

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

RYAN SAUL,

Plaintiff,

v.

TOWNSHIP OF MANCHESTER,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. OCN-PW-L-2381-12

OPINION

Decided: February 21, 2014

Counsel: Peter B. Paris, Esquire, attorney for the plaintiff,
Ryan Saul

Stephen E. Trimboli, Esquire, attorney for the
defendant, Township of Manchester

Opinion by: Mark A. Troncone, J.S.C.

1

EXHIBIT 2

11a

NATURE OF ACTION

This matter involves a *de novo* review pursuant to N.J.S.A. 40A:14-150 of the termination of a Manchester Township police officer, plaintiff Ryan Saul. Saul was terminated following a six-day departmental hearing before a Hearing Officer. This appeal now follows.

STANDARD OF REVIEW

Pursuant to N.J.S.A. 40A:14-150, a police officer may seek review from the Superior Court of charges brought against him and subsequently upheld at a departmental disciplinary hearing. Specifically, the statute provides that "[t]he court shall hear the case *de novo* on the record below and may either affirm, reverse or modify such conviction." The statute also provides that the court may, if appropriate, restore the officer to his employment and may make such other order "as the court shall deem proper." Finally, the statute states that "[e]ither party may supplement the record with additional testimony subject to the rules of evidence." Upon application, the court allowed Officer Saul, who did not testify before the Hearing Officer, to supplement the record below by providing his own testimony at a plenary hearing conducted before the court on January 2, 2014. The court also heard the oral argument of counsel on that date. Following argument, the parties agreed on a list of exhibits (including a transcript of the record before the Hearing

Officer) which were duly entered into evidence. The court was also provided a copy of every performance evaluation of Officer Saul since he joined the Manchester Township Police Department. All exhibits have been fully reviewed and considered by the court.

Upon appeal, a reviewing court must give due deference to the conclusions drawn by the original tribunal, i.e., the Hearing Officer below, regarding the credibility of testifying witnesses. Ruroede v. Hasbrouck Heights, 214 N.J. 339 (2013). The reviewing court must then determine whether the evidence presented below, as supplemented, produced sufficient competent evidence to support the termination by a preponderance of the evidence. In re: Disciplinary Procedures of Phillips, 117 N.J. 567, 575. Here, the defendant, Manchester Township, has that burden of proof.

CONTENTION OF THE PARTIES

A total of twenty (20) separate charges were brought against Officer Saul below. These twenty (20) charges are essentially grouped into four (4) separate incidents. The Township maintains that Saul engaged in three major episodes of dishonesty that warranted his termination. The first involved allegedly false statements he made regarding a domestic incident on September 24, 2010 in which he was a responding officer. The second involved false statements regarding alleged physical

disabilities that he had which prevented him from properly participating in a mandatory departmental training exercise. The final episode related to false statements allegedly made by him to investigators and medical doctors relating to the Township's investigation of the prior two events listed here. The Township also asserts that Saul violated the Township's Code of Conduct for failing to immediately report an injury sustained as a result of the domestic incident of September 22, 2010. Finally, the Township puts forward a separate and independent ground for termination, i.e., the findings of two expert examiners that Officer Saul was unfit for duty.

STATEMENT OF THE CHARGES

The matter below was commenced when, on or about February 10, 2011, Manchester Chief of Police, Brian Klimakowski, charged plaintiff with the following twenty (20) charges (Exhibit J-1):

1. Inaccurate reports: On or about 10/4/10, Ptl. Saul authored and signed a police report which was not accurate, truthful or thorough, specifically by stating/reporting, "Patrolman Carvenak grabbed his left and right arms from behind in an attempt to pull Mr. Bennett off of me and regain control of him." This statement was discounted by another officer on scene and two witnesses.

2. Dishonesty: On or about 10/4/10, Ptl. Saul authored and signed a police report which was not accurate, truthful or thorough, specifically by stating/reporting, "Patrolman Cervenak grabbed his left and right arms from behind in an attempt to pull Mr. Bennett off of me and regain control of him." This statement was discounted by another officer on scene and two witnesses.

3. Dishonesty: On or about 10/4/10, Ptl. Saul authored and signed a police report (report #2010-1925) which was not accurate, truthful or thorough, specifically by stating that, "I landed on my back with my knees in my chest." This statement was discounted by another Officer on scene and two witnesses.

4. Inaccurate Reports: On or about 10/4/10, Ptl. Saul authored and signed a police report (report #5010-1925) which was not accurate, truthful or thorough, specifically by stating that, "I landed on my back with my knees in my chest." This statement was discounted by another officer on scene and two witnesses.

5. Inaccurate Reports: On or about 10/4/10, Ptl. Saul authored and signed a police report (report #2010-1925)

which was not accurate, truthful or thorough, specifically by stating that, "I slid my right arm under his chin and around his neck and began to pull up in an attempt to keep him from gaining access to my weapon." This statement was discounted by another Officer on scene and two witnesses.

6. Dishonesty: On or about 10/4/10, Ptl. Saul authored and signed a police report (report #2010-1925) which was not accurate, truthful or thorough, specifically by stating that, "I slid my right arm under his chin and around his neck and began to pull up in an attempt to keep him from gaining access to my weapon." This statement was discounted by another officer on scene and two witnesses.

7. Dishonesty: During a conversation on 9/28/10, documented by Sgt. Vincent Manco, Patrolman Saul stated that during an altercation with Mr. Bennett on 9/22/10, he applied a "guillotine choke hold" on Mr. Bennett, knowing that this was not truthful.

8. Duty to report injury: Ptl. Saul gave a taped Internal Affairs interview stating that he knew he was injured on September 24, 2010 as a result of an incident which

occurred at work but admitted he failed to report the injury until September 26, 2010, contrary to the Code of Conduct which requires Officers to report all injuries sustained while on duty, whether or not treatment is received.

9. Making misrepresentation and untruthful statements during an Internal Affairs Investigation on or about October 5, 2010, in violation of Title 40A:14-147 and Manchester Ordinance 2-37.

10. Dishonesty: Patrolman Saul told instructor Detective Christopher Hemhauser that he was unable to don his gas mask during in-service training because he is blind without his contacts in and cannot see his hand in front of his face (demonstrated this by holding his hand approximately 12 inches in front of his face), knowing this was not a forthright and truthful statement. This prevented Patrolman Saul from completing the mandatory in-service training.

11. Dishonesty: Patrolman Saul told instructor Detective Christopher Hemhauser during in-service training that he has vertigo, knowing this was not a forthright and

truthful statement. This prevented Patrolman Saul from completing the mandatory in-service training.

12. Making misrepresentations and untruthful statements during Fitness for Duty examination on or about December 17, 2010, in violation of Title 40A:14-147 and Manchester Ordinance 2-37.

13. Dishonesty: During Patrolman Saul's Fitness for Duty examination interview, he told Dr. Guller that he was legally blind, knowing that this was not a forthright and truthful statement.

14. Incapacity to perform duties and responsibilities of a police officer on or about December 29, 2010

15. Dishonesty: During Ptl. Saul's Internal Affairs interview, he admitted that he had repeatedly told police officers of the Manchester Township Police Department during his employment, that he was legally and / or totally blind when he knew this was not a forthright and truthful statement.

16. Dishonesty: During Ptl. Saul's Internal Affairs taped interview, he did not answer questions in a truthful and forthright manner as required, specifically, Ptl. Saul reported that Mr. Bennett landed on top of him during the altercation.

17. During Ptl. Saul's Internal Affairs taped interview, he did not answer questions in a truthful and forthright manner as required, specifically, "As he went down on the ground, momentum carried him up my body as we went down to the ground, pushing my knees further into my chest with his weight."

18. Dishonesty: During Ptl. Saul's Internal Affairs interview, he denied that he told Det. Hemhauser that he suffers from vertigo, knowing that this was not a forthright and truthful statement.

19. Dishonesty: During Ptl. Saul's Internal Affairs interview, he denied that he told officers that he could not don his mask because he had vertigo, knowing that this was not a forthright and truthful statement.

20. Making representations and untruthful statements during an Internal Affairs investigation on or about December 13, 2010, in violation of Title 40A:14-147 and Manchester Ordinance 2-37.

SAUL'S PERFORMANCE EVALUATIONS

The court has been provided with twelve performance evaluations of the plaintiff conducted by the Manchester Township Police Department. These evaluations appear to have been scheduled on a semi-annual basis. The evaluations grade each officer in eleven separate categories with a scoring based on a five point scale with 1 being the least satisfactory and 5 being the most satisfactory. These scores are then added together to arrive at a cumulative score ranging from 11 to 55. These cumulative scores are then graded accordingly:

11 to 21	-	Poor
22 to 32	-	Below Average
33 to 38	-	Average
39 to 49	-	Exemplary
50 to 55	-	Superior

The evaluations also include certain written comments relating to the various categories. The total scores achieved by the plaintiff for each evaluation are as follows:

March 3, 2005	-	44 points
February 28, 2006	-	44 points
August 18, 2006	-	37 points
January 19, 2007	-	36 points
July 26, 2007	-	34 points
January 12, 2008	-	37 points

July 12, 2008	-	38 points
February 3, 2009	-	40 points
August 10, 2009	-	43 points
January 20, 2010	-	43 points
August 23, 2010	-	45 points
March 14, 2011	-	37 points

In six of the twelve evaluations, the plaintiff was found to be an "exemplary" police officer including, most significantly, the four evaluations conducted immediately prior to the incidents relating to this matter. The remaining evaluations all fell within the "average" range including the last evaluation which was conducted following these incidents.

The written comments contained in these evaluations range from very positive remarks to some negative ones. Prior to the incidents which are the subject of this litigation there are no comments in any of the evaluations relating to untruthfulness or lying on his part, refusing to participate in any departmental training or reporting a false injury. The final evaluation of the plaintiff conducted after these incidents do refer to his "alleged injury", "inaccurate" reporting and his "poor judgment and untruthfulness." Yet, even in this evaluation the plaintiff scored in the average category.

THE TOWNSHIP CHARGES AGAINST THE
PLAINTIFF RELATING TO THE INCIDENT OF
SEPTEMBER 22, 2010 ARE WITHOUT MERIT
AND ARE HEREBY DISMISSED
(CHARGES 1 THROUGH 7)

With regard to the September 22, 2010 incident at the Lopez home, the Hearing Officer below found that the testimony given by Officer Cervenak and Ms. Lopez to be "persuasive, credible and worthy of belief" and that the prior statements made by Officer Saul to be "false, inaccurate and dishonest."¹ Accordingly, the Hearing Officer sustained the seven Code of Conduct violations relating to the September 22nd incident.

There are in the record at least six (6) differing versions of that event: 1) the contemporaneous report filed by Officer Patrick Cervenak, the initial responding officer to the September 22, 2010 domestic incident; 2) the contemporaneous report prepared by Officer Ryan Saul; 3) the recorded statement of November 10, 2010 of Elizabeth Lopez, the victim of the domestic violence incident; 4) the testimony of Officer Cervenak before the Hearing Officer; 5) the testimony of Elizabeth Lopez before the Hearing Officer; and 6) the testimony of Officer Saul before this court.

While the court must give deference to the assessment of the Hearing Officer with respect to the credibility of testimony of witnesses, it appears that the Hearing Officer did not

¹ Officer Saul did not testify at the Departmental Hearing

include any reference to the initial and contemporaneous incident report filed by Officer Cervenak on the same night of the incident. If the Hearing Officer had done so it would have been apparent that Officer Cervenak's testimony at the departmental hearing varied significantly from Cervenak's incident report. Moreover, if the incident report had been made available to the Hearing Officer and reviewed by him, the same would also call into question the veracity of Elizabeth Lopez, the victim of the September 22, 2010 domestic incident who gave a number of statements relating to the events of that evening and who testified at the departmental hearing below.

The testimony of Officer Cervenak at the departmental hearing varies in several significant ways from the more contemporary report of filed by Cervenak at the time of the incident. Immediately following the Bennett arrest, Officer Cervenak filed an incident report.² That report provides a detailed narrative of the incident and suggests that Saul had a more significant role in subduing Todd Bennett, the suspect in the domestic incident.

In pertinent part, the Cervenak incident report recounts the struggle between Bennett and the officers:

As I walked inside the residence both parties became aware of my presence and I requested that Mr. Bennett stop screaming and step outside to

² See Plaintiff's exhibit P-12

trying to grab his arms from underneath, I was able to get them out, at which point I requested Officer Saul to grab his right hand while I was holding his left and I retrieved my handcuffs and placed him into custody. (emphasis added)

Clearly, Officer Cervenak's testimony at the departmental hearing below varied in certain key aspects from his contemporaneous incident report. In his testimony before the Hearing Officer, Cervenak testified that Bennett lunged towards the floor when in his incident report he recounted that Bennett lunged towards Officer Saul. Further, while Cervenak's incident report states that both he and Officer Saul wrestled Bennett to the floor, his testimony before the Hearing Officer omits any reference to Officer Saul also falling to the ground with Bennett.

Indeed, Officer Cervenak's incident report is more consistent with the incident report filed by Officer Saul which was also filed on September 22, 2010. In that report, Officer Saul stated:

As we approached the front door to exit the residence Mr. Bennett continued to yell. He then swung both arms backwards, striking Ptl. Cervanek and I in the chest area in an attempt to break away from our control. Unable to break from our control Mr. Bennett dropped down to his knees and launched himself backwards, it was at this point that he was able to break free of our control.

Mr. Bennett then got to his knees and launched himself towards my waist area with his head down and his arms extended out to both sides in an

attempt to tackle me. I slid my right arm under his chin and around his neck and began to pull up in an attempt to keep him from gaining access to my weapon. I landed on my back with my knees in my chest. Ptl. Cervenak grabbed his left and right arms from behind in an attempt to pull Mr. Bennett off me and regain control of him. (emphasis added)

While more detailed, Officer Saul's report is generally in accord with Officer Cervenak's report. Both speak of Mr. Bennett lunging or charging at Saul and a prolonged struggle by both officers on the floor with Mr. Bennett.

As for the testimony of Elizabeth Lopez before the Hearing Officer, that testimony also significantly varies from the original incident report of Officer Cervenak. In her testimony, Ms. Lopez does not state that Mr. Bennett broke free of Officer Cervenak's grip, as he recounted in both his September 22nd report and his testimony before the Hearing Officer. In fact, in a prior statement, Ms. Lopez gave to the Manchester Police Department on November 10, 2010³ she specifically denied that Mr. Bennett ever broke free of the grip of either patrolman. Thus, according to Ms. Lopez, Mr. Bennett neither lunged at Officer Saul as originally reported by Officer Cervenak or at the ground as later testified by Cervenak.

Moreover, had Officer Cervenak's incident report been provided to and/or reviewed by the Hearing Officer, the same

³ See Plaintiff's exhibit P-27, page 5 of 19

would also call into question Ms. Lopez's veracity with regard to, at least, this incident. In his incident report, Officer Cervenak states:

While speaking with Ms. Lopez, I observed that the left side of her neck has a bruise with two scratch marks. I asked Ms. Lopez how the injury occurred and she stated she did not know. Ms. Lopez initially stated that Mr. Bennett did not touch her. After being repeatedly questioned, she proceeded to tell me that Mr. Bennett in fact put his hands around her neck. . .

Officer Cervenak also stated that despite being verbally harassed by Mr. Bennett while he was holding a baseball bat and being injured by him, she refused to sign a domestic violence complaint against him that evening. Cervenak also recorded a past domestic violence history between Ms. Lopez and Mr. Bennett including a reported event that went to trial in Elizabeth, New Jersey thirteen years prior.

It is the court's view that this past history of domestic violence by Mr. Bennett against Ms. Lopez and the potential of future retaliation by him, may have led Ms. Lopez, quite justifiably, to be less than candid in her testimony to the Hearing Officer regarding the degree of the struggle between Mr. Bennett and the officers. Certainly, she changed her story to Officer Cervenak that evening and, more importantly, her version of the incident varies significantly from Officer Cervenak's original incident report. Therefore, the court finds that

because of those facts Ms. Lopez cannot be found to be a credible witness with regard to the events of September 22, 2011.

Finally, the plaintiff's supplemental testimony before this court and which was subject to cross-examination by Township's counsel was entirely consistent to the incident report he drafted that evening. The court finds that the only testimony that has been consistent in the nearly four years since the events of September 22, 2010 is that of the Officer Saul and that testimony is also generally consistent with the contemporaneous incident report filed by Officer Cervenak.

The court finds that the contemporaneous reports of Cervenak and the plaintiff are the most reliable versions of the events of September 22, 2010. They were both prepared on the date of the incident when the recollection of the incident was fresh on the minds of both officers. They were both made without the knowledge of a pending disciplinary action and, most importantly, they are not inconsistent with each other. It is true that in his report Officer Cervenak does not go into detail as to actions of the plaintiff during the struggle with Mr. Bennett but that is to be expected. Obviously, Officer Cervenak cannot be expected to observe all actions of Officer Saul, e.g., how he fell, how he applied a choke hold to Mr. Bennett when he himself was in the throes of subduing the suspect.

As stated above, the court finds that Ms. Lopez is not a reliable witness and further that her two versions of the incident are not consistent with each other and both of those versions are completely inconsistent with both of the contemporaneous reports filed by the two officers involved. Finally, the testimony of Officer Cervenk before the Hearing Officer is not consistent with his contemporaneous reports.

In the final analysis the court finds that for these reasons, the charges filed against Officer Saul relating to dishonesty regarding the events of September 22, 2010 are completely without merit. Accordingly, paragraphs 1 through 7 of the Statement of Charges are dismissed.

**THE COURT FINDS THAT THE PLAINTIFF'S
FAILURE TO REPORT HIS KNEE INJURY (CHARGE 8)
WAS A VIOLATION OF THE MANCHESTER TOWNSHIP
CODE OF CONDUCT BUT DID NOT JUSTIFY
HIS TERMINATION OF EMPLOYMENT**

The Hearing Officer below sustained the violation of the Township Code of Conduct relating to Officer Saul's failure to immediately report the injury to his knee which occurred as a result of the September 22, 2010 incident. The court agrees with this finding. However, this violation would not warrant his termination of employment.

Immediately after his altercation with Mr. Bennett, Officer Saul reported to his supervisor that he had injured his shoulder. He was advised at that time to monitor the injury and

if the pain persisted he was to report the same to the police watch commander. Two days later, on September 24, 2010, the plaintiff noticed a pain in his knee. The shoulder injury had apparently resolved itself by that time.

At the Internal Affairs investigation on December 13, 2010, conducted by Captain Lisa Parker, the plaintiff confirmed that he first felt the pain in his knee on September 24, 2010, two days after the domestic incident but did not report the same to a supervisor until on September 26, 2010. When questioned by Parker as to why he did not report the injury on September 24th, the plaintiff stated " I thought it would get better." The plaintiff's testimony before the court is consistent with that statement.

Charge number 8 against the plaintiff is that he violated the Township's Code of Conduct by failing to report his knee injury on September 24, 2010 when he first noticed the pain. Specifically, the Manchester Township Code provides:

When a member is seriously injured on or off duty, notification will be made to the Chief of Police or the officer acting in his absence as soon as possible. Information shall include the date, location, cause, extent and property damage involved. Serious injury in this instance means an injury which could result in death or disability. All injuries sustained on duty will be reported immediately whether or not treatment is received. Violation of this regulation will result in disciplinary action as specified for a Class "E" violation. (emphasis supplied)

As to the classification of the violation, the Manchester Township Code further provides:

CLASSIFICATION OF PUNISHMENT

A letter designation will appear at the end of each specified violation. The letter designation (A,B,C,D,E) will indicate the severity of the violation with Class A being the most serious and Class E the lowest level of infractions.

Based on the evidence it is clear that Officer Saul violated the Code of Conduct by failing to immediately report the knee injury on September 24, 2010. The plaintiff felt the pain on that day and, further, he clearly attributed the injury to the on-duty altercation with Mr. Bennett. While his testimony regarding his desire to see if the injury would, like the injury to his shoulder, resolve itself may be credible but that was not his decision to make. He was obligated under the Township Code to report that injury immediately and not wait two days. Accordingly, the court sustains the findings of the hearing officer below.

However, the court also notes that this infraction of the Manchester Code is a Class E violation, the lowest level infraction. Given the plaintiff's record of no prior offenses of this kind and the lack of exacerbating factors, this violation cannot justify his termination from his employment with Manchester Township. Pursuant to the Manchester Code, the penalty for a first offense Class E violation ranges between a

reprimand to a two day suspension of duty without pay. Since the delay in reporting his injury was relatively brief (two days), because he ultimately did so voluntarily and due to lack of any evidence of bad faith on the part of Officer Saul in failing to immediately report his injury, the court finds that the appropriate penalty would be a reprimand.

**THE COURT FINDS THAT THE VIOLATIONS
RELATING TO THE OCTOBER 5, 2010
TRAINING SESSION (CHARGES 10 AND 11)
ARE WITHOUT MERIT AND ARE DISMISSED**

Two of the charges lodged against Officer Saul relate to an incident which occurred at an October 5, 2010 in-service training exercise. At that time, Saul refused to fully participate in a training exercise which involved donning a gas mask without his contact lenses because without them he was legally blind and suffered vertigo-like symptoms.

In the proceedings below, the Hearing Officer sustained these violations of dishonesty arising from Officer Saul's conduct and statements made during the October 5, 2010 training. This finding was based on the testimony of: 1) Detective Christopher Hemhauser, the officer who administered the training; 2) Police Sergeant John Sharkey, who was in attendance at the training; 3) Donna M. Malloy, O.D., a licensed optometrist who performs eye exams for the Manchester Township Police Department and who makes the prescription inserts for the

Township's gas masks; 4) Captain Lisa Parker who conducted the Internal Affairs interview of Officer Saul, and 5) Jessica Saul, the plaintiff's mother. At the trial here, the court also heard the supplemental testimony of Officer Saul relating to this incident.

The gravamen of these violations revolve around the failure of Saul to order glass inserts for his gas mask in advance of the training. Four other officers also failed to order the inserts as well. None of these officers, including Officer Saul, were written up for this failure at the time of the incident.

In Saul's case, this failure to order the inserts may have been purposeful and this led to an argument on the day of training between Saul and Detective Henhauser. In summary, Saul said he did not want to wear a gas mask with inserts because that would require him in an actual event to first remove the contacts he always wears in a likely contaminated environment before donning his gas mask. Further, Saul was concerned that if he wore a gas mask with the inserts in place while still wearing his contacts he would suffer vertigo-like symptoms based upon past experiences he had when he put on his eye glasses while still wearing his contacts.

Based on the evidence presented it is undisputed that Officer Saul is extremely nearsighted - that fact was confirmed

by Saul's mother and Dr. Malloy. Further, both Saul and his mother testified that as a child, Saul suffered a severe eye injury leading to at least one early diagnosis that Saul, as a result of the injury was "legally blind." Sergeant Sharkey, on cross-examination recanted his original assertion that Saul stated during the exercise that he was "legally blind" and changed his testimony that Saul said he was "totally blind" without his contacts.

The court notes that there has never been any claim that Officer Saul did not complete his gas mask training on October 5, 2010. Certainly, this much is clear - Officer Saul was never written up for either his failure to complete the training or with regard to his argument with Detective Hemhauser. There is simply no credible evidence in this case that Officer Saul was being dishonest about his faulty eyesight or the fact that he suffers vertigo-like symptoms from time to time. At most, Officer Saul could be faulted for hyperbole but certainly not dishonesty as alleged. Accordingly, these violations are without merit and are hereby dismissed.

**TEN CHARGES OF DISHONESTY RELATING TO
THE DECEMBER 13, 2010 INTERNAL AFFAIRS
INTERVIEW OF PATROLMAN SAUL BY CAPTAIN
LISA PARKER BEING BASED ON THE CHARGES
OF DISHONESTY RELATING TO THE
SEPTEMBER 22, 2010 DOMESTIC INCIDENT
ARE WITHOUT MERIT AND TRUS DISMISSED**

These charges (Charges 15 through 20) are derivative in that they relate to other charges brought against Officer Saul for the September 22, 2010 incident with Mr. Bennett and the October 5, 2010 gas mask training. The court finds that Officer Saul's testimony during the December 13, 2010 Internal Affairs interview was consistent with prior statements made by him relating to these events and for the reasons set forth above in the points directly relating to those events, the court hereby dismisses these charges as without merit.

**THE TOWNSHIP HAS FAILED TO MEET ITS
BURDEN THAT OFFICER SAUL IS UNFIT
FOR DUTY AS A POLICE OFFICER BASED UPON
CREDIBLE PSYCHOLOGICAL OR PSYCHIATRIC EVIDENCE**

At the proceedings below, the Hearing Officer found that the expert psychological testimony of Dr. Guller and the expert psychiatric and neurological testimony of Dr. Gallina were credible and persuasive. On the other hand, the Hearing Officer found the plaintiff's expert, Dr. Gollin, was not credible due to his failure to review relevant reports and his lack of understanding and knowledge of police procedures, duties and responsibilities.

THE EXPERT REPORTS AND
TESTIMONY OF DR. DANIEL GULLER

On December 30, 2010, the Township's psychological expert, Dr. Daniel Guller, issued a Fitness for Duty report on the plaintiff which concluded that Officer Saul was "not fit for duty at the present time" and suggested a six (6) month period of counseling whereby Saul could be evaluated for light duty after three months of counseling and with another evaluation at the end of the six month counseling period to determine whether he was fit for return to full duty. (emphasis added) In his report, Dr. Guller stated that:

Other factors in this subject's history and presentation during the interview are also suggestive of a somatoform disorder. At least with respect to the present injury, and likely with respect to at least his injury during the Police Academy, physical symptoms are not fully explained by medical findings. The subject appears to have poor psychological insight into the possible psychological component to his physical complaints. There is also a clearly dramatic presentation with respect to this subject. He has had many medical problems, starting as early as his birth. Each is described in rather dramatic terms. For instance, as a result of some difficulty with a valve in his throat, he labeled himself a "failure to thrive baby." At six months old, he did not get stitches from falling into a wrought iron chair, instead, he had a "broken skull." Similarly, he had a "fractured orbit" which resulted in him being "legally blind." And, while no evidence of a learning disorder or difficulty in writing was noted in the present evaluation, the subject was quite insistent that

he is "dyslexic." It is noted that the undersigned sees about a dozen writing samples from police candidates and officers on a weekly basis. The subject's writing ability appeared cohesive and without any notable spelling or grammatical errors.

Another characteristic seen in backgrounds of individuals displaying symptoms of a somatoform disorder is a parent who was seriously ill during the subject's upbringing. In fact, this subject had reported that his mother suffered with cancer for many years of his childhood. Finally, the subject, at least in the present case, was completely unaccepting of a medical opinion that he would be okay and could perform physical therapy. Instead, he became quite angry with the physician who rendered this opinion, slamming the door in his office, and immediately seeking a second opinion. This behavior too is characteristic of somatoform disorder.

It must be emphasized that it is often very difficult to distinguish between individuals who are truly experiencing somatoform symptoms in seemingly involuntary ways and malingerers who are good at faking symptoms. Once malingerers are exposed, their motivation is clear: They are trying to get out of something, like a legal responsibility, or are trying to gain something, like a legal settlement. Malingerers are fully aware of what they are doing and are clearly attempting to manipulate others to gain a desired end.

More puzzling is a set of conditions called factitious disorders, which fall somewhere between malingering and conversion disorders. The symptoms are under voluntary control, as with malingering, but there is not obvious reason for voluntarily producing the symptoms except to take on the sick role and receive increased attention.

The root concern with respect to this subject's work performance and the possible presence of a somatoform disorder (or malingering or factitious disorder), is the possibility that he would falsify official police reports in service to his disorder. It is noted that somatoform disorder symptoms are not typically

consciously created, but nevertheless, may compel the subject to create fact in a police report to substantiate the symptoms he believes he is experiencing. Obviously, a secondary concern is the potential abuse of sick time, and what this would mean for the efficient operation of the Department. (emphasis added)

Almost immediately following the issuance of Dr. Guller's report, Captain Lisa Parker sent a detailed email to Dr. Guller outlining in detail ten (10) examples of how Saul, in her belief, lied during his Internal Affairs interview with her or at various other times during his employment as a Manchester Township Police Officer. Dr. Guller acknowledged receipt of this information and, apparently in response, on January 24, 2011⁴ he issued an addendum report. In this addendum, Dr. Guller opines more emphatically that Saul "presents with evidence of an Undifferentiated Somatoform Disorder" whereas in his original report he opined that Officer Saul's symptoms were "suggestive" of Somatoform Disorder. He further opined in his addendum that he does "not believe that this is simply a case of malingering..." Further, while Dr. Guller did not specifically change his three (3) to six (6) month counseling recommendation, he states "Somatoform Disorders are exceedingly difficult to treat. In part, this is because they are highly engrained and the individual typically continues to insist that these maladies

⁴ See Plaintiff exhibit P-51

are real and severe.' The troubling aspect of this addendum is that Dr. Guller seemed to accept Captain Parker's assessment of Officer Saul's honesty and credibility without ever conducting his own investigation of Captain Parker's allegations or even speaking to Officer Saul about Captain Parker's allegations so he could respond to them.

Dr. Guller's opinion as to Officer Saul's fitness for duty continued to evolve. By the time he testified before the Hearing Officer below, Dr. Guller was unequivocal in his diagnosis of Somatoform Disorder and despite his original recommendation of counseling he now found that the same would not be effective in treating Saul's disorder. Specifically, Dr. Guller testified:

[I]ndividuals with the type of difficulties that Officer Saul has, which are more pervasive and personality based, are generally refractive to treatment. It's not an acute problem. It's a lifestyle type of problem.

That's not to say that if somebody had therapy, for example, intensively over a couple of years, that they might not be able to get some insight to change some of that, but of course in this type of situation, if there's treatment that's going to be effective, it would have to be for an acute problem, reasonably short-term treatment that would allow the officer to come back and function well in the job, and that's not the type of situation that we're dealing with here with Officer Saul.

So I don't think that treatment really would be effective in terms of getting him back on the job in any type of reasonable timeframe, and the prognosis here would not be as good as if actually he had an acute depression that could be

treated in a short run with medication and with some therapy and he would just get over it. That's [sic] is not the case here. (emphasis added)

(T4:99:15-101:15).

In addition to his constantly changing diagnosis and his unexplained failure to independently investigate Captain Parker's allegations and to interview Officer Saul regarding the same, there are other problems with Dr. Guller's finding that Officer Saul is not fit for duty. First, his report and his testimony before the hearing officer fails to account for the differences between his findings and those of Dr. Bart Rossi, who had examined Saul in 2004 prior to his employment as a police officer. After conducting similar test to Saul, Dr. Rossi found that Saul did not present any psychological issues and was fit for duty as a police officer. Dr. Guller does not explain why these issues were now present. Second, Dr. Guller, while finding that Saul lied or at least exaggerated the degree of his medical issues, never interviewed Saul's parents or sought access to his past medical records to determine the facts of his past medical history. Third, his diagnosis of Saul of having a Somatoform Disorder appears to be based on false and/or incomplete assumptions and is actually contrary to his own psychological testing of Officer Saul. Indeed, none of the tests conducted by Guller on Saul indicates any disorder and all tests were in normal range. Fourth, Dr. Guller does not

reconcile his Somatoform Disorder finding with the fact that Saul did not continue to complain of his original shoulder injury and, in fact, stated that this injury resolved itself.

Fifth, neither Dr. Guller's reports or testimony address the specific criteria established by the American Psychiatric Association necessary to support a diagnosis of Somatoform Disorder, which provides:

Somatoform Disorders

300.81 Somatization Disorder

- A. A history of many physical complaints beginning before age 30 years that occur over a period of several years and result in treatment being sought or significant impairment in social, occupational, or other important areas of functioning.
- B. Each of the following criteria must have been met with individual symptoms occurring at any time during the course of the disturbance:
 - (1) four pain symptoms: a history of pain related to at least four different sites or functions (e.g., head, abdomen, back, joints, extremities, chest, rectum, during menstruation, during sexual intercourse, or during urination)
 - (2) two gastrointestinal symptoms: a history of at least two gastrointestinal symptoms other than pain (e.g., nausea, bloating, vomiting other than during pregnancy, diarrhea, or intolerance of several different foods)
 - (3) one sexual symptom: a history of at least one sexual or reproductive symptom other than pain (e.g., sexual indifference, erectile or ejaculatory dysfunction, irregular menses, excessive menstrual bleeding, vomiting throughout pregnancy)
 - (4) one pseudoneurological symptom: a history of at least one symptom or deficit

suggesting a neurological condition not limited to pain (conversion symptoms such as impaired coordination or balance, paralysis or localized weakness, difficulty swallowing or lump in throat, aphonia, urinary retention, hallucinations, loss of touch or pain sensation, double vision, blindness, deafness, seizures; dissociative symptoms such as amnesia; or loss of consciousness other than fainting)

C. Either (1) or (2):

(1) after appropriate investigation, each of the symptoms in Criterion B cannot be fully explained by a known general medical condition or the direct effects of a substance (e.g., a drug of abuse, a medication)

(2) when there is a related general medical condition, the physical complaints or resulting social or occupational impairment are in excess of what would be expected from the history, physical examination, or laboratory findings

D. the symptoms are not intentionally produced or feigned (as in Factitious Disorder or Malingering).

300.82 Undifferentiated Somatoform Disorder

A. One or more physical complaints (e.g., fatigue, loss of appetite, gastrointestinal or urinary complaints).

B. Either (1) or (2):

(1) after appropriate investigation, the symptoms cannot be fully explained by a known general medical condition or the direct effects of a substance (e.g., a drug of abuse, a medication)

(2) when there is a related general medical condition, the physical complaints or resulting social or occupational impairment is in excess of what would be expected from the history, physical examination, or laboratory findings

C. The symptoms cause clinically significant distress or impairment in social, occupational,

- or other important areas of functioning.
- D. The duration of the disturbance is at least 6 months.
 - E. The disturbance is not better accounted for by another mental disorder (e.g., another Somatoform Disorder, Sexual Dysfunction, Mood Disorder, Anxiety Disorder, Sleep Disorder, or Psychotic Disorder).
 - F. The symptom is not intentionally produced or feigned (as in Factitious Disorder or Malingering). "DIAGNOSTIC CRITERIA FROM DSM-IV-TR," American Psychiatric Association, 2000.

As established by the American Psychiatric Association ("APA") on diagnosis of Somatoform Disorder requires a finding of a specific set of symptoms. These specific findings were not observed or reported by Dr. Guller to the extent required by the APA nor do they appear anywhere in the record below.

Based on the foregoing, the court finds that Dr. Guller's testimony before the Hearing Officer was not consistent with his original report and, more importantly, he did not reconcile the discrepancies between the two or why his opinion had changed. Moreover, the court finds that Dr. Guller's diagnosis of a Somatoform Disorder is contrary to his own testing of Officer Saul and not in conformance with the specific standards established by the APA. Accordingly, the court finds that Dr. Guller's diagnosis of Somatoform Disorder is neither credible nor supported by the evidence below.

THE REPORT AND TESTIMONY
OF DAVID J. GALLINA, M.D.

The Township's other expert, David J. Gallina, M.D., a licensed psychiatrist, prepared a report dated September 28, 2011. In that report, Dr. Gallina indicated that Officer Saul was suffering from "a somatoform disorder." Specifically, Dr. Gallina opined:

MEDICAL - CLINICAL FORMULATION, REASONING AND OPINION

The first issue to be addressed is whether Officer Saul has a diagnosable medical neuropsychiatric illness at this time. Based on this evaluation, it is my medical opinion, with reasonable medical certainty, that Officer Saul is suffering from the following clinical entities:

DIAGNOSIS

The review of Dr. Guller's report indicates the Dr. Guller felt that Officer Saul was suffering from a somatoform disorder. He was subsequently also evaluated by Dr. Trent, who indicated that "based on the information furnished by Dr. Guller and Ptl. Saul, this conclusion is psychiatrically reasonable. (emphasis added)

AXIS I - CLINICAL SYNDROMES

A Somatoform Disorder is possible. Officer Saul also indicates that he feels that his perception of situations maybe faulty, which results in some of the conflicts and incidents previously described. It is also possible that there are conscious distortions or lies that are involved in some of these incidents.

AXIS II - PERSONALITY DISORDER AND SPECIFIC DEVELOPMENTAL DISORDERS

No Diagnosis on Axis II

AXIS III - PHYSICAL DISORDERS AND CONDITIONS

GI Tract Sphincter Not Working Probably;
Basal Cell Carcinoma By History;
Nearsighted By History;

AXIS IV - SEVERITY OF PSYCHOSOCIAL STRESSORS

Current stressors include suspended without
Pay; occupational stress;

AXIS V - Current GAF 70

My reasoning in this regard is as follows:

1. Officer Saul's mental status examination is essentially entirely normal, with no objective signs or symptoms of neuropsychiatric disorder. There are no active or passive suicidal or homicidal ideations. There are no objective signs of psychoses. There were no delusions, hallucinations, phobias or obsessions. There are no signs of an organic mental syndrome. Recent and remote memory are intact. He is fully oriented and there is no confusion.
2. As noted under Axis I, the exact etiology of this patrolman's difficulties is difficult to pinpoint and my actually involve a combination of those that are suggested, including elements of somatoform disorder, misperceptions and fabrication. (emphasis added)

Concerning the issue of Fitness for Duty, it is my medical opinion, with reasonable medical probability, that Officer Saul is not fit for duty as a police officer.

My reasoning in this regard is as follows:

The issue for Officer Saul is whether he can perform the essential functions of his job as a police officer in a safe and effective manner, or if he has clear potential for continued work problems. It is my opinion, based on this evaluation, that Officer Saul is not able to perform the essential functions of his job in a safe and effective manner, and given his history has clear potential for further work problems. The issue of whether his is a danger to himself or others does not emanate directly, but rather indirectly from the various difficulties that Officer Saul has manifested. Keeping in mind that he must carry a gun, make split second decisions in critical situations, it is clear, given his history, that these issues are problematic for him. His difficulties clearly have negatively impacted on his job performance as reflected by a pattern of poor judgement [sic], that includes distortions and infractions that potentially create dangerous situations for himself and others.

In determining that Officer Saul is unfit for duty, this evaluation has balanced not only the best interest of the department, but must also weigh the best interests of Officer Saul and the public at large.

Considering Officer Saul's level of denial that he has experienced any difficulty, the prognosis is poor that outpatient treatment will produce a positive, therapeutic effect that would allow Officer Saul to return to duty at any time in the future. It is my opinion with reasonable medical probability, that psychiatric or psychological treatment will not change Officer Saul's current designation as unfit for duty.

The difficulty with Dr. Gallina's report and his subsequent testimony before the Hearing Officer below is that he does not independently provide the "whys and wherefores" of his diagnosis of a Somatoform Disorder. Rather, he appears to simply accept

Dr. Guller's diagnosis. Moreover, Dr. Gallina states that a Somatoform Disorder is "possible." Dr. Gallina does not provide any specifics as to Saul's past history that would lead him to this "possibility." Moreover, in his narrative Dr. Gallina refers to his testing of Officer Saul and that the same supports this conclusion but fails to cite to any specific details of his testing and only gives his conclusions of the same. Put simply, Dr. Gallina does not reconcile his diagnosis of Somatoform Disorder with his findings through objective testing that Officer Saul did not present any neuropsychiatric disorders. Finally, like Dr. Guller, Dr. Gallina does not address the specific criteria necessary to support a diagnosis of Somatoform Disorder.

The law regarding net opinions in New Jersey forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data... simply put "[it] requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." State v. Townsend, 186 N.J. 473, 494 (2006). The net opinion rule also prohibits an expert to provide speculative testimony that is not based on empirical evidence. Polzo v. Pfalfer, 301 N.J. Super. 563, 580 (App. Div. 1997).

In the final analysis, Dr. Gallina's report is highly speculative and provides no basis for his "possible" diagnosis.

The court therefore finds that Dr. Gallina's report as well as his testimony before the Hearing Officer which essentially mirrored his report constitutes a net opinion and the same should not have been considered below.

THE EXPERT REPORT AND TESTIMONY
OF DR. DAVID GOLLIN

The Hearing Officer below found that testimony of the defense expert, Dr. Daniel B. Gollin, M.D., a Board certified psychiatrist not to be credible "[d]ue to his lack of thoroughness, his failure to review relevant reports and his lack of understanding and knowledge regarding the duties and responsibilities required of a police officer ..." These findings by the Hearing Officer are all true but they do not go directly to the validity of the psychological testing conducted by Dr. Gollin which found:

The current evaluation fails to reveal any significant pathology or dysfunction relevant to Officer Saul's ability to perform his duties or carry service weapons. The knee injury sustained in the response to the domestic violence call was apparently a significant injury which responded well to appropriate treatment, and officer Saul's reaction to his encounter with the first workman's compensation orthopedist as he described it seems completely understandable under the circumstances, and his failure to accept the incorrect diagnosis and treatment was proven to be the right course of action once another opinion was obtained. There is no evidence whatsoever of any ongoing somatization disorder, despite the possibility raised by the standardized tests, and the second orthopedic opinion supports that Officer Saul had a genuine

source of pain from his injury, and was misdiagnosed, and not somatizing or malingering. Officer Saul had no difficulty communicating and reporting the circumstances of all allegations of dishonesty, and accounting for his statements in a way that seemed he was completely truthful and often times misrepresented and or misinterpreted by others. Of particular concern is the suggestion previously that the officer was lying or inaccurate about his own medical and learning disorder history and practicing considerable distortion, while no part of the history given in this current evaluation was felt to be inaccurate. For example, the history of dyslexia during childhood, if effectively addressed during school years, can be compensated for, and not be evident in adult writing samples or reading tests given after successful interventions have been made, however one prior evaluator interpreted the current lack of reading and writing findings as dishonesty rather than response to treatment, while not taking into account previous responses to individual and marital counseling. It also seems unreasonable to assume that officer Saul's ability to deal with dangerous situations is somehow inadequate given his excellent past performance in life-threatening situations. Lastly, the current objective testing administered was responded to by this officer openly and gave valid results showing personality dysfunctions that were completely within the normal range, and are not felt to represent any risk with regard to the performance of police work.

It is recommended without reservation that Officer Saul is fit to return to full and active duty without any restrictions, and is fit to have his identification and weapons returned to him at this time. He shows absolutely no evidence of dangerousness to himself or others at this time, and appears very capable of performing well even in potentially life-threatening situations.

The court finds that the testimony of Dr. Gollin, relative to the lack of any disorder which would render Officer Saul

unfit for duty, to be consistent with his report. Moreover, his finding that Officer Saul did not present with any psychological issue is consistent not only with his testing but indeed with the testing conducted by the Township's own experts. The court however agrees with the Hearing Officer finding that Dr. Gollin failed to review key documents in the preparation of his report.

Upon consideration of all the expert reports and the testimony of each expert before the Hearing Officer below, the court finds that, at best, the evidence regarding whether Officer Saul is fit or unfit for duty as a police officer is inconclusive. The reports and testimony of Dr. Guller are inconsistent with psychological testing of Officer Saul and inconsistent with each other and these inconsistencies were not adequately addressed by Dr. Guller in his testimony. The only apparent basis for Dr. Guller's change from a recommendation of a period of three (3) to six (6) month counseling for Officer Saul to his opinion that counseling would probably be unsuccessful and, in any event, take years seems to be the additional information provided to him by Captain Parker-information which was not independently evaluated and verified by Dr. Gollin. The report and testimony of Dr. Gallina is based upon the premise that Dr. Gollin's diagnosis was correct despite his own findings through objective testing that Officer Saul presented no neuropsychiatric signs of any disorder. Therefore,

Dr. Gallina's opinion is highly speculative and not based upon any objective findings and therefore constitutes a net opinion. Finally, the report and testimony of Dr. Gollin, while based upon objective testing of Officer Saul, which appears to be sound from a strictly medical point of view is also called into question due to his failure to review the police reports relating to the September 22, 2010 domestic incident and other critical documents relating to the charges lodged against Officer Saul.

Thus, while all of the reports and testimony of the various experts are problematic, the defendant Township had the burden here to establish by a preponderance of the evidence that Officer Saul was unfit for duty. For the reasons set forth above, the court finds that this burden has not been met.

CONCLUSION

For the reasons set forth above, the court sustains the findings of the Hearing Officer below with regard to Charge 8 relating to Officer Saul's failure to report an on-duty injury and his record will reflect a reprimand as to that violation of the Township's Code of Conduct. As for each of the remaining nineteen (19) charges, the court finds that the Township did not meet its burden of proving by a preponderance of the evidence the alleged violations. Accordingly, the findings of the

Hearing Officer as to these alleged violations are reversed and vacated. Finally, the court finds that the Township has not sustained its burden to establish through psychological or psychiatric testing that Officer Saul is unfit for duty as a police officer. Therefore, the court finds that Officer Saul was wrongfully terminated from his employment as a police officer for Manchester Township.

Based upon these findings, Officer Ryan Saul shall within twenty (20) days from the date of this opinion be reinstated as a Manchester Township Police Officer at his former grade and at current pay. His credited service time will be adjusted to include the period of time from his termination to his reinstatement. Within forty-five (45) days, the Township shall reimburse Officer Saul for all back pay which would have accrued from the date of his termination to his reinstatement.

Counsel for plaintiff, Ryan Saul, shall submit an order consistent with this opinion pursuant to the five day rule.