



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 11238-17

AGENCY DKT. NO. N/A

**IN THE MATTER OF BIJOY RODRIGUEZ,  
CITY OF PATERSON.**

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**Christopher A. Gray, Esq., and Frank C. Cioffi, Esq.,** for appellant (Sciarra & Catrambone, attorneys)

**Steven S. Glickman, Esq., and Gregory S. Glickman, Esq.,** for respondent,  
(Steven S. Glickman, attorney)

Record Closed: December 1, 2017

Decided: December 14, 2017

BEFORE **KIMBERLY A. MOSS, ALJ:**

**STATEMENT OF THE CASE**

Appellant, Bijoy Rodriguez (Rodriguez or appellant), appeals his removal by respondent, City of Paterson (Paterson or respondent), on charges of conduct unbecoming a public employee; incompetency, inefficiency, or failure to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and other sufficient cause, relating to not returning to work on June 5, 2017, and the accuracy of the doctor's note and report. At issue is whether Rodriguez engaged in the alleged conduct, and, if so, whether it constitutes conduct unbecoming a public employee;

incompetency, inefficiency, or failure to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and other sufficient cause that warrants removal.

### **PROCEDURAL HISTORY**

On June 12, 2017, Paterson served Rodriguez with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on June 27, 2017. Paterson served Rodriguez with a Final Notice of Disciplinary Action on July 14, 2017, sustaining charges of incompetency, inefficiency, or failure to perform duties, chronic or excessive absenteeism or lateness, neglect of duty, conduct unbecoming a public employee and other sufficient cause. Rodriguez requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL). The appeal was filed with the OAL on July 28, 2017. Appellant agreed to waive back pay for the period October 5, 2017, to October 19, 2017. The hearing was held on November 20, 2017, and November 22, 2017. Closing briefs were submitted on December 1, 2017, after which I closed the record.

### **FACTUAL DISCUSSION**

#### **Testimony**

##### **Gustave Seden**

Gustave Seden (Seden) is the commander in charge of the Paterson Police Department Internal Affairs (IA) unit. Rodriguez was on suspension in the beginning of 2017. The suspension was to end in June 2017. On June 5, 2017, Rodriguez gave Seden a note from Dr. Gazzillo which stated that Rodriguez was disabled and could not work. Seden contacted the officer in charge that day, Deputy Chief Troy Oswald (Oswald), and Director Jerry Speziale (Speziale) and gave them a copy of the note. He did not know that the note came from Rodriguez's workers' compensation doctor. IA sent a letter to Dr. Gazzillo on June 6, 2017. Dr. Gazzillo responded to the letter the next day. A few days later Seden told Rodriguez to come in regarding Dr. Gazzillo's

note. Seden had not received Rodriguez's medical files before requesting that he come in. IA attempted to contact the risk manager, Samir Goow (Goow), but had difficulty reaching him. Rodriguez came into headquarters to write the report. He was using a cane, but did not appear to be in pain.

Once Rodriguez provided his report on June 12, 2017, he was suspended. He was advised to contact counsel and draft charges for the suspension of Rodriguez. At the meeting, there was no discussion of Rodriguez's medical condition or if he was taking prescription opioid medication.

Seden was not part of the surveillance of Rodriguez. At that time IA was processing an upcoming academy class. Oswald and Speziale conducted the surveillance. He does not know why they conducted the surveillance and does not know of any other case where Oswald and Speziale conducted a surveillance.

Seden was never directed to do an investigation of Rodriguez or get his medical records. He did not write a report regarding Rodriguez.

### Jerry Speziale

Speziale is the police director of Paterson. The deputy police chiefs are responsible for the day-to-day operations of the police department. In June 2017 he was informed by Oswald that Rodriguez had returned to work for one day after a suspension and stated that he was completely disabled. Speziale does not know what Rodriguez's injuries are. He saw a note stating that Rodriguez was disabled. He does not know how or when Rodriguez was injured. He does not know what medications Rodriguez was taking. He did not speak to appellant's doctor and never saw any of his medical records. He does not recall if he saw the questionnaire filed out by Dr. Gazzillo.

It was decided that based on Rodriguez's prior discipline, the claim needed to be investigated. Internal Affairs could not do the surveillance because of a recruit class. Speziale cannot direct Internal Affairs to investigate. Speziale contacted Goow about getting an investigator for the surveillance. It was decided by Speziale, Oswald, and

Deputy Chief Rodriguez that Oswald and Speziale would conduct the surveillance of Appellant Rodriguez. The surveillance took place on June 11 and 12, 2017, using a high-speed camera with a zoom lens. Photos of the surveillance show Rodriguez at his home, opening the garage door and entering his jeep, backing the jeep out of the garage, walking around the front of the vehicle, closing the garage door, loading the rear of the jeep, and leaning into the jeep. While he was doing this, he had complete mobility. He did not use a cane or other aides to assist him with walking. His movements were fluid and he used both hands. Rodriguez was not in visible pain. Speziale was fifteen to twenty feet away from Rodriguez when he took the pictures.

Speziale next took pictures of Rodriguez picking his daughter up from school. These photos show Rodriguez opening the vehicle door with both feet on the curb, grabbing his daughter's hand, squatting to assist his daughter into the car, and picking up his daughter to put her in the car. Rodriguez did not use a cane or any other device to assist him with walking.

Speziale then took pictures of Rodriguez when he returned home. Rodriguez exited the vehicle carrying two water bottles in his arm that was in a sling and his daughter's backpack in his other hand. Rodriguez then entered the house. He did not use a cane or any other device to assist him with walking. Speziale does not know how old Rodriguez's daughter is or what was in her backpack.

Speziale took pictures of Rodriguez as he was entering police headquarters on June 12, 2017. At that time the photos show Rodriguez's wife assisting him out of the car; Rodriguez is limping and using a cane. Speziale does not know why Rodriguez's arm was in a sling.

Someone is placed on modified duty who is recovering from an injury or surgery—an officer who cannot be on the street. Modified duty includes answering phones or watching cameras, working in the radio and records room. Speziale testified that Rodriguez could have done modified duty. There have been officers on modified duty who were taking painkillers. Rodriguez was previously terminated for fraud but he was given a second chance.

Dr. David Weiss

Dr. David Weiss is board certified in orthopedics. He evaluated Rodriguez on September 15, 2017. As part of the evaluation, he reviewed Rodriguez's medical records. The MRI revealed a disc herniation at C5/C6 and C6/C7, protruding type. This type of herniation causes pain going down the body, a pins-and-needles feeling, and weakness in the arm. The EMG revealed that Rodriguez had radiculopathy, a pins-and-needles feeling, and pain going down his arm.

Rodriguez could no longer perform as a police officer. As of September 2017 he could only do sedentary work. The use of his weapon is curtailed in his left arm. Rodriguez has a permanent nerve injury, as per the EMG.

In a June 19, 2017 letter, Dr. Gazzillo stated that Rodriguez had started to drive short distances. Rodriguez had to be careful when driving because he was taking Vicodin.

Troy Oswald

Oswald is the deputy police chief of Paterson and the chief of detectives. On June 5, 2017, he became aware that appellant was not returning to work. He spoke to Deputy Chief Rodriguez, Speziale, and Seden regarding appellant. It was decided that there would be an investigation due to appellant's prior discipline. Oswald was involved in appellant's prior investigation. Oswald did not talk to Risk Management. He did not know appellant's diagnosis or what medications he was taking. There was no discussion of speaking with the doctor. He did not review medical records and did not know that Rodriguez had been receiving treatment since October 2016. Oswald and Speziale did the surveillance. They parked down the street from Rodriguez's house. Oswald did not see Rodriguez use any walking aides during the surveillance. He did not notice any problem with Rodriguez's neck or torso. Rodriguez's left arm was in a sling, but he was using it. Rodriguez showed no signs of pain or discomfort.

Once the surveillance concluded, Oswald met with Deputy Chief Rodriguez and Seden to discuss the pictures that were taken and what Oswald had observed. It was decided to call Rodriguez to headquarters. When Rodriguez arrived at headquarters he was hobbling, walking gingerly, and using a cane. Rodriguez was not hobbling, walking gingerly, or using a cane when the surveillance pictures were taken.

Modified duty or light duty consists of working in the communication room entering information into the computer, which Rodriguez would be able to do. Oswald did not draft the preliminary charges or discuss what charges would be filed against Rodriguez.

### Bijoy Rodriguez

Rodriguez became a Paterson Police patrolman on October 24, 2003. He was assigned to the cellblock on October 24, 2016. At that time, he was advised that there was a combative prisoner. The prisoner's behavior escalated and Rodriguez and another officer were assigned to do a cell extraction. Rodriguez grabbed the prisoner's arm. The prisoner resisted, sweeping Rodriguez off his feet. This caused Rodriguez to strike his neck and arm on the end of the steel bunk in the cell, and then fall to the floor.

Rodriguez felt like his arm blew up when it hit the steel bunk. He felt pain in his back and lost feeling in his left arm. He reported the injury to the sergeant. He was sent to ImmediCenter for medical treatment. Rodriguez did not return to work after the injury. Appellant testified that if he sits too long or walks long distances his legs feel numb. He uses a cane for support.

On December 16, 2016, Rodriguez was terminated from Paterson Police Department for a previous incident. The termination was changed to a six-month suspension. From October 24, 2016, to December 16, 2016, Rodriguez was not required to come in on modified duty. Dr. Gazzillo was his Paterson-assigned workers' compensation doctor. Rodriguez began treating with Dr. Gazzillo one week after the incident in lockup. In May 2017 he discussed with Dr. Gazzillo that his suspension was ending and he had to return to work on June 5, 2017. Dr. Gazzillo told him that he

could not return to work on full or modified duty. He gave Rodriguez a letter to this effect, which Rodriguez gave to Seden. Rodriguez was told by Seden to go to IA on June 12, 2017. He reported to IA as requested. His wife came with him. He brought the cane to the meeting because he knows that the elevator does not work and he would have to use the stairs.

Rodriguez agreed with Dr. Gazzillo's responses on the questionnaire. He was asked to write a report regarding his agreement with the questionnaire. Dr. Gazzillo told him that he would never go back to full-duty work. IA never requested his medical records. He applied for disability retirement on June 15, 2017. Rodriguez is still being treated by Dr. Gazzillo, through Paterson's workers' compensation insurance. He has completed physical therapy. He is still taking medication. Rodriguez told Dr. Gazzillo about his right arm going numb and pain in his neck while driving. Dr. Gazzillo told him that he should only occasionally drive short distances. Rodriguez last saw Dr. Gazzillo on October 16, 2017.

### **FINDINGS OF FACT**

In light of the contradictory testimony presented by respondent's witnesses and appellant and his witness, the resolution of the charges against appellant requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances

in evidence excite suspicion as to its truth.” In re Perrone, 5 N.J. 514, 521–22 (1950); see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Dr. Weiss and Rodriguez to be credible. Rodriguez described his injury and was told by Dr. Gazzillo, a Paterson workers’ compensation doctor, that he could not return to work. This was confirmed by a letter and questionnaire filed out by Dr. Gazzillo. Dr. Weiss agreed with the medical questionnaire and letter of Dr. Gazzillo. I **FIND** Oswald and Speziale less credible. Their testimony as to what they saw was credible, but the determinations that they made that Rodriguez could return to work did not consider Dr. Gazzillo’s opinion, Rodriguez’s medical records, or the medication that Rodriguez was prescribed.

Having reviewed the testimony and evidence and the credibility of the witnesses, I make the following **FINDINGS** of **FACT**.

Rodriguez became a Paterson police officer in 2003. There was an incident in 2016 that resulted in his termination. Rodriguez and Paterson entered into an agreement on or about March 20, 2017, reducing the termination to a six-month suspension.

On October 24, 2016, prior to the termination, Rodriguez was injured during a cell extraction of a prisoner. He struck his neck and arm on the steel cell bunk. Upon impact, he felt like his arm blew up and had pain in his neck and arm. He began treatment with ImmediCenter, where he was treated by Dr. Gazzillo. Dr. Gazzillo is his workers’ compensation doctor provided by Paterson. To date, Rodriguez is still being treated by Dr. Gazzillo.

In May 2017, Rodriguez told Dr. Gazzillo that his suspension would end on June 5, 2017, and he was scheduled to return to work. He was given a note by Dr. Gazzillo stating that he was disabled and was not able to function on full duty or light duty. Rodriguez provided this note to Seden on June 5, 2017. Dr. Gazzillo sent a letter to the workers’ compensation claims resolution department dated June 5, 2017, stating that



Rodriguez was still taking Vicodin and that he was unable to work full time or light duty. Dr. Gazzillo completed a questionnaire from Paterson regarding whether Rodriguez would be able to return to work in various capacities. Dr. Gazzillo answered that Rodriguez could not do the work in any of the capacities.

Speziale, Oswald, Seden, and Deputy Chief Rodriguez met regarding appellant not returning to work in June 2017. It was decided that there would be an investigation as to whether Rodriguez could return to work. The surveillance was conducted by Oswald, who was a deputy chief, and Speziale, who was the police director. The surveillance took place on June 11, 2017, and June 12, 2017. Speziale took photos with a high-power camera with a zoom lens. Photos of the surveillance show Rodriguez at his home, opening the garage door and entering his jeep, backing the jeep out of the garage, walking around the front of the vehicle, closing the garage door, loading a skateboard into the rear of the jeep, and leaning into the jeep. He did not use a cane or other aides to assist him with walking. His movements were fluid. Speziale was fifteen to twenty feet away from Rodriguez when he took the pictures.

Speziale next took pictures of Rodriguez picking his daughter up from school. These photos show Rodriguez opening the vehicle door with both feet on the curb, grabbing his three-year-old daughter's hand, squatting to assist his daughter into the car, and picking up his daughter to put her in the car. Rodriguez did not use a cane or any other device to assist him with walking.

Speziale next took pictures of Rodriguez when he returned home. Rodriguez exited the vehicle carrying two water bottles in his arm that was in a sling and his daughter's backpack in his other hand. Rodriguez then entered the house. He did not use a cane or any other device to assist him with walking. Rodriguez was not doing any strenuous activity in the surveillance photos. Speziale took pictures of Rodriguez as he was entering police headquarters. At that time the photos show Rodriguez's wife assisting him out of the car; Rodriguez is limping and using a cane.

Speziale and Oswald never contacted Dr. Gazzillo regarding Rodriguez's medical condition. They did not review the medical records of Rodriguez. There was

no testimony that Paterson had a doctor review Rodriguez's medical records or Dr. Gazzillo's reports. Speziale did not know what Rodriguez's injuries were or what medication he was on.

Rodriguez has herniated discs at C5/C6 and C6/C7, protruding type, which caused pain radiating down his body, a pins-and-needles feeling, and weakness in his arm. An EMG confirmed radiculopathy. Rodriguez was prescribed Vicodin, which is a class-two opioid. The sides effects include: dizziness, nausea, impairment of judgment, and passing out. Rodriguez's gait is wider than it should be. His gate function is not normal. He had spasms in his neck and restricted motion. An adequate grip-strength test could not be done on Rodriguez's left side. He had sensory deficit in his left upper extremities. Rodriguez has chronic cervical sprain and strain and two cervical herniated discs with a radicular component confirmed by an EMG.

If Rodriguez sits too long or walks too long his legs feel numb. He uses a cane for support. Rodriguez told Dr. Gazzillo that his right arm goes numb and he has pain when he drives. Dr. Gazzillo told him to only drive occasionally and only short distances. Rodriguez is still treating with Gazzillo. As of June 2017, Rodriguez was taking Vicodin as prescribed by Dr. Gazzillo.

In a workers' compensation context, treating physicians generally determine when an employee should return to work and whether the employee should return to full duty, part-time duty, or modified duty. The type of medication that the employee is taking can determine if he can go back to work.

Rodriguez applied for disability retirement on June 15, 2017. Dr. Weiss is an expert in orthopedics, impairment disability, and workers' compensation disability.

### **LEGAL ANALYSIS AND CONCLUSION**

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of conduct unbecoming a public employee; incompetency, inefficiency or failure

to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and other sufficient cause are not sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for “incompetency, inefficiency, or failure to perform duties.”

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency’s judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old’s face was terminated, despite lack of any prior discipline). “There is no constitutional or statutory right to a government job.” State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). “In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change.” Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a County treasurer who couldn’t balance the books, after the auditors tried three times to show him how).

In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.

[In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation. In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary-period case involving a nurse:

Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4). "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." W. New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

However, approval of an absence shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b).

In Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (App. Div. 1963), a classified employee who was granted a leave of absence was improperly denied an extension of that leave because of the appointing authority's failure to provide proper notice of the denial; the appointing authority knew she was absent, was aware that she was confined to a hospital, and had previously granted the leave.

"Unbecoming conduct" is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

In this matter Rodriguez was injured at work on October 24, 2016. He is still being treated by Dr. Gazzillo, his workers' compensation doctor provided by Paterson. Dr. Gazzillo wrote a note and filed out a questionnaire stating that Rodriguez could not

return to full or light duty on June 5, 2015. At that time Rodriguez was taking the opioid medication Vicodin. The surveillance showed Rodriguez getting into a vehicle, leaning into a vehicle, walking around a vehicle, putting a skateboard into the vehicle, lifting his three-year-old daughter into the vehicle, putting her backpack into the vehicle, and holding bottles of water with the sling on his arm. He was not using a cane during the time these photos were taken. The surveillance did not show any strenuous activity that was undertaken by Rodriguez.

Paterson attempts to substitute the observations of Speziale and Oswald for medical documentation that Rodriguez can return to work. Dr. Gazzillo wrote that Rodriguez was unable to return to full or light-duty work on June 5, 2017. This was also the opinion of Dr. Weiss. Paterson has provided no medical testimony to refute Dr. Gazzillo or Dr. Weiss. There was no indication that Paterson ever asked what medication Rodriguez was taking.

I **CONCLUDE** that appellant's conduct by following the instructions of his Paterson provided workers' compensation doctor, Dr. Gazzillo, did not constitute conduct unbecoming a public employee, incompetency, inefficiency or failure to perform duties; chronic or excessive absenteeism or lateness, neglect of duty and, other sufficient cause.

In his closing brief Rodriguez submitted a motion to dismiss the charges pursuant to N.J.S.A. 52:17B-243. N.J.S.A. 52:17B-243 provides:

- a. A State, county, or municipal law enforcement officer who has been injured in the performance of the officer's duties shall not be discharged from employment as a result of a determination, based upon a medical examination by a physician designated by the employer of the officer, that the officer is physically incapacitated, due to the injuries, for the performance of the officer's usual duties or any other available duties in the department which the employer is willing to assign to the officer.
- b. Pending retirement, the employer of the law enforcement officer shall maintain health insurance for the

officer at the level that coverage was provided prior to the injury.

c. The provisions of this section shall apply only when the law enforcement officer has filed an application for retirement with the Police and Firemen's Retirement System, the State Police Retirement System, or the Public Employees' Retirement System and the officer has sick leave or workers' compensation time available.

d. The provisions of this section shall apply to both civil service and non-civil service jurisdictions.

In this matter, Rodriguez was not terminated because of a determination based upon a medical examination by a workers' compensation physician that he is physically incapacitated due to the injuries for the performance of the officer's usual duties or any other available duties in the department which the employer is willing to assign to the officer. It is not a case that Paterson, believing Rodriguez was disabled, terminated him. Paterson did not believe that he was disabled from performing other available duties. Paterson believed that Rodriguez could work on modified duty. In addition, Rodriguez received his Preliminary Notice of Disciplinary Action on June 12, 2015, prior to his application for disability retirement.

I **CONCLUDE** that Rodriguez was not terminated as a result of a determination, based upon a medical examination by a physician designated by the employer of the officer, that the officer is physically incapacitated due to the injuries for the performance of the officer's usual duties or any other available duties in the department which the employer is willing to assign to the officer.

### **ORDER**

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of respondent that appellant, Bijoy Rodriguez, be removed from employment is **REVERSED**.

I further **ORDER** that appellant be reinstated to his position as a police officer and that back pay and other benefits be issued to appellant as may be dictated by N.J.A.C. 4A:2-2.10.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

December 14, 2017



\_\_\_\_\_  
DATE

\_\_\_\_\_  
**KIMBERLY A. MOSS, ALJ**

Date Received at Agency:

December 14, 2017

Date Mailed to Parties:

\_\_\_\_\_

ljb



**WITNESSES**

For Appellant:

Dr. David Weiss

For Respondent:

Gustave Seden

Jerry Speziale

Troy Oswald

**EXHIBITS**

For Appellant:

- A-1 Not in Evidence
- A-2 Not in Evidence
- A-3 Preliminary Notice of Disciplinary Action dated June 12, 2017
- A-4 Letter from Dr. Gazzillo dated May 31, 2017
- A-5 Medical Note of Dr. Gazzillo dated May 31, 2017
- A-6 Paterson Police Department Questionnaire Answered by Dr. Gazzillo
- A-7 Not in Evidence
- A-8 Certification of Jerry Speziale dated August 15, 2017
- A-9 Paterson Police Report of Bijoy Rodriguez dated October 24, 2016
- A-10 Report of Injury on Duty dated October 24, 2017
- A-11 Workers' Compensation Treatment Authorization dated October 24, 2016
- A-12 Examination of Dr. Gazzillo dated June 5, 2017
- A-13 Letter from Dr. Gazzillo to Claims Representative dated June 5, 2017
- A-14 Letter from Dr. Gazzillo dated June 19, 2017
- A-15 Letter from Dr. Gazzillo to Claims Representative dated August 31, 2017
- A-16 Letter from Dr. Gazzillo to Claims Representative dated October 16, 2017
- A-17 Independent Medical Evaluation of Dr. David Weiss dated September 25, 2017
- A-18 Functional Capacity Evaluation dated September 28, 2017
- A-19 Supplemental report of Dr. David Weiss dated November 16, 2017

A-20 Curriculum Vitae of Dr. David Weiss

A-21 Not in Evidence

For Respondent:

R-1 Final Notice of Disciplinary Action dated June 12, 2017

R-2 Preliminary Notice of Disciplinary Action dated June 12, 2017

R-3 Note in Evidence

R-4 Questionnaire completed by Dr. Gazzillo dated June 7, 2017

R-5 Report of Bijoy Rodriguez dated June 12, 2017

R-6 Surveillance photographs

R-7 Report of Deputy Chief Troy Oswald

R-8 Preliminary Notice of Disciplinary Action of Bijoy Rodriguez dated September 12, 2016

R-9 Not in Evidence

R-10 Not in Evidence

R-11 Not in Evidence

R-12 Not in Evidence

R-13 Final Notice of Disciplinary Action of Bijoy Rodriguez dated December 6, 2016

R-14 Memorandum of Agreement dated March 2017