SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3271-20

MIKEEDWAR JEAN-BAPTISTE,

Plaintiff-Appellant,

v.

BOROUGH OF NORTH PLAINFIELD and NORTH PLAINFIELD POLICE DEPARTMENT,

Defendants-Respondents.

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Submitted May 16, 2022 – Decided June 2, 2022

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1199-20.

Hanlon Dunn Robertson, attorneys for appellant (Robert E. Dunn and Wayne G. Perry, on the briefs).

Eric M. Bernstein & Associates, LLC, attorneys for respondents (Eric M. Bernstein, of counsel and on the brief; Philip G. George, on the brief).

PER CURIAM

In this police disciplinary action, plaintiff Mikeedwar Jean-Baptiste sought reinstatement to his position as a police officer with defendants Borough of North Plainfield (the Borough) and North Plainfield police department (NPPD), back pay, and counsel fees following an administrative determination of misconduct. Plaintiff appeals from a June 4, 2021 Law Division order denying his application for reinstatement, dismissing his complaint with prejudice and affirming the administrative decision. We affirm.

I.

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

Our Supreme Court has recognized "misconduct" under N.J.S.A. 40A:14-147 "need not be predicated on the violation of any particular department rule

or regulation," but may be based merely upon the "implicit standard of good behavior which devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct." In re Phillips, 117 N.J. 567, 576 (1990) (quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). Because "honesty, integrity, and truthfulness[] [are] essential traits for a law enforcement officer," the Court has upheld termination where, for example, an officer made conflicting statements to internal affairs investigators about an off-duty altercation. Ruroede, 214 N.J. at 362; see also State v. Gismondi, 353 N.J. Super. 178, 185 (App. Div. 2002) ("[T]he qualifications required to hold [a law enforcement] position require a high level of honesty, integrity, sensitivity, and fairness in dealing with members of the public.").

Pursuant to N.J.S.A. 40A:14-150, an officer is entitled to a hearing, and, if convicted of any charge, he or she may seek review in the Superior Court. Ruroede, 214 N.J. at 355. The trial court's review is de novo. Ibid. And, the trial court must provide "an independent, neutral, and unbiased" review of the disciplinary action, and make its own findings of fact. Id. at 357 (quoting Phillips, 117 N.J. at 578, 580). The court must "make reasonable conclusions based on a thorough review of the record." Ibid. (quoting Phillips, 117 N.J. at 580). "Although a court conducting a de novo review must give due deference

to the conclusions drawn by the original tribunal regarding credibility, those initial findings are not controlling." Ibid. (quoting Phillips, 117 N.J. at 579).

Our role in reviewing the de novo proceeding is "limited." Phillips, 117 N.J. at 579. "[W]e must ensure there is 'a residuum of legal and competent evidence in the record to support'" the court's decision. Ruroede, 214 N.J. at 359 (quoting Weston v. State, 60 N.J. 36, 51 (1972)). We do not make new factual findings, but merely "decide whether there was adequate evidence before the . . . [c]ourt to justify its finding of guilt." Phillips, 117 N.J. at 579 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). "[U]nless the appellate tribunal finds that the decision below was 'arbitrary, capricious[,] or unreasonable[,]' or '[un]supported by substantial credible evidence in the record as a whole,' the de novo findings should not be disturbed." Ibid. (fourth alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 580 (1963)). On the other hand, we do not refer to the trial court's legal conclusions. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 203 (1997) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

II.

We now turn to the facts pertinent to this appeal derived from the record. On December 9, 2013, plaintiff was hired by the NPPD as a patrolman. Several

years later, on March 2, 2017, in the afternoon, A.A.[1], her young child, her "boyfriend,"[2] and his mother drove to the NPPD seeking assistance because she was homeless and had no place to go. Plaintiff was on duty at the time and was assigned to the matter. In response, plaintiff accompanied A.A. and the individuals with her to the Somerset County Board of Social Services (SCSS) office located in North Plainfield. Along the way, plaintiff utilized the vehicle's Mobile Data Terminal (MDT) to run the boyfriend's license plate to find out A.A.'s "story." After the parties arrived at the SCSS office, plaintiff entered the building, explained the situation to the employees, and subsequently left.

Later that day, while plaintiff was still on duty, dispatch informed him A.A. and the others with her had returned to the NPPD and had specifically requested to speak with plaintiff. He met with A.A., now joined by the boyfriend's child, in the municipal parking lot. They explained to plaintiff they had been denied shelter by the SCSS and again had no place to go. In response, plaintiff explained there was not much he could do but offered to "put [them] in

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[1] We use initials to protect the identity of A.A., who was the victim of domestic violence allegedly at the hand of her boyfriend. See R. 1:38-3(d)(10).

[2] Plaintiff claims that although A.A. initially introduced the man with her as her boyfriend, she later admitted he was not really her boyfriend but "just an ex-lover."

a room" when he got off work. Plaintiff instructed A.A. and the others with her to wait for him to finish his shift in the parking lot located across from the NPPD. By the time plaintiff finished his shift, however, the boyfriend could no longer drive A.A. and her son because he had to drop his own child off.[3] Therefore, plaintiff offered to take A.A. and her son with him in his personal vehicle.

According to plaintiff,[4] he initially intended to bring A.A. to the Howard Johnson Hotel, located in North Plainfield, but was concerned about "the people in Howard Johnson's seeing [him] in town coming in there with a girl." Plaintiff

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[3] The record is unclear if the boyfriend's mother left with the boyfriend or left by alternative means.

[4] Plaintiff and A.A.'s versions of the relevant facts that occurred after they left the parking lot in plaintiff's personal vehicle differ drastically. Whatever version of the relevant facts is in fact true is not relevant to this current appeal, however. It is also irrelevant in the matter under review whether plaintiff's sexual encounter with A.A. was consensual or non-consensual, contrary to N.J.S.A. 2C:14-2. The sole focus of this appeal is whether plaintiff's sexual encounter with A.A. justified plaintiff's termination from the NPPD, pursuant to N.J.S.A. 40A:14-147. Both the hearing officer's September 14, 2020 written opinion recommending termination, and the trial court's June 4, 2021 order affirming the September 14, 2020 opinion and dismissing plaintiff's complaint with prejudice, relied solely on his version of events in which he recognized: (1) "his involvement started as a police matter"; (2) "he learned of her homeless condition while on duty"; (3) "he learned of her age . . . and of the age of her child" while on duty; (4) "[h]e learned of her complete absence of support and that . . . . [s]he had no money, no food, no clothes, and had a young child in her care. . . . while on duty"; and (5) "made arrangements to meet her immediately at the end of his shift."

then proceeded to drive to the Garden State Motor Lodge, located in Union, but again changed his mind.[5] Plaintiff ultimately decided on the Kenilworth Hotel, located in Kenilworth, because A.A. told him she had not "had a good night's sleep and she[was] really stressed" and he knew there she could "relax and have a good time."

Plaintiff stated that while driving to the Kenilworth Hotel, A.A. began "chatting" and it was his belief "she showed interest in [him]."[6] When plaintiff inquired about A.A.'s relationship with her boyfriend, plaintiff learned she was a victim of domestic violence, and the boyfriend was her abuser. Therefore, plaintiff believed she was trying to take the boyfriend out of the picture and see if she could "entertain" him. Plaintiff claims "the conversation became really

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[5] Plaintiff claimed he decided against the Garden State Motor Lodge because he knew the motel's rooms did not have phones in them and A.A. would be unable to contact anyone. However, as noted by the investigator, the Garden State Motor Lodge "is located less than a mile from [plaintiff's] home where he resides with his family."

[6] In this opinion we refer to plaintiff's recitation of the facts as his statement or testimony, which stems from his July 24, 2017 video-recorded interview with the Union County Prosecutor's Office (UCPO). Prior to the interview, plaintiff was advised of the charges pending against him, provided with a copy of the complaints, read his rights aloud, waived each right respectfully, and voluntarily agreed to speak with the UCPO. At the conclusion of the interview, plaintiff swore to the truthfulness of his statements. Plaintiff never directly testified before the hearing officer or the trial court.

flirty, she was giving [him] compliments," such as how nice his car was and how she wished she could meet a guy like plaintiff, and "giving [him] the signs as a man and woman."

When plaintiff and A.A. arrived at the Kenilworth Hotel, he provided her with his cellphone and instructed her to call the boyfriend using an application on the phone that would conceal his personal number and advise A.A.'s boyfriend where she was. This application "allows the user to select another cellular number so that the user's real number is not shown." The application also changes the number monthly. Plaintiff denied providing A.A. or those accompanying her with his actual or disguised phone number prior to leaving the parking lot and claimed he never provided her with his actual phone number.

Plaintiff then proceeded to check A.A. into a hotel room. Upon returning to his car, plaintiff claims A.A. informed him that her boyfriend did not need to come and would not be coming. She then asked plaintiff if he could "come and hang out" after he went to get her some "necessities." Plaintiff then escorted A.A. and her son into the hotel room, which consisted of two queen size beds, and plaintiff left after she finished explaining what she needed—an extra set of clothes, milk for her child, and food.

Plaintiff thereafter returned home to procure some clothes—a plain white shirt and some black shorts—and a one-half pint of Hennessey. Plaintiff told his wife he "was gonna step out for a little while" and "was going out to the bar to . . . have a drink." Plaintiff then stopped at a Walgreens store to purchase milk, food, and condoms[7] before proceeding back to the Kenilworth Hotel. After returning to the hotel, plaintiff and A.A. "hang[ed] out" with A.A. and her child on one bed and plaintiff on the other. While hanging out, plaintiff drank and ultimately finished the Hennessey he brought. A.A., who was only twenty years old at the time, did not drink alcohol.[8]

After the child fell asleep, plaintiff claims A.A. moved to his bed and sat next to him. Plaintiff testified he then asked A.A. if she needed a back massage, which is "normally how [he] initiate[s] anything sexually with a woman." Plaintiff claims that while massaging A.A.'s back, she lowered her shorts down "to the thigh area," which plaintiff assumed to have been an invitation for sex. Plaintiff then removed her shorts and had sex with her at least once while "laying

[7] Plaintiff's version of the facts was inconsistent as to whether he had previously bought the condoms and had them in his glove compartment or if he bought the condoms specifically for that night after A.A. invited him to "hang out."

[8] Plaintiff stated he did not believe A.A. drank alcohol but may have done so outside of his presence.

on top of her." Plaintiff claims he never penetrated A.A. orally or anally. Afterwards, A.A. left to smoke a cigarette before coming back to watch Shark Tank with plaintiff. He ultimately left the hotel that night but instructed A.A. to call him in the morning to let him know what she needed.

Plaintiff claims A.A. called him on March 3, 2017. He returned to the hotel room with items from Dunkin' Donuts and helped A.A. secure a ride back to the county where she lived. Plaintiff could not recall the county where A.A. actually resided, but testified it was farther than he had planned to drive. Therefore, plaintiff instructed A.A. to contact her boyfriend, who plaintiff claims became irate on the phone because she had not called him earlier. Plaintiff stated he told A.A. to call him thereafter and instructed her as to the hotel's checkout time. Plaintiff then called the hotel to explain A.A. would be staying a little past checkout time and asked the clerk to inform him when she left because the room was listed in his name.

On March 3, 2017, at or about 12:15 p.m., A.A. reported to the Kenilworth Police Department (KPD) that plaintiff had engaged in "sexual intercourse with her . . . against her will, including anal intercourse." The KPD investigated A.A.'s complaint, seizing "several items of possible evidentiary value from . . . the Kenilworth Hotel." During the KPD's investigation, plaintiff called the hotel

to inquire whether A.A. had checked out and been picked up. The hotel confirmed to him A.A. had been picked up and that the KPD was investigating the room. Plaintiff testified he presumed the KPD had been called in response to a domestic dispute between A.A. and her boyfriend regarding where she had been the night before, and he asked nothing further regarding the police investigation. Plaintiff asserted he had been more concerned with whether the room was left in satisfactory condition because it was in his name.

The KPD subsequently "turned the matter over to the [UCPO] for investigation." On March 6, 2017, plaintiff was suspended with pay from the NPPD pending an investigation.[9] The NPPD's internal affairs unit subsequently began its own investigation into plaintiff's actions regarding A.A.

On July 24, 2017, a warrant of arrest was issued against plaintiff for one count of second-degree sexual assault, contrary to N.J.S.A. 2C:14-2. He was subsequently arrested and the UCPO interviewed him regarding A.A.'s allegations. Plaintiff's statement was made freely and voluntarily, and he signed

[9] The record is unclear if plaintiff's suspension was pending the UCPO's investigation, NPPD's investigation, or both. The UCPO's investigation report, however, notes both the Somerset County Prosecutor's Office (SCPO) and NPPD's internal affairs unit requested a letter indicating the UCPO was not continuing its "investigation into the sexual assault allegation . . . at this time."

a statement acknowledging a waiver of his Miranda[10] rights to remain silent and to counsel. Incidental to plaintiff's arrest and pending conclusion of the UCPO's criminal case: (1) plaintiff was suspended without pay from the NPPD from July 24, 2017, through June 12, 2019; and (2) the NPPD's investigation was suspended.

On June 13, 2019,[11] the UCPO's dismissed the criminal charges against plaintiff because A.A. failed to appear to testify at trial. Having concluded the UCPO's criminal case: (1) the NPPD's investigation was reopened; and (2) plaintiff was again suspended with pay from the NPPD. The NPPD obtained the UCPO's entire investigation file, including video recordings of plaintiff and A.A.'s interviews. On August 12, 2019,[12] based on the recommendation of the SCPO, plaintiff was served with a notice of disciplinary charges, pursuant to N.J.S.A. 40A:14-147 and the NPPD's rules and regulations.

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[10] Miranda v. Arizona, 384 U.S. 436 (1966).

[11] The trial court noted "on the day of trial in March 2019[] the matter was dismissed." In contrast, defendants claim plaintiff was suspended without pay pending the resolution of the criminal charges, which were dismissed on June 13, 2019.

[12] The notice was dated August 5, 2019.

On July 30, 2020, the hearing officer, a retired Superior Court judge, conducted a hearing in this matter, pursuant to N.J.S.A. 40A:14-150. Defendants presented the testimony of Lieutenant Alan McKay[13] of the NPPD's internal affairs unit and a videotape of plaintiff's interview with the UCPO. Plaintiff did not present any witnesses.

On September 14, 2020, the hearing officer issued a written opinion recommending plaintiff's termination. The hearing officer concluded:

> The evidence clearly and convincingly shows that [plaintiff] is guilty of misconduct in office under N.J.S.A. 40A:14-147. He has clearly and convincingly violated the [NPPD]'s [r]ules and [r]egulation[s]. He admitted conduct evidences an abuse of his authority and power as a police officer and misconduct. He used the initial police contact to obtain personal information that he then used to obtain an advantage or benefit for himself.
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> His position as a police officer, the trust, power, and access provided to him by virtue of his office was intentionally and purposely used to arrange a one night stand with what he knew to be a particularly vulnerable woman, who came to the police department seeking help.

[13] McKay testified "it is procedure to have the Prosecutor's Office review a case involving a possible crime by an[] officer and to have an assistant prosecutor examine the case." McKay was not the initial officer assigned to this matter but replaced the original officer who retired pending the conclusion of the UCPO's criminal case.

Specifically, the hearing officer found:

> [Plaintiff] recognizes that his involvement started as a police matter, he learned of her homeless condition while on duty, he learned of her age while on duty, and of the age of her child. He learned of her complete absence of support and that even her mother would not take her in. She had no money, no food, no clothes, and had a young child in her care. He learned everything he knew about this mother while on duty. He made arrangements to meet her immediately at the end of his shift.
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> . . . .
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> Learning of [A.A.'s] status as a homeless mother, her rejection by the [SCSS], her total lack of a support system and the use of that and other information gathered only because of the access and status provided to him as a law enforcement are clearly acts relating to his office. He used the MDT police system in his vehicle to look up the license plate number of the vehicle [A.A.] came in. . . . He only had access to the MDT information gathered system as a result of being a law enforcement officer. . . .
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> Whether the conduct occurs while you are on duty or having just ending your shift while still in uniform is a difference without significance. The perceived power of law enforcement remains exactly the same. Having people wait and meeting them in a parking area directly across from the [p]olice [s]tation, immediately after your shift, while still in uniform, for the purpose of getting a room remains for all intent and purpose, police conduct. Suggesting that subsequent sex with a young woman in such dire circumstances was consensual stretches one's rational imagination. [Plaintiff] clearly gathered information while on duty which was later

> used for an unauthorized purpose. That purpose was his own personal sexual gratification.

On September 15, 2020, based on the findings of the hearing officer, plaintiff was terminated from his employment with the NPPD.

On October 21, 2020, plaintiff sought a de novo review before the Law Division pursuant to N.J.S.A. 40A:14-150 and filed a complaint in lieu of prerogative writs. On December 18, 2020, defendants filed a motion to dismiss the complaint, which the trial court denied on February 12, 2021.

On June 3, 2021, the trial court conducted a de novo review of the record. The next day, the court issued a fifty-page written opinion upholding plaintiff's termination and dismissing the complaint with prejudice. The opinion stated:

> The [c]ourt finds that [the hearing officer]'s decision is supported by the record . . . and [is] not arbitrary, capricious and unreasonable. In addition, [defendants] have shown, based upon the record, by a preponderance of the evidence, that [plaintiff] violated N.J.S.A. 40A:14-147 as well as numerous [NPPD] [r]ules and [r]egulations.

Specifically, the trial court found plaintiff's "plain, straightforward testimony and clear unequivocal admission of his conduct . . . clearly constituted misconduct in office and just cause for termination." A memorializing order was entered. This appeal followed.

III.

On appeal, plaintiff primarily contends the trial court finding of misconduct in office pursuant to N.J.S.A. 40A:14-147 was founded on conduct actually occurring while he was off duty and not in uniform, and therefore, his termination is unjustified. According to plaintiff, there were no circumstances presented or "any indication that [A.A.] or her son believed [plaintiff] was still on duty as a police officer" when he went to the hotel. Plaintiff also argues termination was a disproportionate penalty in view of the circumstances and was not in accordance with the tenets of progressive discipline in light of his unblemished record as a police officer.

We reject these contentions in light of the record and applicable legal principles. Pursuant to our "limited" standard of review, Phillips, 117 N.J. at 579, we affirm substantially for the reasons expressed in the trial court's comprehensive written decision, recognizing it "is based on findings of fact which are adequately supported by evidence" in the record. R. 2:11-3(e)(1)(A). In doing so, we determine the court's decision was not "arbitrary, capricious[,] or unreasonable." Phillips, 117 N.J. at 579. We add only the following remarks.

In reaching its decision, the trial court painstakingly reviewed the evidence supporting the charges. The trial court found plaintiff's sexual

encounter with A.A. was the result of actions he took while on duty and constituted an abuse of his position as a police officer. Our Court has routinely held an officer's off-duty misconduct may serve as the basis for the officer's termination. See, e.g., Ruroede, 214 N.J. at 343; and Phillips, 117 N.J. at 577 (holding whether the officer's misconduct occurred while off-duty does not mitigate the conduct). We are also unpersuaded by plaintiff's argument that his conduct could not support his termination because the trial court relied on case law employing the Civil Service standard of "conduct unbecoming a public employee" under N.J.A.C. 4A:2-2.3(a)(6), instead of the "misconduct" standard set forth in N.J.S.A. 40A:14-147.

The statutory framework for a municipality's disciplinary proceedings against its police officers differs if the municipality is a civil or non-civil service jurisdiction. Civil service jurisdictions are governed under the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, which provides an officer "may be subject to discipline for conduct unbecoming a public employee," pursuant to N.J.A.C. 4A:2–2.3(a)(6). Karins v. City of Atl. City, 152 N.J. 532, 553 (1998) (emphasis added).

In contrast, non-civil service jurisdictions are governed under N.J.S.A. 40A:14-147 to -151, which provides "[a]n officer cannot be removed for

political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations," pursuant to N.J.S.A. 40A:14-147. Ruroede, 214 N.J. at 354 (emphasis added). Plaintiff asserts "conduct unbecoming" and "misconduct" are "entirely separate statutory violation[s]." Thus, plaintiff contends the trial court could not rely on Karins, 152 N.J. 532, and Emmons, 63 N.J. Super. at 136, to support its finding that "[c]onduct may be actionable, whether the police officer is on duty or off duty." We disagree.

Plaintiff's argument is a distinction without a difference. First, both "conduct unbecoming" and "misconduct" are "catchall" provisions. Karins, 152 N.J. at 542 (citing Arnett v. Kennedy, 416 U.S. 134, 161 (1974)). Therefore, neither term is limited to what conduct may result in discipline. See ibid.; but see MISCONDUCT, Black's Law Dictionary (11th ed. 2019) (defining misconduct as "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp[ecially] by someone in a position of authority or trust" (emphasis added)). Second, the trial court itself notes the cases it relies upon are distinguishable, however, "the distinguishing characteristics are not so meaningful so as to undermine the lessons of those cases." See Ruroede, 214 N.J. at 354 (permitting extrinsic aids when a statute's plain language is not sufficient).

Indeed, our Court has routinely utilized the lessons of other cases to aid in its review of "catchall" discipline provisions. See, e.g., Karins, 152 N.J. at 553 (noting "[c]onduct unbecoming . . . is reminiscent of the common-law offense of misconduct in office and the statutory offense of official misconduct, N.J.S.A. 2C:30-2"); Phillips, 117 N.J. at 576-77 (citing civil service jurisdiction case for a non-civil service jurisdiction termination (citing Emmons, 63 N.J. Super. at 140)).

Third, plaintiff provides no case law to support his argument off-duty misconduct that would qualify for termination in a civil service jurisdiction, pursuant to N.J.A.C. 4A:2–2.3(a)(6), cannot qualify for termination in a non-civil service jurisdiction, pursuant to N.J.S.A. 40A:14-147. In contrast, the Court has held off-duty misconduct can qualify for termination in a non-civil service jurisdiction. In Phillips, where an officer in a non-civil service jurisdiction was involved in an off-duty vehicular accident, the Court held a municipality's decision to demote the officer was justified by his failure "to exercise the good judgment required of an armed police officer." 117 N.J. at 577. "That he did so while off-duty [did] not mitigate his actions." Ibid.; see also Ruroede, 214 N.J. at 343-45, 363 (affirming non-civil service jurisdiction

officer's termination for charges that originally stemmed from the officer's off-duty conduct).

Unassailable evidence in the record established the nature and severity of plaintiff's misconduct. Moreover, the trial court's decision evinces its "careful sifting" of the evidence necessary to make independent factual findings. See King v. Ryan, 262 N.J. Super. 401, 412 (App. Div. 1993). The court's de novo review under N.J.S.A. 40:14-150 here was based upon the facts of record and the court made "reasonable conclusions based on a thorough review." Ruroede, 214 N.J. at 357 (quoting Philips, 117 N.J. at 580). Therefore, we conclude the trial court's decision adhered to the de novo standard and was based upon substantial credible evidence in the record.

IV.

Next, plaintiff argues that in the event the charges are affirmed, the trial court erred by not applying progressive discipline. He contends termination is an inappropriate remedy and that the trial court failed to consider his otherwise unblemished record as a police officer. Defendants assert termination was warranted in light of the seriousness of the disciplinary infractions.

Progressive discipline "generally requires a progression of steps to address the employee's deficiencies before removal." Klusaritz v. Cape May

Cnty., 387 N.J. Super. 305, 312 (App. Div. 2006). While one's past record cannot prove a current charge not based upon habitual misconduct, it may present "guidance in determining the appropriate penalty for the current specific offense." In re Carter, 191 N.J. 474, 484 (2007) (quoting Town of W. N.Y. v. Bock, 38 N.J. 500, 522-23 (1962)).

However, progressive discipline is not "a fixed and immutable rule to be followed without question." Ibid. Rather, "some disciplinary infractions are so serious that removal is appropriate" even despite "a largely unblemished prior record." Ibid. Though it remains "a worthy principle," progressive discipline need not be considered "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In re Herrmann, 192 N.J. 19, 33, 36 (2007).

To determine the appropriateness of a disciplinary sanction, courts assess whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 28-29 (quoting In re Polk, 90 N.J. 550, 578 (1982)). Our Supreme Court has warned "courts should take care not to substitute their own views of whether a particular

penalty is correct for those of the body charged with making that decision." Carter, 191 N.J. at 486.

Courts routinely eschew progressive discipline and terminate police officers for severe misconduct. See, e.g., McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 397 (App. Div. 2008) (finding police officer's continued refusal to patrol as instructed was misconduct "so serious that progressive discipline need not be imposed"); Cosme, 304 N.J. Super. at 207 (holding police officer who left for Cancun knowing his vacation may have been cancelled constituted "a major breach of conduct and discipline" warranting termination); Ruroede, 214 N.J. at 362 (positing termination warranted for police officer who made "inconsistent statements during the course of the internal affairs investigation").

It is self-evident that police officers are "constantly called upon to exercise tact, restraint and good judgment in [their] relationship with the public" and "must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). Police officers are held to a higher standard as "one of the obligations [they undertake] upon voluntary entry into the public service." Phillips, 117 N.J. at 577 (quoting Emmons, 63 N.J. Super. at 142).

Here, the trial court determined termination was the only appropriate discipline for misconduct in office while both on and off duty, where the plaintiff used his position as a police officer to facilitate a liaison with a young, homeless domestic violence victim who came to the NPPD with her young child for help. Plaintiff had no prior disciplinary history, but that is irrelevant because progressive discipline is not required to be implemented by an employer. In re Stalworth, 208 N.J. 182, 196-97 (2011) (quoting Herrmann, 192 N.J. at 30-33). We do not substitute our own views of whether a particular penalty is appropriate "for those of the body charged with making that decision." Carter, 191 N.J. at 486.

Moreover, here plaintiff admitted his sexual encounter with A.A. was misconduct when he testified, "I shouldn't have been there." As noted by the hearing officer, when plaintiff was "ultimately confronted with the ethics of his having sex with a homeless mother he was tasked to help while on duty[,] he admit[ted] he should have just got the room and left her, and should have rejected the lady's invitation to hang out." We see no reason to disturb the trial court's finding that plaintiff's conduct was "egregious" and therefore, progressive discipline was unwarranted.

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

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION