

PUBLIC EMPLOYMENT RELATIONS COMMISSION
TRENTON, NEW JERSEY

IN THE MATTER OF ARBITRATION)
)
 between)
)
 MIDDLESEX COUNTY SHERIFF'S OFFICE,) OPINION
) AND
 Employer) AWARD
 and)
)
 PBA LOCAL 165,)
 Union)
)
 Re: Grievance of Sheriff's Officer)
 Michael Abode)
 Docket No. AR-2020-095)

Before: Prof. Robert T. Simmelkjaer, Esq.
 Arbitrator

APPEARANCES

FOR THE COUNTY

Benjamin D. Leibowitz, Esq., Senior Deputy County Counsel

FOR THE UNION

Catherine M. Elston, Esq., C. Elston & Associates, LLC

ALSO PRESENT

Jessie Harris, Union Representative, Fraternal Order of Police

BACKGROUND

Pursuant to the procedure for arbitration contained in the collective bargaining agreement (“CBA”) between the County of Middlesex (hereinafter the “County” or “Sheriff’s Office”) and the Sheriff’s Offices of Middlesex County, Policemen’s Benevolent Association Local No. 165 (hereinafter the “PBA” or the “Union”) covering the period January 1, 2017 to December 31, 2020 (Jt. Ex. #1), a hearing was held on July 16th, August 25th and September 23, 2020 at the Family Courthouse, New Brunswick, New Jersey. The purpose of the hearing was to arbitrate the disciplinary grievance of Sheriff’s Officer Michael Abode.

At the hearing, the parties were given ample opportunity to present their respective positions, including testimonial and documentary evidence, to directly examine and cross-examine witnesses. The hearing was transcribed, and record consists of six (6) Joint Exhibits, eight (8) Union Exhibits and three (3) Sheriff’s Office Exhibits. The evidence so submitted as well as the arguments of the parties has been considered by the Arbitrator in the preparation his Opinion and Award.

ISSUE: Did the Sheriff’s Office have just cause to suspend the Grievant, Officer Michael Abode, for five (5) days on June 14, 2019 based upon a charge that he failed to follow a lawful order from a Captain in violation of N.J.A.C. 4A:2-2.3(a)?
If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

Article II: Maintenance of Benefits

Section A. This Agreement shall not be construed to deprive any employee of any previously granted benefits, right, privilege or protection granted by the Laws of the State of New Jersey, Resolutions, Ordinances or Promulgation's of the county, Rules and Regulations of any State Agency, Title 4A inclusive, or any applicable provision of the United States Constitution, the Federal Fair Labor Standards Act of 1985.

Article III: Maintenance and Modification of Work Rules

Sec. A. All conditions of employment relating to wages, hour of work, and general working conditions contained in the General Orders, Promulgations and Rules and Regulations of the Office of the Sheriff, which are currently in effect, shall be maintained for the life of this Agreement.

Article V: Retention of Civil Rights

Section A. All employees covered by this Agreement shall retain all rights as set forth within the Constitution of the State of New Jersey and the Constitution of the United States as well as N.J.S.A. 40A:14-147 and any other applicable statutes.

Article XXIII: Adherence to New Jersey State Civil Service Commission

Section A. The Employer and the Association understand and agree that all rules promulgated by the New Jersey Civil Service Commission concerning any matter whatsoever not specifically covered in this Agreement shall be binding upon both.

Article XXXIV: Just Cause

Section A. No Officer shall be discharged, disciplined, reprimanded, reduced in rank, compensation, or deprived of any occupational advantage or given an adverse evaluation of his or her services without just cause. Any such action asserted by the County, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth if recourse is not provided for under N.J.S.A. Title 11A.

RULES AND REGULATIONS OF THE SHERIFF'S OFFICE

3.1.5 Duty Responsibilities

Members of the agency are always subject to duty and they shall at all times, respond to the lawful orders of superior officers and other proper authorities, as well as calls for assistance from citizens. Proper action must be taken whenever required. The administrative delegation of the enforcement of certain laws and ordinances to particular units of the agency does not relieve members of other units from the responsibility of taking prompt, appropriate action within the scope of those laws and ordinances when the occasion so requires. Members assigned to special duties are not relieved from taking proper action outside the scope of their specialized assignment when necessary.

3.2.1 Performance of Duty

All members and employees shall perform their duties as required or directed by law, agency rule, policy or order, or by order of a superior officer. All lawful duties required by competent authority shall be performed promptly as directed, notwithstanding the general assignment of duties and responsibilities.

3.2.5 Insubordination

Members and employees shall not commit acts of insubordination. The following specific acts are examples of the conduct prohibited by this section:

1. Failure or deliberate refusal to obey a lawful order given by a superior officer.
2. Any disrespectful, mutinous, insolent, or abusive language or action toward a superior officer.

3.3 ORDERS

3.3.1 Manner of Issuing Orders

Orders from superior to subordinate shall be in clear and understandable language, civil in tone, and issued in pursuit of agency business.

3.3.2 Unlawful Orders

No commander or supervisory officer shall knowingly issue any order which is in violation of any law, ordinance or agency policies and procedures.

3.3.3 Improper Orders

No supervisor shall knowingly issue any order which is in violation of agency rule, policy or procedure.

3.3.4 Questions Regarding Orders

Employees in doubt as to the nature or detail of an order shall seek clarification from their supervisors by going through the chain of command.

3.3.5 Obedience to Unlawful Orders

Obedience to an unlawful order is never a defense for an unlawful action. Therefore, no member or employee is required to obey an order which is contrary to Federal or State law or County ordinance. Responsibility for refusing to obey rests with the member. He/she shall be strictly required to justify his/her actions.

3.3.6 Obedience to Unjust or Improper Orders

Members or employees who are given orders they feel to be unjust or contrary to policies and procedures, must first obey the order to the best of their ability and then may proceed to appeal as provided below.

3.3.7 Conflicting Orders

Upon receipt of an order conflicting with any previous order or instruction, the member or employee affected will advise the person issuing the second order of this fact. Responsibility for countermanding the original instruction then rests with the individual issuing the second order. If so directed, the latter command shall be obeyed first. Orders will be countermanded, or conflicting orders will be issued only when reasonably necessary for the good of the agency.

3.3.8 Reports and Appeals – Unlawful, Unjust, Improper Orders

A member or employee receiving an unlawful, unjust or improper order, shall, at first opportunity, report in writing to the Sheriff through the chain of command. This report shall contain the facts of the incident and the action taken. Appeals for relief from such orders may be made at the same time. Interagency action regarding such an appeal shall be conducted through the Office of the Sheriff.

3.4.3 Reports

No employee shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false, or improper information on records of the agency.

Middlesex County Sheriff's Office Manual

- Law Enforcement Code of Ethics
- 3.12.5 Truthfulness
- 81.1 Purpose [of Report Writing]

Case precedent establishes that law enforcement officers are subject to a higher standard of conduct. (Citations omitted)

STATEMENT OF FACTS / HISTORY OF PROCEEDINGS

A. The Grievant

Sheriff's Officer Michael Abode ("Abode") was hired by the Middlesex County Sheriff's Office ("MCSO") in March 2014. (T3 @ 9).* He had been a Sheriff's Officer for five years and assigned to the Family Courthouse when the incident that generated the instant case occurred.

B. Officer Abode's Draft Operations Report

On March 15, 2019 at approximately 8:25 a.m., Abode was traveling to work when he witnessed a car accident on Livingston Avenue in New Brunswick. Abode witnessed a female driver hit three cars as she came past a red light.

* The transcripts will be denoted as follows: T1 – the transcript for July 16, 2020; T2 – the transcript for August 25, 2020; T3 – the transcript for September 23, 2020.

The female driver in one vehicle collided with three parked vehicles. He then called to the MCSO dispatch that he was stopped at the accident. He gave dispatch the location of the accident and the plate of the vehicle that hit the others and told them to have New Brunswick police respond.

Upon arriving to work after leaving the accident scene, Abode saw first Sgt. Candace Burgess and then Sgt. Mata. Both were Abode's supervisors on that date. Neither Sgt. Burgess nor Sgt. Mata asked him for a report concerning his actions at the accident scene. About an hour or two later, Abode saw Sgt. Williamson, who relayed an order from Captain Pepenella to write a report about his involvement with the accident. Abode did so by typing the report into the computer system which then transferred it directly to the supervisor. (Jt. Ex. #5C @ 8).

Abode submitted a "Draft" Operations Report on March 15, 2019. The three lines that contain the names of Captain Pepenella ("Pepenella"), Sergeant Mata ("Mata") and Sergeant Burgess ("Burgess") have been underlined and bolded to highlight that they were subjects of the Captain's order and are an issue in this grievance. The narrative section of Abode's draft Operation Report is as follows:

On 3/15/2019 at approximately 0825 am, this officer witnessed a silver dodge pick up take a sharp left turn on to Livingston avenue from Suydam street at a high rate of speed. I witnessed the driver of the vehicle lose control of the pickup truck and fishtailed into a parked car head on, and then the rear of the vehicle fish tailed and hit 2 (two) more parked vehicles. The silver dodge truck ended up facing opposite direction of traffic on Livingston Avenue.

I was in my personal vehicle on my way to work and stopped at the accident and informed dispatch via radio to contact New Brunswick

Police Department. I approached the pickup truck and immediately observed a Spanish female who was the driver. I ordered her to turn off ignition and she complied. Immediately after turning off the ignition she began holding her chest. I notified dispatch to also have a ambulance sent to my location. I asked the female if she had any injuries and she replied in broken English that she did not understand. The female driver stated that she spoke Spanish. I also notified dispatch to notify New Brunswick to send a Spanish speaking officer.

At approximately 0833 New Brunswick Police Officer Gayden arrived on scene. I briefed Officer Gayden of the situation and he took over the scene. At approximately 0840 I was cleared off the scene and immediately notified dispatch that I was no longer on scene.

There is no further information as the driver did not have any ID on her and we did not have her name at that point.

***** Advised as per Captain Pepenella the above report needs to be modified and add more. This information was relayed to me by Sergeant Mata******

****The plate on the dodge pickup that hit the parked cars is LELT26, it is a 2003 Dodge Ram Pickup Grey in color.

The Reg comes back to: Yesenis Galena-Avilaq Dob: 12-16-1986 at 179 Seaman Street, New Brunswick NJ 08901 social 802-32-4396

There is no available information for the driver of the vehicle. Any additional information required for this report can be obtained from the New Brunswick Police Department when the report is completed.

****** 03/22/2019 per Captain Pepenella revise report to reflect information that was listed on the police report.**

Was told by Sergeant Burgess that as per Captain Pepenella I needed to call New Brunswick and get the police report to that accident that I witnessed.****

New Brunswick Police department was called and a copy of the accident report was faxed to Family Court Holding cells. As previously stated the Driver of the Silver Dodge Ram which at the time was unknown is stated to be Ademita Nazario Jiminez who is

an unlicensed driver as per the accident report. Mrs. Nazario-Jiminez resides at 18 Louis St Apt. 2 in New Brunswick NJ. The owner of the Vehicle that she was driving is stated to be Yesenia Galeia-Availia who resides at 179 Seamann Street in New Brunswick NJ. The three (3) vehicles that she struck as follows: 1999 Nissan Maxima with NJ reg: G65EDG the R/O of this vehicle is Thomas Williams who resides at 116 Livingston Ave APT.402 New Brunswick, Nj(sic) 08901. The second Vehicle is 2012 Silver Honda Accord the R/O is Daniel Marko who resides at 116 Livingston ave apt. 209. The third Vehicle that was struck was a 1997 Honda Civic the R/O is Hartley Hays who resides at 116 Livingston ave apt. 201.

All the above information that was added is taken off the police report that New Brunswick Police Department has furnished upon the request made by this officer in compliance with direct orders from my chain of command. ****end of addition for 03/22/2019 MA.

(This Narrative is contained in Section 11 of each of the "DRAFT" Operations Reports of Officer Abode that are contained on pages 20 through 25 of Sheriff's Exhibit S-1).

Abode testified that his first report¹ ended with the words on the first page, "there is no further information as the driver did not have any ID on her and we did not have her name at that point.

Abode's initial report did not list the details of the vehicles that had been struck nor the driver's address since he did not have that information. Mata approved the original report as well as the revised report as evidenced by his signature on the bottom of the report. (T2@127-128) (S. Ex. #1). Undersheriff ("US") Harris, as well as Mata, testified that a supervisor's signature at the bottom right side of the report indicates his/her approval of it. (T2 @ 144).

After Mata announced Abode's initial report, Peppenella told Mata to order Abode to add additional information to it. Mata, who was asked to review the

¹ US Harris testified that the original report was no longer available as when changes are made to an original report, the "previous change is just written over." (Tr.1@ 49).

report because of his proficiency in the new computer system, testified that the new system was requesting information that had not been previously required. While Mata found nothing wrong with Abode's original report, he testified "it was just that I was told to have Officer Abode add additional information, more specifically, a police report, and to draw a sketch, you know, in addition to what he had already written." (T2 @ 9-10).

Abode then sent the report back up the chain of command a second time with the following additions: the license plate of the vehicle that he had called into dispatch and a line preceded by an asterisk that read, "Advised as per Captain Pepenella the report needs to be modified to add more information was relayed to me by Sgt. Mata." (T3 @ 23). Mata approved this revised report. (S. Ex. #1). (This document shows that Mata approved the changes at least twice).

Pepenella, however, then ordered Mata, (and/or Burgess), to order Abode to add even more information to the report, including that of the driver and all the vehicles involved, and to further obtain New Brunswick PD's report and add that information into his report. Id. T3:22:5-14. Abode told Mata that he couldn't incorporate another department's report into his own because he didn't witness the New Brunswick officer obtaining any of the information. "It was nothing that I was privileged to or was there for so I couldn't add somebody else's report as if I took the information." Essentially, Abode did not wish to put information into his report that he had no first-hand knowledge of, and had not personally obtained or witnessed himself. (T3 @ 22).

After a few days, Sgt. Burgess told Abode that Pepenella was ordering him to obtain the New Brunswick Police report and to add the information in the report. In response, Abode asked if he could just attach the New Brunswick police report to his report. Burgess advised that Pepenella stated that that was unacceptable. T3:25:2-17.

Abode obeyed the order to change his report. In doing so, he memorialized the alterations to the report. He added the last paragraphs of the report starting with, "the New Brunswick PD was called..." as well as adding information regarding the vehicles to the front page. (T3 @ 25-26) (S. Ex. #1).

Additional asterisked information was added as follows:

**** 03/22/2019 per Captain Pepenella revise report to reflect information that was listed on the police report. Was told by Sergeant Burgess that as per Captain Pepenella I needed to call New Brunswick and get the police report to that accident that I witnessed****. Exhibit S-1, pages 22-23.

Mata testified that Pepenella ordered Abode to remove from his report that Pepenella gave him the order to alter his report. Mata testified that Abode wasn't happy that "the Captain wanted – how he wanted him to alter his report." Id. At 13:14-21.

Abode testified that Burgess also told him that Pepenella wanted his name, as well as the names of the sergeants he ordered to have Abode alter his report, removed, and, therefore, permanently omitted from the report. T3:28-29.

Abode responded to Burgess:

I told her that I didn't witness the report. I didn't witness the report. I was being ordered to write something in my report by the sergeant or the captain that I didn't witness. I needed to document their name in there so later on if I ever had to testify why that was in my

report, I can always say that I was ordered to by the captain or by the sergeant. My report initially is true actually to what I witnessed. They were asking me to do something which I didn't find to be legal by adding someone else's report that I didn't even witness and take that report into my own. (T3 @ 30).

Abode testified that Burgess agreed with him. In fact, Burgess testified during her internal affairs interview that she felt Abode did nothing wrong. (Jt. Ex. #5B @ 19-20).

She testified as to the language Abode would not remove: "...I reviewed this report and I found it was sound and accurate and I approved it...So the Captain told me it needed to be modified...He specifically told me what needed to come out and that his name or any supervisors names had no part in this Operations Report. (Jt. Ex. #5B @ 19).

Burgess testified that "without memorializing that the Captain ordered changes and what those changes were, it would appear to the reader of the report that all such changes were made on the same date of the report. Burgess testified that Abode wanted to document that the changes he was ordered to make occurred after the 15th." (Jt. Ex. #5B @ 11-12).

Burgess further testified during her Internal Affairs interrogation "so I felt there was nothing inaccurate about the way Abode did his report. It was a personal pet peeve with the Captain." (Jt. Ex. #5B @ 19-20).

Once it was determined that Abode would not alter his report, he was ordered to report to the Captain's office. Abode brought his Union representative with him. At that time, Pepenella ordered Abode to remove his name from the report and the names of the two sergeants. (T3 @ 33).

Abode requested permission to speak with "FOP Labor Counsel." Abode and his FOP representative next spoke to a FOP Labor Counsel, Sean Lavin, who advised him via speaker phone that "the department cannot tell him what to put in his report so long as the report was true and that putting something in the report that he didn't witness would constitute a violation of the 'Brady' law."

Ultimately, Abode was told by Pepenella to change his report, as per the Undersheriff, or be charged with insubordination. Abode replied: "With all due respect, I cannot change my report because it is not – to me it is not a legal order to change my report." (T3 @ 38). He further testified:

Abode testified that he believed the order was illegal,

Because they were asking me to doctor a report that was mine. My report from the beginning was true and factual. Anything I witness, anything I saw, anything that I did goes into my report. They wanted me to add somebody else's report from New Brunswick Police Department, another officer who I don't even know if he spoke Spanish or brought somebody else to speak Spanish into my report. So how do I add someone else's report who I don't even know if it is accurate into my own report and say that basically I witnessed this happening because if I got to court and you are the attorney there questioning me on this report, you are going to say, well, how do you know if it is in your report, you put it in your report. I felt that I had to document that I was told by the captain, by the sergeants to add something that I didn't want to add into my report. So if it ever came up again five years from now or ten years from now, I can always say reading y report I know why I added this because my chain of command wanted me to put something that I didn't witness into my report. (T3 @ 38-39)

Abode was not given any reason why Pepenella ordered his name, as well as other superior officers removed from his report. Abode stated that he couldn't put the additional information about the accident in his report without stating he was ordered to do so because "if I am put on the stand five years from now and

they say who in your department told you to do that Officer Abode I can then say Captain Pepenella because it's on my report." (T3 @ 75-76).

According to Abode, anything he did not witness or have first-hand knowledge as to its accuracy, could not be included in his report less its "integrity" would be affected.

He described the training he received in the academy with respect to writing reports that it was,

beaten into us over and over again that any report that we do must be in true chronological order. If we are told to do something it should be included in part of our report. So I was only doing what I was told – what I learned to do. They brought the prosecutor's office and they explained to us how important your report is when you are on the stand. So by me not adding or revising my report so, for instance, you see a revised report, why was the report revised so many times. It goes to the fact of showing why my report was revised and why I revised it and who asked me to revise it if it was not part of something that was part of my original report. (T3@90).

During his IA and grievance hearing, Abode maintained "it is not ethical." In support of his position, Abode provided his interpretation of *Brady v. Maryland*, 373 U.S. 83 (1963), as well as read directly from the MCSO's Code of Ethics² contained within the MCSO Manual. (U. Ex. #-7); (S. Ex. #3).

On March 28, 2019, Abode was notified by Internal Affairs that a complaint had been made against him. The complaint involved an allegation of 4A:2-2.3(2) Insubordination, 3:2.1 Performance on Duty and 3:1.1 Standard of Conduct.

IA investigator Anderson agreed with Abode's interpretation of *Brady*. T2:195:6-19. Anderson testified that *Brady* is "basically a court rule of evidence

² Sgt. Mata similarly testified that an order is lawful as long as it doesn't compromise your responsibility, ethics, or violations of the SOP's. (T2:@155-156)

that requires a prosecutor to supply the defense with exculpatory evidence which may include prior discipline of an officer involved.” Anderson stated further that it involved prior discipline as to “truthfulness” and “honesty.” Anderson further testified that “a ‘Brady list’ are people who are found to be dishonest in their reports or an investigation that they became on the Brady list which is an officer you wouldn’t put on the stand to testify.” (T2@195).

An Internal Affairs Disposition Recommendation Form, submitted by Undersheriff Harris on June 12, 2019, recommended that Officer Abode be charged with insubordination, with the penalty of a five (5) day suspension. Abode was interviewed by Internal Affairs (“IA”) on April 12th and April 30, 2019. (Jt. Ex. 5A). Captain Pepenella, Sgt. Burgess and Sgt. Mata were also interviewed. (Jt. Exs. #5B, #5C).

On June 14, 2019, Abode was served with a Notice of Discipline and charged with a five-day suspension for insubordination for not altering his report per order from Captain Pepenella (S. Ex. #1).

On or about June 2019, a grievance was filed by the PBA. (Jt. Ex. #2). The County denied Abode’s grievance. US Harris testified that he understood the different articles the Union alleged were violated and thought the grievance was “pretty clear.” (T2 @ 102).

CONTENTIONS OF THE PARTIES

County Position

As an initial matter, the County acknowledges that pursuant to N.J.A.C. 4A:2-2.3(a)(2) it has the burden to prove the administrative charge of insubordination by a preponderance of the competent, relevant and credible evidence. Under N.J.S.A. 34:13A-5.3 binding, arbitration became a statutorily authorized means for disciplinary suspensions of Civil Service employees for five or less days, i.e., “minor discipline.” In this case, the Sheriff of Middlesex County decided to impose a five-day suspension on Officer Abode.

Although the term “insubordination” is neither defined in the Civil Service Act nor the CBA, the County has cited the definition in Black’s Law Dictionary as the “refusal to obey an order that a superior officer is authorized to give.” In re Williams, 443 N.J. Super. 532, 548 N.4 (App. Div. 2016), the Appellate Division provided a broader definition stating that insubordination “ordinarily is defined as a failure to obey a lawful order.” The County notes that “[t]his is consistent with Sheriff’s Office Rule and Regulation 3:2.5, which describes an example of insubordination as being ‘[f]ailure or deliberate refusal to obey a lawful order given by a superior officer.’”

The County maintains that Abode’s status as a Sheriff’s Officer, a sworn law enforcement position, “subjects him to a higher standard of conduct than ordinary public employees.” Given the strict discipline required in a law enforcement organization, with the chain of command running from the Sheriff, through the Undersheriff, through the Captains, through the Lieutenants, through the Sergeants, to the Officers,” Officer Abode was obligated to cooperate with his Commanding Officers and obey their lawful orders.

The County contends that Abode did not adhere to paragraph 3:3.8, Reports and Appeals – Unlawful, Unjust, Improper Orders, when he was first ordered to add information to his draft report. Since he maintained that the order was wrong and unlawful, his alternative to compliance was to appeal that order to the Sheriff pursuant to R&R 3:3.6 and R&R 3:3.8 or even report to his chain of command pursuant to R&R 3:3.7.

Abode had a second opportunity to appeal the order when Sgt. Mata and Sgt. Burgess told him several times over the next few days that Captain Pepenella had ordered him to remove his name and the names of Sgt. Burgess and Mata from his draft report. “Rather than appeal that order to the Sheriff before March 26, 2019, he continued to refuse to comply with that order up to March 27, 2019,” despite being told by the Captain to his face that he would be charged with insubordination for non-compliance.

Notwithstanding the Grievant’s erroneous reliance on the Brady rule or Brady law, a defense raised only when the Union Labor Counsel alluded to the holding of the U.S. Supreme Court in Brady v. Maryland, the County argues that “[a]t that time as well as now, Officer Abode has failed to justify his actions on any sustainable ground under the facts of this case.”

The Captain’s Order was not Unlawful

The County reviewed the landmark decision of Brady v. Maryland in which the U.S. Supreme Court held that the government’s withholding of evidence in the prosecution of a defendant that is “material” to the determination of either guilt or punishment of a defendant, irrespective of the good faith or bad faith of

the prosecution, violates the defendant's constitutional right to due process. "The Brady rule applies even where defendant makes no formal request for Brady material (Citations omitted)." State v. Nelson, 330 N.J. 206, 212 (App. Div. 2000).

"In order to establish a Brady violation, defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence is favorable to the defense; (3) the evidence is material.

Given this analysis of Brady, the County argues "there is nothing 'material' or 'exculpatory' about the three names that Captain Pepenella ordered Officer Abode to remove from his Report about the motor vehicle accident that Abode personally witnessed."

Since neither the Captain, nor Sergeants Mata or Burgess had any involvement in the motor vehicle accident, the County argues that their names were not material to Abode's Report. Undersheriff Harris testified that their names did not belong in Abode's Report. Moreover, the Brady Rule did not provide justification for Abode's refusal to remove their names as "part of his reference to the Captain's order to add factual information to his Report from the New Brunswick Police Report that was missing from his Report."

Inasmuch as Abode was a witness to the accident, it was logical that the owners of the three damaged vehicles would access his report to submit their insurance company claims. Adding their vehicle information to his Report, including the name and address of the driver and registered owner of the vehicle that caused the damage," was essential, "without anyone necessarily having to obtain the New Brunswick Police Report."

Had Abode complied with the Captain's order and removed the three names, the County argues he would not have violated Brady on the ground that such a removal would have "falsified" his report or compelled him to lie if called to testify in some case at a future date. Having identified that the added information contained in his revised report emanated from the New Brunswick Police Report, the County argues that Abode's "legal" claims are contradicted by the last two paragraphs of his Report as follows:

New Brunswick Police Department was called and a copy of the accident report was faxed to Family Court Holding Cells... All the above information that was added is taken off the police report that New Brunswick Police Department has furnished upon the request made by this officer in compliance with direct orders from my chain of command. ****end of addition for 03/22/2019 MA.

According to the County, Abode has no obligation under Brady at some future trial to list any names in his chain of command that were involved in the removal order. If he could not remember the names, "it would not matter because he witnessed the vehicles being damaged, he saw the vehicle that caused the damage drive at a high speed and lose control of her vehicle...and he had ascertained that she was okay and only spoke Spanish." Since "no one asked him to change what he wrote in his Report as to what he witnessed," the County maintains that the Captain's order to remove the names was lawful, and compliance would not have "compelled Abode to 'falsify' his Report and to lie if he were called to testify about his observation of the accident..."

Law Enforcement Code of Ethics in the Sheriff's Office Manual

The County notes the reason Abode gave in his memo to the Sheriff for refusing to comply with the Captain's Order was as follows:

I cannot change my police report due to the fact that it would be falsifying an official police document as to the chain of events that occurred. All the information that I have placed in my report are a true and accurate account of what occurred. (S. Ex. #1 @ 11).

Alluding to Undersheriff Harris' testimony that the "chain of events" should pertain to the accident itself as distinguished from "the Captain's post-accident instruction to add information from the New Brunswick Police Report," the County argues that Abode's "gratuitous remarks mentioning the names of the Captain and two Sergeants does not justify Abode's refusal to remove the names from his draft Report."

With respect to Abode's reliance on the "Code of Ethics" as a defense to his refusal to remove the names, the County identifies Abode's first IA interview on April 12, 2019 as the source. The County cites the exchange Abode had with Detective Anderson as his basis for refusing to comply with the order. He believed it was unlawful because "I spoke with my attorney. I spoke with my union rep and I know that you cannot ask an officer to document – it is my report. How are you going to tell me what to put in my report?" (Jt. Ex. #5A @ 32-35).

In characterizing the advice his Union representative, and "apparently his attorney" gave to him as "bad advice," the County contends that nothing in the Code supports Abode's assertions that:

- A. I would be deceiving the person who would be getting this report, if it was ever subpoenaed. By lying, by saying I took information that I did not when I was ordered to add into the report when I never had that initially in my report.

I was asked to write an Operations Report. I did that. Now, I was told to write what I saw, what I witnessed. I wrote exactly what information I got and what I witnessed. It wasn't good enough for the good – for Captain Pepenella.

So, therefore, he wanted me to deceive my report (sic). He wanted me to – he wanted to control my report by him telling me what to add into it. And if sought to do that I have all the right, because it was a true and factual event that he ordered me to put in in there, so it becomes part of my report that he ordered me to.(sic). (Emphasis added) (Jt. Ex. #5A @ 36-37).

Considering the credible testimony of Undersheriff Harris and Sergeant Mata, as well as the IA interview of Captain Peppenella, Sergeants Burgess and Mata, the County argues that “Abode claims in this regard are not credible.”

Abode’s Police Academy Report Writing Training

According to the County, “[i]t was not until his testimony at the hearing in this case on September 23, 2020 that Abode claimed for the first time a third justification for his refusal to comply with the Captain’s order namely training he received at the Police Academy in 2014 when he was a recruit.” In the County’s view, Abode’s claim that “his instructors beat it into their heads that reports had to be chronological and true” did not justify his refusal to remove the names from his report as per the Captain’s orders.

The fact that Abode did not raise his Academy training as a defense to his refusal to comply with the Captain’s order in his memo to the Sheriff on March 27, 2019, his response to the Captain when called into his office on March 26, 2019 and confronted with the likelihood of an insubordination charge, his first or second Internal Affairs interview, or during his March 27, 2019 “final chance” meeting with the Captain to either comply with the order or face an insubordination charge persuades the County that his “claim about his Academy training in this regard was not credible.”

Prior Alleged Inconsistent General Order or Standing Order

Notwithstanding Abode's assertion that "sometime in 2014, 2015 or 2016, when an incident involving a report that a person outside the Courthouse was exposing themselves and a Captain ordered that they just call the local police department and not get involved in the matter," the County rejects as not credible that this constituted a General Order or Standing Order that relieved him of the responsibility of preparing a report about the motor vehicle accident he witnessed on March 15, 2019. Whereas Abode recalled that this Standing Order or General Order was issued at some Roll Call, absent Abode's ability to produce any Rule and Regulation or SOP to this effect, and given the Undersheriff's testimony that he was not aware of such an order, the County urges the Arbitrator to ignore this claim.

Moreover, even if such an order had been issued several years earlier, "it would not have made the Captain's Order unlawful." Since Abode did not testify that pursuant to Rule and Regulation 3:3.7 "Conflicting Orders" he informed either Captain Pepenella, or Sergeants Mata or Burgess or the Sheriff so that they "could decide either to countermand such a prior order or clarify it pursuant to R&R 3:3.4, to establish that the prior order did not apply to instances when an Officer witnesses a motor vehicle accident...Abode's assertion about the alleged prior conflicting order is without merit."

Abode's Purported Reliance on Unsound Legal Advice

According to the County, Abode's "purported reliance on unsound legal advice of his Union Labor Counsel or his attorney is not a valid defense to the

charge of insubordination in this case.” The issue of relying on unsound legal advice was addressed In the Matter of Luis Santiago City of Bridgeton Police Department 2009 WL 3248073 (N.J. Admin. 2009). The case, which involved insubordination and a disciplinary fine equivalent to ten days pay, was upheld in the Final Administrative Action of the Civil Service Commission. Santiago’s union representative and legal counsel had advised him not to obey “a direct order from his chief of police to prepare a written statement about alleged improprieties he learned of regarding the Office’s Internal Affairs Unit.”

The County describes the significance of insubordination in the Sheriff’s Office as follows:

Insubordination in a para-military organization especially is a serious offense. Individual employees cannot be afforded the luxury of deciding for themselves whether to obey a particular order. Such behavior would result in chaos. Good order and discipline are essential for a properly operated law enforcement office, such as the Sheriff’s Office. Officer Abode had a duty to carry out the Captain’s order in issue, after which he could have pursued his concerns at a later time consistent with the process provided for in the Rules and Regulations of the Sheriff’s Office.

Finally, the County maintains that “under the circumstances of this case, Abode’s suspension of five days for insubordination was reasonable.” Since the parties’ CBA does not require the Sheriff to apply progressive discipline for insubordination; therefore, “the Sheriff retained the right to impose major discipline or minor discipline for insubordination, without having first issued a corrective action, oral reprimand, written reprimand or suspension of one day, or less than five days.”

In dismissing Abode's defenses, including the applicability of the Brady law, which the last two paragraphs in his Operations Report negate and "completely obviate his contrived fears about misrepresenting either in the Report or when testifying about the incident that he was the exclusive source of all the information in the Report."

From the Captain's perspective, "the illogical and unsubstantiated reasons for his conduct make no sense," constituted "a bad faith pretext to retaliate against the Captain for having ordered him to add information to his Report, which Abode said he did not 'feel' was right...[and] wasted the Captain's time as well as that of Sergeants Burgess and Mata as they attempted to reason with him so that he could avoid being charged with insubordination." "A repetition of such conduct in a future situation by Abode when someone's life may be in danger could have catastrophic consequences for a co-worker, a Judge, a Court staff member, a witness, a victim, a member of the public, or even himself. Hopefully, the five day suspension in this case will cause him to forego a repetition of such conduct as this case involved."

Union Position

The Union, on behalf of the Grievant, Officer Abode, prefaced its defense with a series of County Admissions.

Admission No. 1

MCSO Admits that There was No Rule or Regulation Requiring Abode to Write a Report Regarding the Off-Duty Incident and, in fact, Abode's Supervisors Did Not Require One. MCSO Further Admits that there was No Rule or Regulation Setting Forth What was Required to be Included in an Operations Report. As such,

Abode's Original Report Could Not "Miss" Information that was Not Required in the First Instance.

- 1) Neither supervisor on duty the date that Abode witnessed a car accident on his way to work (Mata and Burgess) requested a report from him regarding the off-duty incident. Sgt. Williamson relayed to Abode an Order from Captain Pepenella to write a report. (T3 @ 18). Undersheriff ("US") Harris testified that he did not know who told Abode to write a report or on which day he was told to write it.
- 2) There is no rule or regulation requiring a report from an officer for an off-duty incident/accident witnessed by an MCSO officer. (T2 @ 30, 38).
- 3) US Harris admitted that in the absence of an order to do so or a rule or regulation requiring it, Abode had no duty to conduct an accident investigation in a jurisdiction that wasn't his while off-duty.
- 4) US Harris testified that he was unaware of any rule or regulation or SOP stating what an officer needs to include in a report or place in an Operations Report (T2 @ 30-31).
- 5) US Harris testified that there is no rule or regulation or SOP that states the information Abode put in his report, including the name of the supervisor who told him to alter the report and how to alter it is "unnecessary." (T2 @ 57-58).
- 6) US Harris testified that a supervisor's electronic signature on the bottom of a report means he/she has authorized/approved the officer's report reviewed. (T2 @ 66) (U. Ex. #2). Sgt. Mata's testimony was consistent with US Harris' in this regard. (T2 @ 128-129, 132-133, 136-137, 145-156).
- 7) Abode's altered report, containing the language Pepenella ordered to be removed, was approved not only by Sgt. Mata and Sgt. Burgess, but also by Lt. Randy Paul on July 24, 2019 as confirmed on the Case System Data List where the report is listed as "closed" on the same date as Lt. Paul's approval of the report. (Jt. Ex. 5B @ 12) (U. Ex. #5) (S. Ex. #1 @ 58-59).

The Union asserts that "US Harris lied on direct examination that the language Pepenella ordered to be removed was 'never approved,' even though it had been, and even though he was the one who ordered it to be approved. (T2 @ 84). US Harris failed to provide the approved report in discovery to conceal the fact that the report was approved." (T2 @ 78-85).

Admission No. 2

MCSO Admits that Abode Wrote a Complete, Factual, and Honest Report and that Supervisors were Not Authorized to Order Alterations to it or to Preclude Abode from Including in the Report that he was Ordered to Alter His Report and the Name of the Supervisor Who Issued Such Order.

- 8) Both US Harris and Detective Anderson agreed that when an officer writes a report and signs it, it becomes an official government record.
- 9) US Harris testified that police reports must be factual and contain what an officer observed and the actions the officer took. Also, the report must be honest, clear and comprehensive. (T2 @ 26-28).
- 10) US Harris testified that the officer who made the observations and took the actions should be the one who writes the report, in his/her own words, and that someone else should not write it for them. (T2 @ 29).
- 11) US Harris testified that the rules reflect that in writing a report, the investigator or Sheriff's officer should assume that the reader knows absolutely nothing about the case other than what he will read in the report. (T2 @ 92-93).
- 12) US Harris testified that if an officer writes information in his report that he didn't obtain himself and someone else reads the record without any background, a person could be misled into thinking that the officer had personal knowledge of all the information in the report. (T2 @ 29).

US Harris also admitted that such a report would be inaccurate. (T2 @ 91-92).

- 13) US Harris testified that there is no rule or regulation that precludes an officer from including in a report that he was ordered to write something in the report. (T2 @ 22). Prior reports written by Abode included language of an order given, the superior who gave it, and what the order was. Abode was never disciplined for doing so. (U. Exs. 3 and 4) (T2 @ 100). Other reports with similar language have been approved by Mata. (U. Ex. #2). Further, Mata testified that his union advised him to include in a report he was ordered to

- write that he was given the order to write the report. (T2 @ 146-147).
- 14) US Harris testified that there is no rule or regulation or SOP authorizing a superior officer to order an officer to alter an official police report. (T2 @ 33). Investigator Anderson concurred. (T2 @ 222-223).
 - 15) US Harris testified that there is no rule, regulation or SOP that authorizes a superior officer to order an officer to remove or omit factual information from his report. Investigator Anderson concurred. (T2 @ 34, 217).
 - 16) US Harris testified that Abode's original report was factualized, truthful and based on his personal observations. (T2 @ 34-35, 37).
 - 17) US Harris testified that superior officers are accountable for the orders they issue. US Harris further testified that there is no rule, regulation or SOP authorizing a supervisor to conceal his identity in a report with regard to an order he issued. (T2 @ 49-50).
 - 18) US Harris testified that Captain Pepenella's ordered Abode to add the name of the driver who caused the accident to his report even though he didn't obtain that information himself. US Harris admitted that by doing so, someone reading the report would assume that Abode had personal knowledge of that information. (T2 @ 36-37, 55-56).
 - 19) Pepenella ordered Abode to remove the entire sentence after the four asterisks on the first page of his report where starting with, "**** Advised per Captain Pepenella.." (T2@20-21); (S. Ex. #-1). He also ordered Abode to remove from page 2 the sentence beginning with, "****03/22/19 per Captain Pepenella..." as well as the sentence underneath beginning with, "Was told by Sergeant Burgess..." (T2 @ 168-169) (S. Ex. #1).
 - 20) US Harris testified that Pepenella wanted any indication of his orders to Mata and Burgess removed from the report. (T2 @ 88).
 - 21) US Harris testified that this matter was the first time he could recall where a captain wanted his name removed from a report. (T2 @ 53).
 - 22) US Harris testified that when Abode included the order given to change his report, and who issued it, that Mata approved the report. (T2 @ 73-74).

- 23) US Harris testified that there is no rule or regulation stating that an officer must retrieve an auto accident (report) for an accident he witnessed, off-duty and place that information in his report. (T2 @ 37-38).
- 24) US Harris testified that it didn't matter what language Pepenella ordered removed; it only mattered that Pepenella gave an order to remove language and that Abode didn't follow it. (T2 @ 96). When asked why the IA Investigator's report determined Pepenella's order to be lawful, US Harris testified, "Because it wasn't unlawful." (T2 @ 98).
- 25) US Harris testified that police reports are scrutinized in both criminal and civil cases.
- 26) US Harris testified that officers' reports have several purposes, one of which is to refresh an officer's recollection in the event he has to testify in court several months or years after this incident occurred. (T2 @ 28).

Admission No. 3

The IA Investigator Admitted to Violating the Attorney General Guidelines on Internal Affairs By Failing to Include Mitigating Factors in his Report and By Coaching/Assisting Captain Pepenella with Leading Questions Containing Answers Adverse to Abode

- 27) Investigator Anderson, the IA Investigator who conducted the investigation, admitted that the Attorney General Guidelines applied to the MCSO and that he was trained in said Guidelines. (T2 @ 172). He also admitted that the 2017 Guidelines were in effect at the time of his investigation of Abode.
- 28) Anderson admitted that he was trained not to ask leading questions when interviewing witnesses but to ask "openminded" questions. (T2 @ 175).
- 29) Anderson admitted that an IA investigation is to be fair, unbiased and objective.
- 30) Anderson admitted that the IA investigator is supposed to obtain all evidence, whether exculpatory or non-exculpatory. (T2 @ 175).
- 31) Anderson admitted that the first part of his investigative report should be an objective accounting of all relevant information

- disclosed, including statements, documents and other evidence. (T2 @ 205).
- 32) Anderson did not obtain Abode's training records with respect to operations reports with respect to off-duty matters outside his jurisdiction. (T2 @ 181-182).
 - 33) Anderson testified that there is no rule requiring Abode to leave a report on an off-duty incident or any rule or regulation that states what information should be included in an operations report.
 - 34) Anderson testified that he did not determine whether there were any mitigating circumstances. (T2 @ 193).
 - 35) Anderson admitted that Abode's concerns about becoming a Brady Officer by writing an untruthful report was the essence of Brady. (T2 @ 197).
 - 36) Anderson admitted that an officer could be found to have falsified or lied by omission in a police report and that falsification of a report is a criminal offense. (T2@ 197).
 - 37) Anderson did not attempt to ascertain whether there was any policy regarding what information needed to be included in an operations report, or what type of instruction Abode received in the police academy as to report writing prior to concluding his investigation. (T2 @ 198-199).
 - 38) Anderson testified that he had an obligation to report mitigating or exculpatory information in his report. (T2 @ 207).
 - 39) Anderson did not include in his report that two supervisors, Mata and Burgess, found nothing wrong with Abode's reports. (T2 @ 208-209).
 - 40) Anderson did not include in his report that Burgess sided with Abode's point of view. (T2 @ 209).
 - 41) Anderson did not include in his report that Burgess testified that the captain was irritated that his name was in the report. (T2 @ 209).
 - 42) Anderson did not include in his report that when objecting to altering his report as Pepenella ordered, Abode wasn't rude, but was tactful and polite, never raising his voice. (T2 @ 209).

- 43) Anderson did not include in his report that Burgess was an IA officer for years, and that she testified that she reviewed Abode's report and found it to be sound and accurate and approved it. (T2 @ 210).
- 44) Anderson did not include in his report that Burgess testified that there was nothing inaccurate about Abode's report based on her training. (T2 @ 210).
- 45) Anderson did not include in his report that Burgess testified that it was Pepenella's "pet peeve" to have his name in reports. (T2 @ 211) (Jt. Ex. #5B).
- 46) Anderson did not include in his report Mata's testimony that it was subjective as to whether the information Pepenella wanted removed was "necessary." (T2 @ 212).
- 47) Anderson did not include in his report that Mata testified that Abode was respectful in disagreeing to the orders, T2:213:5-8, even though he admitted that the way Abode presented himself might be mitigating. (T2 @ 216-217).
- 48) Anderson did not include in his report that Mata testified that he found nothing wrong with Abode's reports. (T2 @ 213).
- 49) Anderson conducted a second internal affairs interview of Abode, asking identical questions as the first. (Jt. Ex. #5A).
- 50) During Abode's IA interview, Anderson repeatedly asked Abode what County ordinance he was relying on to support his position that the Captain could not order him to alter his report. Abode stated he didn't know of an ordinance. Anderson later admitted during the grievance hearing that the sheriff's officers are not trained in the County ordinances. (T2 @ 231).
- 51) While testifying that an IA officer should not ask witnesses leading questions, almost every question Anderson asked of Pepenella was leading and/or suggesting an answer that was adverse to Abode. (T2 @ 234-236). When asked why he deviated from procedure by using leading questions for a majority of the interview, Anderson responded, "I don't have an answer." (T2 @ 16-20).

The MCSO violated various provisions of the Parties' CBA by imposing unjust discipline when Abode refused to obey an illegal order to alter his report

According to the Union, Captain Pepenella's order to Abode to alter his report was "unlawful as it would cause his report to falsely state what he observed and what actions he took by adding information for which he had no first-hand knowledge."

Referring to Undersheriff Harris' testimony that an officer's report is "required to be honest, complete, factual, written by the officer in his/her own words, setting forth what actions he/she took and what observations he/she made, and based on the assumption that the reader knows absolutely nothing about the case other than what he/she reads in the report", the Union argued that the Captain's order would have caused Abode to undermine the integrity of his report. (See, Admission No. 2). In Asbury Park v. Dept of Civil Service, 17 N.J. 419 (1955), the Court held that "a finding of misconduct of a police officer 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 as an upholder of that which is morally and legally correct.'"

The Union asserts that it is undisputed that "Abode's first report was an honest and factual accounting of the actions he took and the observations he made at the scene." Once he signed the report it became an official government record. "Abode's two supervisors admitted that they approved the report and saw nothing wrong with it." The County's admission that Abode was not required by any MCSO rule or regulation to write a report about the off-duty incident in the first instance as well as there was no rule or regulation setting forth what should

be included in the Operations Report, negates Captain Pepenella's testimony that there was information "missing" from the report.

The Union argues that "Pepenella's order to Abode to add information obtained by another police department, and incorporate into his own, without qualification, is an order that would make Abode's report appear as if he observed more than he did and/or obtain information first-hand, which he didn't. The order thus would be result in a misrepresentation of what occurred and, therefore, constitute falsification of an official government record. It is, thus, an illegal order."

Abode's contention is credited that compliance with Pepenella's order would have the effect of altering the chronology he placed in the report, namely "when he was given an order, by whom, and what information he was ordered to insert in the report." As such, this order was unlawful. Although Abode wrote his report on the date of the accident, March 15, 2019, the changes that he was ordered to make in his report occurred over the course of the following week. By including in his report not only the date when such changes were ordered but also who ordered them and what changes were ordered to be made, Abode retained the accuracy of his report.

Abode's rationale for including the foregoing information for clarification purposes would enable him in the future to explain to a prosecutor if he testified years from now that he had changed his original report. ("MCSO stated that the original report is not retained by the MCSO"). MCSO admitted that there is no rule or regulation precluding Abode from including the additional information.

By ordering Abode to exclude the information that changed the chronology of his report, particularly the identity of the superior officer who gave the order, the Captain was making the report “incomplete and false by omission.” Alluding to the testimony of Sgt. Burgess, who had been an IA Officer for years, the Union argues that “the chronology is necessary as otherwise, a reader will be falsely led to believe that the report was written in one day, on the date of the accident. False reports are unlawful; as such, Pepenella’s order was unlawful.” Pursuant to MCSO rule 3:3.5, Abode was not required to comply with an unlawful order.

Pepenella’s order was unlawful because it would cause Abode to falsely represent what he observed and what actions he took. “The MCSO admits that reports must be written by the officer and must state the actions be taken and observations made in his own words.” Since MCSO admits that there is no rule or regulation governing the type of information to be included in an Operations Report for an off-duty incident and it is undisputed that Abode’s original report was accurate and truthful ordering Abode to obtain information he did not verify as truthful was facilitating the production of a false report. Although Abode did not obtain certain details about the accident or the driver of the car, he was not required by any rule or regulation to obtain this information. Pepenella’s order that he insert hearsay information into his report would cause Abode to misrepresent facts and convert an accurate government report into a false report. “Pursuant to MCSO’s regulations, Abode was not required to follow Pepenella’s order.”

Pepenella had no authority to order Abode to alter an official government record so as to conceal his order to alter the report.

In the absence of a rule or regulation authorizing a superior officer to order the alteration of a government document or to conceal his name from a report memorializing an order he gave, Abode properly refused to follow Pepenella's illegal order. Since MCSO admits that superior officers are responsible for their orders and they cannot conceal the fact they issued an order, Pepenella's order, which would have had the effect of inaccurately accounting for the revisions he ordered Abode to make, constituted "falsification by omission – a criminal offense." Accordingly, "Pepenella's order to conceal true facts in Abode's reports, including the fact that he was the one who issued the order to do so, is unlawful."

The MCSO has no credibility as Undersheriff Kevin Harris lied when he testified that Abode's Final Report was never approved

Alluding to the testimony of US Harris where he states that the Operations Report of Officer Abode was never approved the Union challenges his veracity. (Tr. 1 @ 58),

Abode's production of his report, signed off by Lt. Paul on July 24, 2019, combined with US Harris' failure to produce this report during discovery, leads the Union to conclude that he lied. It further considers unpersuasive US Harris' "efforts at rehabilitating his testimony, by stating the report was only approved to clean the system and, therefore, was not really approved..."

MCSO violated the AG Guidelines on Internal Affairs by conducting an unfair, biased investigation

The Union reiterates that the New Jersey Attorney General Guidelines on Internal Affairs ("Guidelines") are applicable to the MCSO. The Guidelines, inter

alia, require that “internal affairs investigations must be unbiased, impartial and objective.” (U. Ex. #6) (Admission No. 3).

Despite the Guidelines, IA Investigator Anderson “failed to obtain all mitigating factors” such as the fact that Supervisors Mata and Burgess had reviewed Abode’s report, approved it as written, and found nothing wrong. Sgt. Burgess, who formerly worked at IA, testified that omitting the chronology of the revisions would give the reader “the false impression that the report as revised, was done in one day on the date of the accident.”

Investigator Anderson also did not review Abode’s training records to ascertain whether he had received any training in report writing. “Anderson further failed to include in his report that there was no rule or regulation authorizing a supervisor to order a subordinate to change an official government record by removing factual and accurate information, or to order concealment of the fact that an order was given and the identity of the supervisor who gave it.”

The Union also discerns bias in the manner Anderson conducted his respective interviews of Peppenella and Abode. During Peppenella’s interview, he utilized leading questions instead of open-ended questions. “By contrast, Anderson interviewed Abode twice, only to harass him at the second interview where he repeated the same questions from the first.” He also inferred that Abode should have been able to cite a County ordinance, despite the fact that officers are not trained in County ordinances. It concludes that the “IA Investigation was a sham with a predetermined outcome.”

Based upon all statutes, regulations, and precedents cited, as well as admissions by the County, the Union concludes that “Abode was charged and disciplined unjustly and contrary to precedent requiring honesty from law enforcement officers, and, therefore, in violation of the parties’ contract provisions as noted by Grievant.”

DISCUSSION

Considering the evidence in its entirety, the Arbitrator is not persuaded that the County had just cause to suspend the Grievant, Officer Michael Abode, for five (5) days based upon a charge that he failed to follow a lawful order from a captain in violation of N.J.A.C. 4A:2-2.3(a)2. The charge of insubordination was not proven by a preponderance of the credible evidence. The order issued by Captain Pepenella was unlawful in that it would have caused the Grievant to alter a factual police report he had prepared based upon his observations at the scene of an accident he witnessed to add information that had been derived from an external source, without identifying the source or the superior officer who gave the order.

It is undisputed that on March 15, 2019, Officer Abode, while on his way to work, witnessed a car accident in New Brunswick, NJ. A female driver had collided with three parked vehicles. Abode notified MCSO dispatch that he was stopped at the accident. Although the County acknowledges that Abode was not required by any MCSO rule or regulation to write a report regarding the off-duty incident and that neither of his immediate supervisors at the time, Sergeant

Burgess and Sergeant Mata, ordered him to write a report, Captain Pepenella through Sergeant Williamson conveyed an order that he write a report.

It is further undisputed that the draft Operations Report Abode submitted on March 15, 2019 was factually accurate and contained the requisite information concerning what Abode observed and the actions he took. Abode described the accident in the narrative section of his report, including his observation that the accident was caused when the driver at high speed lost control of her vehicle, the ensuing damage to three parked cars, and his notification to dispatch to send an ambulance. Abode concluded his initial draft report by stating “[t]here is no further information as the driver did not have any ID on her and we did not have her name at that point.” Abode had also indicated that the driver spoke only Spanish.

Although Sgt. Mata approved and signed Abode’s report as originally written, Abode was informed by Sgt. Mata that Captain Pepenella, upon his review, wanted additional information included in the report. Specifically, the license plate of the Dodge pickup he had called in to dispatch and the registration of the car. This additional information was preceded by an asterisk that read “Advised as per Captain Pepenella the report needs to be modified to add more information was relayed to me by Sgt. Mata.”

Once Sgt. Mata approved the revised report, Pepenella next ordered Mata or Burgess to have Abode add more information to his report, including information on the driver, all of the vehicles involved, and information provided by the New Brunswick Police Department. Abode resisted including information

obtained from the New Brunswick PD report on the ground that he could not incorporate information into his report that he had not actually witnessed or had first-hand knowledge.

Pursuant to Pepenella's order that Abode supplement his report with the New Brunswick police report and Pepenella's refusal to allow Abode to add the New Brunswick report simply as an attachment, Abode, after a few days, complied with the order to change his report. However, he prefaced the additional information with the following asterisked statement:

**** 03/22/2019 per Captain Pepenella revise report to reflect information that was listed on the police report. Was told by Sergeant Burgess that as per Captain Pepenella I needed to call New Brunswick and get the police report to that accident that I witnessed**** (S. Ex. #1 @ 22-23).

When Abode refused to omit the name of Captain Pepenella and Sergeants Burgess and Mata from his revised reports, an impasse ensued which led to the charge of insubordination. Abode's response to Burgess when she informed him of Pepenella's order to remove the names summarizes his position as follows:

I told her that I didn't witness the report. I didn't witness the report. I was being ordered to write something in my report by the sergeant or the captain that I didn't witness. I needed to document their name in there so later on if I ever had to testify why that was in my report, I can always say that I was ordered to by the captain or by the sergeant. My report initially is true actually to what I witnessed. They were asking me to do something which I didn't find to be legal by adding someone else's report that I didn't even witness and take that report into my own. (T3 @ 30).

In the Arbitrator's opinion, since the report written by Abode was initially accurate and provided all of the factual information that he could attest to based

upon his observations at the scene, and given the absence of any rule or regulation that delineated the information he had to include in his report, Captain Pepenella's order that Abode alter his report to include information obtained from sources other than Abode's observations was unlawful. In crediting Undersheriff Harris' testimony that police reports must be factual and contain what an officer observed and the actions the officer took, it can be inferred that the information Captain Pepenella ordered Abode to include in his report was improper and unlawful.

In this regard, it is noteworthy that both US Harris and Sgt. Burgess agreed that if an officer includes information in his report that s(he) did not obtain herself/himself, it could mislead a person reading the report into thinking that the officer had personal knowledge of the entirety of the report's contents. Were Abode to testify in a subsequent proceeding, he would be accountable for all of the information set forth in his report and his credibility determined by the truthfulness of the report.

Moreover, as Sgt. Burgess testified, the effect of adding information from the New Brunswick Police Department to his report, which Abode did not obtain on the scene, would change the chronology of his report and make it appear, without clarification, that all of the information was obtained on March 15, 2019 – the date of his report. By adding the asterisk notation, Abode not only ensured the continuing accuracy of his report but also identified the date (3/22/2019) when he was ordered to make revisions and the supervisor officer(s) who gave the orders.

Contrary to the position of the County that the names of the officers who ordered him to change his report was not “material” because they had no role in the accident Abode had witnessed, the Arbitrator maintains that the order requiring Abode to alter his report to exclude their names was unlawful. By acceding to Pepenella’s order to add information from the New Brunswick Police Department without attribution of the information source, the officer who gave the order or the revised chronology of the events, Abode’s report would have become false by omission. Although the information Pepenella ordered Abode to include in his report was reasonable to make it complete, and would be useful to those involve in the accident who accessed the report, it was not reasonable or lawful that he order Abode to exclude Pepenella’s name and that of the other superior officers who had caused his report to be altered. To ensure that an official government document remained accurate once he signed it, Abode reasonably refused to include hearsay information beyond his personal knowledge pursuant to the Captain’s order.

Whereas the County has argued that since “no one asked him to change what he wrote in his Report as to what he witnessed,” the Captain’s orders to remove the names was “‘lawful’ and compliance would not have compelled Abode to ‘falsify’ his report and to lie if he were called to testify about his observation of the accident,” in the Arbitrator’s opinion, unless Abode had distinguished the information he obtained as the result of his own observations at the scene from information from other sources he was ordered to include, he would have falsified a police document. Given US Harris’ testimony that there is

no MCSO rule or regulation that precludes an officer from including in a report that he was ordered to write something in the report, Abode acted within the parameters of his prior conduct in writing reports, which included the language of the order given and the superior officer who gave it. (U. Exs. #3, #4).

Since there is no MCSO rule or regulation authorizing Pepenella to order Abode to alter an official police report, his order to Abode to remove his name and that of the sergeants was arbitrary and constituted an order that Abode did not have to obey. US Harris' testimony that Pepenella's order was lawful because it wasn't unlawful reinforces the arbitrariness of the order that Sgt. Burgess testified was the Captain's "pet peeve."

Clearly, Rule Regulation 3:3.5 of the Sheriff's office allows an officer to disobey an unlawful order. Since superior officers are accountable for the orders that they issue, Captain Pepenella knew or should have known that there was no rule, regulation or SOP which permitted him to either order Abode to include in his report information regarding which he had no first-hand knowledge or order Abode to conceal his identity from the report as the superior officer who gave the order.

Inasmuch as Sgt. Mata and Sgt. Burgess discerned no problems with Abode's original report, and both sergeants approved it, Pepenella's order that Abode first add information he hadn't observed and second omit the names of the officers who had given the orders was unlawful. Since Sgt. Burgess, who had worked several years for IA, found nothing inaccurate in Abode's original

draft report based on her training, the omissions ordered by Pepenella would have made the report “incomplete and false by omission.”

The County has focused on Abode’s purportedly erroneous reliance on the Brady rule or Brady law as set forth in the U.S. Supreme Court’s decision in Brady v. Maryland, supra. After reviewing the criteria required to invoke the Brady rule, the County contends that “there is nothing material or exculpatory about the three names that Captain Pepenella ordered Officer Abode to remove from his Report about the motor vehicle accident that Abode personally witnessed.”

Although the Arbitrator agrees with the County in finding that the last two sentences in Abode’s report would have satisfied the Captain’s order, particularly “that the New Brunswick Police Department has furnished upon the request made by this officer in compliance with direct orders from my chain of command,” the Arbitrator does not consider the refusal of Abode to remove the names of the superior officers from his report constituted insubordination. Including the names of the superior officers who issued the orders increased the accuracy and specificity of the report, notwithstanding Pepenella’s unwarranted objection to his inclusion.

In addition to the requirement that the prosecution is required to disclose to the defense any material that is exculpatory, the Brady rule also stands for the proposition that this evidence should include the prior discipline of an officer for “truthfulness” and “honesty.” Abode understood the Brady rule as stigmatizing an officer who had been found to be dishonest in his/her reports or prior

testimony. Detective Anderson largely agreed with Abode in his testimony that the “Brady list” was comprised of such officers who “you wouldn’t be put on the stand to testify.”

Although the Grievant’s reliance on the Brady rule was not accurate in all of its particulars, his refusal to exclude the names of the Captain and Sergeants was predicated on a legitimate concern that his report would become less accurate and probably false if he complied with the Captain’s order.

Whereas the County has argued that the removal of the names wouldn’t matter if Abode was called to testify in the future because “even if at some future trial he did not remember any of the names in his chain of command who were involved in the removal order...he witnessed the three vehicles damaged,” Abode’s objective in avoiding even the appearance that he had altered his report by reducing its specificity cannot reasonably be construed as insubordination because Pepenella had no authority to issue the order in the first place and he never explained his reason for the order. Both US Harris and Investigator Anderson testified that there is no rule, regulation or SOP that authorizes a superior officer to remove or omit factual information.

The County has noted that Abode, rather than refuse to obey the order, had the option under 3:3.6 Obedience to Unjust or Improper Orders to first obey and then file an appeal. However, when called to the Sheriff’s office on March 27, 2019, there is no evidence that he was apprised of the obey/appeal option but rather was told to change his report or be charged with insubordination. There is also no evidence that Abode was well versed and/or comprehensively

trained in the rules and regulations of the Sheriff's officer to the extent that he would be expected to know each rule.

The County, which has the burden of proof in the insubordination charge, has focused extensively on invalidating the Grievant's defenses. In the Arbitrator's opinion, the County's burden is not diminished by finding fault in some of the Grievant's defenses so long as the County, on the one hand, has not proven the insubordination charge by preponderant evidence and, on the other hand, the Grievant's defenses for refusing the Captain's order largely remain intact.

For example, the County has argued that Abode got "bad advice" from his Labor Council representative and/or his Labor Counsel when he inquired about compliance with the order. Insofar as that advice concerned the information Abode was required to put in his report, it was essentially accurate. That is, the order to add information he did not actually observe would, as Abode wrote in his memorandum, be tantamount to "falsifying an official police document as to the chain of events that occurred." Having found that Abode correctly refused to comply with an illegal order to add information he didn't observe without identifying the source of the information and the identity of the superior officer, the instant case is distinguishable from the Matter of Santiago, supra, where the officer was ultimately found guilty and penalized for following unsound legal advice.

Clearly, some aspects of the Grievant's defense have been deemed belated or unsubstantiated. Abode's claim that his report writing training at the

Academy had stressed the necessity that these reports should be “chronological and true” was not rebutted by the County. To the extent Abode relied on this report writing training in refusing to alter his report by changing the chronology of the events he recorded on March 15, 2019, his training recollection was appropriate and unrebutted. Although Abode did not allude to his Academy training during his IA interviews or when the Captain’s office on March 27, 2019 for his “final chance” to comply does not, in the Arbitrator’s opinion, negate the credibility of his testimony.

The County has further argued that the Grievant’s inability to produce the “prior inconsistent general order or standing order” as a defense to his insubordination charge renders it incredulous. Whereas Abode recalled that the order may have been issued at a roll call in 2014, 2015 or 2016, the testimony of US Harris that he was not aware of such an order supports the County’s position that Abode may have misconstrued what he heard. Given Abode’s inability to produce any rule, regulation or SOP consistent with his roll call recollection and his failure to abide by Rule and Regulation 3:3.7, with respect to “conflicting orders,” the County reasonably rejected this line of defense. Abode’s deviation from R&R 3:3.7 prevented his superior officers from either countermanding or clarifying the prior inconsistent general order or standing order.

While the Arbitrator is inclined to invalidate the Grievant’s claim that a prior inconsistent general order or standing order was in effect on March 15, 2019 that supported his refusal to obey the Captain’s order, the Arbitrator reiterates that the

sufficiency of the Grievant's defenses does not shift the burden of proof to Abode.

In the final analysis, the County had to show that the Captain was authorized to issue an order requiring Abode to change his sequential and factual report to add information he didn't observe, to change the chronology of the events as he observed them so that it would appear that all information was obtain on March 15, 2019, and to order the omission of the Captain's name and this sergeant's as the superior officers who ordered the alterations in an official government document for whose accuracy Abode would be ultimately responsible were he to testify in a future proceeding. Given the County's inability to adequately address these issues, the Arbitrator has concluded that the Captain's order was illegal and, as a result, Abode had no obligation to comply.

Assuming arguendo that Abode had been found culpable of deliberately violating a legal order issued by the Captain, there is substantial evidence that would have mitigated the penalty imposed. The Union established that the Internal Affairs investigation conducted by Detective Anderson failed to adhere to the Attorney General's Guidelines in that it failed to consider mitigating factors was biased in its questioning of Officer Abode and Captain Pepenella and omitted exculpatory evidence that would have been beneficial to Abode.

In conducting a skewed investigation of the incident, Detective Anderson did not ascertain whether there were policy or procedures governing what information Abode should have included in his police report, the type of instruction Abode received at the Academy with respect to report writing or

whether there was a Sheriff's office rule or regulation that permitted a superior officer to order the removal of his name as the ordering officer from an official report that was otherwise accurate and complete. Additional bias can be discerned in the fact that Anderson omitted from his report that Sgt. Mata testified it was "subjective" that Peppenella ordered his name be removed as "unnecessary" information that Sgt. Burgess, who had previously worked for IA, agreed with and approved Abode's report as accurate and that neither Mata nor Burgess, who read and approved the report, found anything wrong with it.

Further evidence of bias in the investigation was evident in the fact that Anderson asked Peppenella predominantly leading questions while asking Abode identical questions during his second interview as well as asking him about the County ordinance he relied upon in refusing the Captain's order when knowledge of County ordinances was not included in his training.

There is also evidence that the County was not forthcoming during discovery when US Harris testified that Abode's final report was never approved when in fact Abode produced his final report signed off by Lt. Randy Paul on July 24, 2019. By testifying that the report was only approved to clear the system as distinguished from being approved for official purposes, US Harris provided misleading testimony in an apparent attempt to undermine the credibility of Abode. The fact Abode produced the original report that US Harris testified was no longer available due to the "previous change is just written over" casts doubt on his credibility.

Conclusion

In the Arbitrator's opinion, the County failed to sustain its burden of proof by a preponderance of the evidence. The County, having admitted that an officer's police report should be an honest and factual account of the observations he made and the actions he took consistent with the chronology of the events, was unable to produce any basis for altering Abode's report by adding information he did not acquire during his personal observations or omitting information which would detract from the accuracy of the report, specifically the names of the superior officers who ordered him to add the so-called "missing" information or to exclude the so-called "unnecessary" information.

Compliance with Captain Pepenella's order would have had the effect of misrepresenting what occurred in an official government document. Therefore, it was an illegal order which Abode did not have to obey. Absent evidence that Pepenella's order to conceal his name from a report memorializing an order he issued and that of the two sergeants were authorized by a Sheriff's office rule or regulation, the Arbitrator finds that Pepenella's order was illegal and Abode's compliance would constitute falsification by omission. As such, Abode was not obligated to comply with the unlawful order.

Remedy

As a remedy, the five (5) day suspension of Officer Abode for insubordination is dismissed. He shall be made whole and reimbursed for any wages deducted.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

- (1) The Middlesex County Sheriff's Office did not have just cause to suspend the Grievant, Officer Michael Abode, for five (5) days, without pay, for insubordination.
- (2) As a remedy, he shall be made whole, and reimbursed for the five (5) days deducted from his wages.

December 28, 2020

Robert T. Simmelkjaer
Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

On the 28th day of December, 2020 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument which is his Award.

December 28, 2020

Notary Public