPO does not have the authority to amend or alter the OAG's Guidelines or Directives. It cannot create a mechanism that does not exist. The IAPP is under the exclusive purview of the OAG. To the extent that the Respondent wants to challenge the contents of the Guidelines, his challenge should be the State of New Jersey and the OAG. Even at

this stage, the Respondent has not provided a satisfactory explanation as to why he has chosen not to pursue a remedy against the OAG which created the IAPP.

Respondent also fails to address the serious concerns raised in Appellant's initial brief concerning the separation of powers and the limits of mandamus. Mandamus is an extraordinary and limited remedy only to be used when the need to act is clear, certain and outside the need for judgement and discretion. *See, In re Failure to Adopt 861 CPT Codes*, 358 N.J. Super. 135, 149 (App. Div. 2003) (internal citations omitted); *In Re Matter of Failure by the Department of Banking and Insurance to Transmit a Proposed Dental Fee Schedule*, 336 N.J. Super., 253, 262 (App. Div. 2001) (internal citations omitted).

Finally, even if a process to challenge a sustained finding was found to exist, or was created, that responsibility would fall to the Marlboro Police Department. Not the MCPO. As previously noted, formal disciplinary charges can only be brought by the employing department- Marlboro.

III. THE DEFINITION OF “SUSTAINED FINDINGS” DOES NOT CREATE A REMEDY (Raised below 1T)

The bulk of the Respondent's brief is an argument concerning a section of the IAPP dealing with the definition of a “sustained finding”—a section which he claims confirms the existence of such a process to challenge findings post-retirement. From this drop of water, the Respondent infers not just the existence of an ocean, but demands that the MCPO create that ocean if it does not, in fact, exist.

IAPP § 9.11.2 defines a “sustained finding.” It lists several specific examples of what would be considered a “sustained finding.” The section on which the Respondent relies states in part: “On the other hand, if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission or the Superior Court.” [IAPP § 9.11.2. Pa 140]

This definition is designed to prevent officers and employers from negotiating away the public posting requirements of IAPP § 9.11.2. It provides that officers and employers cannot negotiate those consequences away via a settlement. In other words, if a sustained charge that would require public posting is dismissed as part of a settlement, public posting is still required if there is sufficient credible evidence to prove the allegation. The only mechanism for an officer to avoid the public posting requirement is to challenge the sustained finding on the merits and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, Civil Service Commission, or the Superior Court (all various potential avenues for a challenge depending on the agency’s collective bargaining agreement and whether or not the agency is a civil service or non-civil service jurisdiction) Obviously, the Respondent

did not challenge the finding. He did not obtain a favorable ruling. He did not negotiate the dismissal of a charge. Instead, Respondent negotiated, in an attempt to create a loophole, that no charges be filed. He traded his right to have a hearing for a guaranteed outcome. He would retire without any effect on his retirement—no possible suspension, no possible loss of rank, no possible negative outcome to his benefits. By specifically negotiating away the charges, he made this section inapplicable to him and instead, locked in the MCPO's finding that he had been untruthful and thus, subject to being publicly reported.

To the extent that the Respondent argues that the scenario described in this part of the definition is unlikely, we agree. A circumstance where an officer is charged, has a hearing, then negotiates a settlement presumably to avoid appeals may not be common. However, that does not mean that the OAG is unable to anticipate and protect against unlikely scenarios. To the extent that the Respondent argues that this language is overwrought or poorly crafted, we may agree. But if that were the case, the Respondent needs to take that complaint to the OAG². However as complex as the sentence structure may be, no reasonable reading of it, gives an officer a mechanism to challenge sustained findings post-retirement when he negotiated away the ability of the municipality to file discipline charges.

² For our part, we have requested the OAG assume the responsibility of defending their Guidelines, they declined. This court always retains the right to ask for their input.

Respondent retired under a sustained finding of untruthfulness, triggering IAPP § 9.11.2(k). This section was added to the IAPP to specifically prevent an officer from retiring or otherwise separating from his agency to avoid IAPP public website posting requirements. The MCPO had no role in or responsibility for the situation the Respondent negotiated himself into. Accordingly, the MCPO has no responsibility for the fact that the IAPP requires the public reporting of the findings. By negotiating his right to a hearing, Respondent has made his bed, now he must lie in it.

IV. PRACTICAL CONSIDERATIONS CONTINUE TO WEIGH AGAINST THE RESPONDENT (Raised below 1T).

Leaving aside the fact that there is no legal authority supporting Respondent's position, there are also practical considerations which are not addressed by the Respondent or the Court below making the requested relief untenable. By way of example, in order to have a hearing, formal disciplinary charges would need to be filed. How does Marlboro bring charges against a retired officer? Who would be required to hold this hearing? What is the burden of proof? Who has the burden of proof? What consequence can follow from an adjudication on those discipline charges? Can Marlboro impose punishment retroactively—suspend him, dock his pay? What appeals would follow? How would they be decided? In answering these

questions, it must be reiterated that under the IAPP, after the MCPO performed the investigation, its role in the disciplinary process was complete—it does not bring charges, hold hearings, adjudicate or impose discipline. All of those are the responsibility of the employer, Marlboro. Accordingly, to provide the Respondent with the remedy he seeks, this Court must void the settlement agreement between Respondent and Marlboro and return the parties to square one to starting over.

CONCLUSION

It is clear that the Respondent only wants to undo *some* of the consequences of his decisions. He wants to stay retired. He wants to continue collecting his pension and any other benefits associated with that retirement. He negotiated a settlement of these charges in Marlboro, a settlement which was designed to try to carve out a loophole that does not exist. Finding that it does not exist, he wants this Court to create that loophole for him. Such a result cannot be allowed.

For those reasons, and the reasons discussed here at length, the MCPO respectfully request that this Court reverse the decision of the Trial Court and grant summary judgment in favor of the MCPO and bring this matter to a close.

Respectfully submitted,

/s/ Sean J. Brennan

Sean J. Brennan