

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

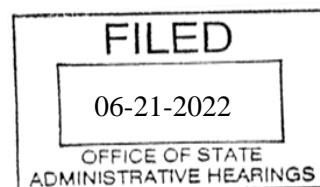
HOWARD DOWNER,
Petitioner,

v.

**GEORGIA PEACE OFFICER
STANDARDS AND TRAINING
COUNCIL,**
Respondent.

**Docket No.: 2219041
2219041-OSAH-POST-CERT-67-Boggs**

Agency Reference No.: 2219041



INITIAL DECISION¹

I. INTRODUCTION & PROCEDURAL HISTORY

Petitioner Howard Downer (“Petitioner”) is a peace officer certified under the Georgia Peace Officer Standards and Training Act (“the Act”). The Respondent, the Georgia Peace Officer Standards and Training Council (“Respondent” or “POST”), determined that the Petitioner’s certification should be revoked for alleged violations of the Act. The Petitioner requested a hearing, and the Respondent referred the Petitioner’s request to this Court on February 10, 2022. The Petitioner initially represented himself in this matter; on or around March 16, 2022, David Basil, Esq., submitted an Entry of Appearance as counsel for the Petitioner. Deborah Gore, Assistant Attorney General, represented the Respondent.

On February 10, 2022, the Respondent filed a motion for summary determination and brief in support thereof. The Petitioner filed a response to the Respondent’s motion on February 22, 2022.² On March 18, 2022, the Court issued an order granting summary determination in the Respondent’s favor as to the issue of whether the Petitioner violated the Act’s provision relating

¹ This Initial Decision is being issued on June 21, 2022, which is the first non-holiday business day following the 30th calendar day after the hearing. See O.C.G.A. §§ 1-3-1(3), 1-4-1, 50-13-41(c).

² The Petitioner was representing himself at the time he filed his response.

to unprofessional conduct, which is subsection (a)(6) of Code Section 35-8-7.1. In the same order, the Court denied summary determination as to the remaining three alleged violations of the Act, involving subsections (a)(6), (a)(8), and (a)(11) of Code Section 35-8-7.1.³

A hearing took place on May 20, 2022,⁴ to address the remaining allegations against the Petitioner, as well as whether revocation or a lesser sanction is appropriate. At the start of the hearing, counsel for POST announced the council would no longer proceed with the allegation involving subsection (a)(8) of Code Section 35-8-7.1.

Having considered the evidence presented at the hearing, the rulings in the order granting partial summary determination, and the parties' legal arguments, the Court hereby **AFFIRMS** the Respondent's decision.

II. FINDINGS OF FACT

Petitioner's History with South Fulton Police Department

1.

The Petitioner began working for the South Fulton Police Department ("SFPD") in February 2019. As a new officer, he completed both mandatory and field training, which included three months of training with the SFPD. This was his first law enforcement agency, though he previously had been in the academy in Decatur and had worked in corrections. (Testimony of Petitioner; Testimony of Maj. Gary Johnson.)

2.

During his time with the SFPD, the Petitioner faced several internal investigations and disciplinary actions. All these investigations were overseen by Major Gary Johnson, who at the

³ The Order Granting in Part and Denying in Part Respondent's Motion for Summary Determination is incorporated herein by reference.

⁴ By the time of the hearing, the Petitioner was represented by Attorney Basil.

time was a captain⁵ and served as commander of the SFPD's Office of Professional Standards, which oversees internal affairs, open records, and training. Major Johnson testified that 45 days are allowed for investigations into policy violations, though sometimes the time is extended. (Testimony of Maj. Gary Johnson.)

3.

The Petitioner's first disciplinary action constituted a verbal reprimand, based on an incident on or around March 21, 2020, when he failed to use his body-worn camera to record an interaction with a citizen. According to Major Johnson, an officer is required to turn on his camera whenever he interacts with a citizen.⁶ (Testimony of Maj. Gary Johnson; Ex. R-2.)

4.

On or around July 7, 2020, the Petitioner received his second disciplinary action, which was a written reprimand. Reports of this violation originated from a citizen complaint about a burglary call to which the Petitioner responded on or around May 17, 2020. The burglary victim was a law enforcement employee with another agency. While investigating, the Petitioner handled a window screen without wearing gloves, and he failed to set aside the screen so the technicians could process it for prints. This led to a contamination of the crime scene. According to the reprimand, written by Major Johnson and SFPD Chief Keith Meadows, the Petitioner had violated SFPD Rule and Regulation 1.19, "Unsatisfactory Performance," because he had "failed to properly handle evidence and notify supervision when another agency is involved." In addition to the written reprimand, the Petitioner was directed to attend Crime Scene Investigation ("CSI")

⁵ For consistency and to avoid confusion, this Court shall refer to Gary Johnson as "Major" throughout this Decision.

⁶ An SFPD officer's body-worn camera may be activated manually. The camera also activates automatically when an officer's vehicle is in emergency mode; when the officer gets out of the vehicle; when the officer starts to struggle or run; and when the officer is lying down. (Testimony of Maj. Gary Johnson.)

training. While the Petitioner had the option to not sign the written reprimand, he did so. At the instant hearing, the Petitioner conceded he had broken policy by replacing the screen in the window without using gloves.⁷ However, he contended he was never offered CSI training after the reprimand, and no one ever instructed him on how he should have handled the screen differently to preserve fingerprints. (Testimony of Petitioner; Testimony of Maj. Gary Johnson; Ex. R-3.)

5.

On or around August 11, 2020, the Petitioner received a third disciplinary action, which was a written reprimand. The incident arose when the Petitioner responded to a call about a woman threatening to hurt herself on or around May 17, 2020. The Petitioner testified the woman's father agreed at that time to take the woman to her sister's place, and that paramedics refused to transport the woman. The father also asked to show the Petitioner a video, in which the daughter stated she was going to harm herself. Eventually, the father called the deputy supervisor. In the written reprimand, Major Johnson and Chief Meadows stated the following to the Petitioner:

While you were made aware of thoughts of self-harm, you failed to take or notify the medical personnel of the threats. You only attempted to separate the disputing family members, which also required a Domestic Violence Dispute report, which you failed to obtain. It wasn't until supervision intervened and directed you to complete the hospital transport and incident report. [*sic*]

The reprimand cited the Petitioner for violating SFPD Rules and Regulations 1.19, "Unsatisfactory Performance"; 1.42, "Ill or Injured Persons"; and 1.60.A., "Duty to Make Reports." The Petitioner also was ordered to attend "an upcoming Crisis Intervention Training (CIT) course." While the Petitioner had the option to not sign the reprimand, he did so. At the hearing, the Petitioner

⁷ The Petitioner testified he had touched only the "rugged" edges of the screen's frame, and he "absolutely" knew he could not get fingerprints from that unsmooth surface. Later in his testimony, he contended he touched the screen to replace it in the window "as a reflex." (Testimony of Petitioner.) Regardless of the Petitioner's varying explanations, it remains undisputed he did violate policy during the burglary call that led to the written reprimand.

conceded that his failure to transport the daughter had violated policy.⁸ But he again asserted that, although he tried to get the ordered CIT training, he never got an opportunity to complete it. (Testimony of Petitioner; Testimony of Maj. Gary Johnson; Ex. R-4.)

6.

In addition to the reprimands described above, the Petitioner faced investigation into an incident involving a driver's license he had collected from a woman following her arrest.⁹ Though officers typically return licenses to individual within the day, the Petitioner had the license in his possession for at least three days before he turned it into the evidence custodian. The Petitioner testified he inadvertently kept the license and only discovered he still had it when he went to wash his uniform. He stated he attempted to contact the woman by phone and also went by her residence to return it, because it would take the woman longer to retrieve the license from evidentiary custody and he wanted to be helpful. At the hearing, Major Johnson⁸ testified that, given the number of days the Petitioner had the license in his possession, the proper procedure would have been to turn in the license to the evidence custodian. Major Johnson also testified the investigation had revealed the Petitioner had shared the driver's license information with another citizen. However, Major Johnson conceded the investigation had been "ongoing" and "pending" prior to the Petitioner's termination, and he had not spoken to the Petitioner about the incident. (Testimony of Petitioner; Testimony of Maj. Gary Johnson.)

⁸ The Petitioner told the Court the father had a "vendetta" against the City of South Fulton, and that the disciplinary action had been "pushed" by his superior. (Testimony of Petitioner.) Presumably, he offered this testimony to explain how the matter in question resulted in disciplinary action. Nonetheless, it remains undisputed the Petitioner violated policy during the incident.

⁹ It is not clear from the record when the underlying incident with the driver's license occurred. The Petitioner testified that, at the time of this incident, the fingerprints incident "came back up." This would suggest the driver's license incident occurred before his first written reprimand on July 7, 2020. (Testimony of Petitioner; Ex. R-3.)

Shooting Incident on August 1, 2020

7.

Besides the investigations described above, the Petitioner also faced an internal investigation for an incident on August 1, 2020, while he was working an off-duty security job at a plaza by Old National Highway (hereinafter “August 2020 incident”). The plaza included several clubs and had a parking lot for about 400 vehicles. One of the clubs, called South Beach, had six or seven security guards inside, with four or five working outside. According to the Petitioner, security was present at that location because of a history of shootings. (Testimony of Petitioner.)

8.

In the early morning hours of August 1, the Petitioner saw an individual (hereinafter “the suspect”) get kicked out of a club. The Petitioner approached him, initially to de-escalate the situation, but the suspect ran toward his car. The Petitioner testified he believed the suspect “was angry enough to do damage,” and he thought the suspect may have had something in his car. The suspect proceeded to drive recklessly through the parking lot at 60 miles per hour; the Petitioner described him as putting “everyone in danger.” The Petitioner and another officer working security, Sergeant Carter, told the suspect to stop, but the sergeant ended up being assaulted by the vehicle. (Testimony of Petitioner; Testimony of Maj. Gary Johnson; see also Exs. R-1, R-5.)

9.

After he lost sight of the vehicle, the Petitioner heard 16 to 17 shots fired. However, he could not determine whether the suspect was the shooter. He proceeded to check whether anyone had been hurt or if property had been damaged, and he also assisted people attempting to leave the parking lot. He described the scene as “a very serious situation” that remained “chaotic” even 20 to 30 minutes after the shooting. (Testimony of Petitioner.)

10.

Shortly after he heard the shots, he ran into a security guard who pointed out a shell casing to him. As previously determined by this Court, the following exchange between the Petitioner and the security guard was captured on the Petitioner's body-worn camera footage:

Security guard: Here's one. If you ain't gone worry about, I ain't gone worry about it.

Petitioner: "I ain't worried, honestly –"

Security guard: I'ma pick it up. Don't even worry about it, I ain't seen shit, and you ain't either.

(Testimony of Petitioner; Case File, Order Granting in Part and Denying in Part Respondent's Motion for Summary Determination, Findings of Fact, ¶ 7.)

11.

The Petitioner conceded at the hearing that, after this exchange, he turned off his body-worn camera. He also conceded he never picked up or secured the shell casing himself. However, he testified that he told the security guard, while the camera was turning off and still recording, to leave the shell casing where it was. This was the first time the Petitioner had ever seen the security guard, and he was not sure where the guard went after leaving to look for additional property damage or injuries. (Testimony of Petitioner.)

12.

On-duty officers eventually arrived on the scene, and the Petitioner remained there until approximately 3 a.m. (Testimony of Petitioner.)

Investigation into Shooting Incident on August 1, 2020

13.

Following the August 2020 incident, the SFPD received a complaint about an officer firing his gun at the scene. Consequently, the department initiated an internal-affairs investigation to determine whether any of its officers on the scene had violated policies, rules, or general orders. (Testimony of Maj. Gary Johnson; Ex. R-1.)

14.

As part of this investigation, the Petitioner was advised to write a statement about the incident. In a memorandum dated August 5, 2020, with the subject line “Shooting at 5495 parking lot,” the Petitioner gave the following account:

On 7/31/2020¹⁰ at approximately 0130 hours I was on a part time job securing the parking lot of 5495 Old National Hwy when a black male suspect who was escorted out of South Beach by security became aggressive and started rushing toward his vehicle.

I was unable to intersect the subject before he got into his vehicle, and that’s when he started to drive through the parking lot recklessly going about 60 miles an hour.

A few minutes later when the subject was out of my sight, I heard multiple shots rang out possible [*sic*] in the air. I checked the area and found no damage to property or persons injured.

At no point in time did I discharge my firearm at the suspect.

The memorandum made no mention about the Petitioner and/or the security guard locating a shell casing. (Testimony of Petitioner; Ex. R-5.)

¹⁰ As noted previously by this Court, the date “07/31/2020” appears to be a typo. The evidence overwhelmingly indicates the incident occurred in the early morning hours of August 1, 2020. (See Case File, Order Granting in Part and Denying in Part Respondent’s Motion for Summary Determination, Findings of Fact, fn. 3.)

15.

On August 6, 2020, the Petitioner met with a detective named Jackson to be interviewed as part of the internal investigation. Before the interview began, the Petitioner signed an “Awareness Statement: Truthfulness,” in which he confirmed he was aware he would be dismissed for violating SFPD’s rules and regulations requiring him to “tell the truth” and “not willfully or recklessly depart from the truth” in an official police investigation. The Petitioner also signed a “Garrity Warning,” confirming he understood he was being ordered to answer questions in an administrative proceeding, and that the questions were related to determining his fitness for duty relative to the incident in question. (Testimony of Petitioner; Exs. R-6, R-7, R-12.)

16.

During the interview with Detective Jackson, the Petitioner described the suspect speeding recklessly through the parking lot, as well as hearing shots fired. He confirmed he did not fire his own weapon, and to his knowledge no other officer fired. The following exchange then ensued:

Det. Jackson: Did you find any—any crime scene, and [*sic*] shell casings?

Petitioner: There was a shell casing that was located—I believe it was located by the security guard, OK. And that was pretty much it. I believe Gibbons was the one that did the report. And the other officers that was [*sic*] on duty was the one that actually caught up him on Old National Highway from what I was hearing. Not sure, but I think that’s what it is. Caught up with him on Old National.

Det. Jackson: What did y’all do with the shell casing?

Petitioner: Um, that I do not know. Um, the shell casing was picked up by the security guard. I was walking towards back to the location, and that was pretty much it. So I assume—I assume Gibbons or whoever did the report got that information.

Det. Jackson: So you—you’re saying that the security guard—are you saying that the security guard picked the shell casing up?

Petitioner: Yeah. Um, as I was walking back, he was like, he got uh, he's got a casing over here. And I said, OK, where? He says, he got it. And I said, no problem.

Det. Jackson: Did you secure it?

Petitioner: No, I did not secure it. I was walking back towards the club to find out what's going on, if anybody was injured, or anything like that.

Det. Jackson: So you didn't get the shell casing?

Petitioner: No.

The Petitioner went on to state he did not know the security guard's name, though he assumed he worked for one of the nearby establishments. Detective Jackson concluded the interview by asking the Petitioner whether he wanted to say anything else about the incident, and the Petitioner responded there was nothing else. At no point during this interview did the Petitioner tell Detective Jackson he had instructed the security guard to leave the shell casing where it was. (Ex. R-12.)

17.

At some point during the investigation, the Petitioner was placed on administrative leave. Chief Meadows then had another employee put out a press release regarding the investigation into the Petitioner. (Testimony of Maj. Gary Johnson.)

18.

In completing the investigation into the August 2020 incident, internal affairs reviewed written and oral statements made by the officers involved; other investigative and supplemental reports; 911 radio calls from the officers; and video footage from officers' body-worn cameras and a dash camera. Major Johnson also sent an investigator to the scene to see who was employed there that night. However, he did not get a statement from the security guard, as he could not be identified. Also, although a body-worn camera is part of an officer's mandatory uniform, no

footage was found for at least three of the officers on the scene, and there was no indication those devices were malfunctioning at the time. (Testimony of Maj. Gary Johnson; Ex. R-1.)

Petitioner's Termination from SFPD

19.

In a summary report of his investigation, dated September 11, 2022, Major Johnson informed Chief Meadows of the former's conclusion that the Petitioner had mishandled evidence during the August 2020 incident. Major Johnson stated as follows:

This is the third instance where Cpl. Downer has mishandled SFPD case property/evidence. The first was during the investigation of a burglary (May 2020), the second was the failure to return a driver's license of an offender Cpl. Downer arrested. It was later determined that the license information was shared with an associate of Cpl. Downer having no relation to the arrest incident, and now this failure to collect evidence at the scene of a crime.

While the driver's license matter was still an ongoing investigation, Major Johnson testified he included it in his recommendation because "it's part of [the Petitioner's] overall pattern." The summary also listed a finding of administrative violations of the SFPD's rules and General Order, as well as the city's human resources policies. These violations include, in relevant part:

...

COSF HR & P&P ART 22. Miscellaneous.

A. Violations of City Policies and Procedures and any other violations or actions not specifically enumerated in this manual which impair or reflect upon the integrity, efficiency, good order or operation of any segment of City government.

...

SFPD R&R 1.08 OFF-DUTY EMERGENCY ACTION:

An officer, though off duty, must take appropriate and necessary police action in any situation where a crime is being committed or human life is endangered. The officer will, as soon as possible, turn over the situation to on-duty police officers.

...

SFPD R&R 1.19 UNSATISFACTORY PERFORMANCE:

An employee shall maintain sufficient competency to perform his/her duties and assume the responsibilities of his/her positions. Employees shall establish and maintain the highest standards of efficiency in carrying out the functions and objectives of the South Fulton Police Department. Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of the laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employee's rank, grade or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention; absence without leave or unexcused absence from a duty assignment during a tour of duty. In addition to other indications of unsatisfactory performance, the following will be considered prima facie evidence of unsatisfactory performance of duty: Repeated poor evaluations, or repeated infractions of Rules, Regulations, General or Specific Orders, or procedures which are documented in writing.

...

SFPD R&R 1.25 CRIMINAL ACTS:

An employee will not, while on duty or off duty, commit any act which is a violation of any Federal or State statute or a violation of any local ordinance. However, an officer will not be deemed to have violated such law if his/her conduct is authorized in the performance of his/her duty. (16-10-1 Violating Oath of Office, 16-10-94 Tampering with Evidence)

....

SFPD R&R 1.31.B. PERFORMANCE OF DUTY:

All employees shall perform their duties as required or directed by law, Departmental rule, policy, or order, or by order of a superior officer.

...

SFPD G.O. Canon 1: PERFORMANCE OF DUTIES

A. All City of South Fulton Police Department employees will promptly perform their respective duties as required by applicable rules and regulations, orders, policies or procedures of the Agency and do so to the best of their ability.

SFPD G.O. Canon 6: CONDUCT UNBECOMING

The City of South Fulton Police Department employees will act in an official (on-duty) or private (off-duty) capacity in such a matter not to bring discredit upon the Agency or the employee.

Major Johnson testified it is standard procedure to identify all violations from all sources, even though—as in this case—the underlying conduct for these violations is the same. (Testimony of Maj. Gary Johnson; Ex. R-1.)

20.

Major Johnson concluded his summary report to Chief Meadows by stating that, “[b]ased on the failure to perform and seriousness of” the violations, internal affairs recommended the Petitioner be terminated. At the hearing, Major Johnson testified that, by this statement, he considered both the “serious” violations arising from the Petitioner’s failure to handle the crime scene during the August 2020 incident, as well as the Petitioner’s history of complaints and violations. He also testified that Canon 6 (“Conduct Unbecoming”) and Rule and Regulation 1.31.B. (“Unsatisfactory Conduct”) were the two primary violations driving this recommendation, as they addressed the Petitioner’s failure to follow through with an investigation during the August 2020 incident. (Testimony of Maj. Gary Johnson; Ex. R-1.)

21.

After Major Johnson discussed his findings and recommendations with Chief Meadows, the chief decided to move forward with terminating the Petitioner. Major Johnson testified that, apart from his findings and recommendations to the chief, he knows of nothing else that factored into this decision. (Testimony of Maj. Gary Johnson.)

22.

On or about September 18, 2020, the Petitioner received a letter from Chief Meadows, stating that the August 2020 incident had resulted in an internal complaint levied against him, which resulted in multiple violations of SFPD and City of South Fulton rules and policies. The

letter stated Chief Meadows was considering terminating the Petitioner's employment and gave the Petitioner an opportunity to discuss the matter with him. (Testimony of Petitioner; Ex. R-8.)

23.

As previously determined by this Court, by letter dated September 23, 2020, Chief Meadows notified the Petitioner he was being dismissed from employment with SFPD effective September 24, 2020. The letter stated the dismissal stemmed from an internal investigation into the August 2020 incident, which uncovered violations of SFPD Rules & Regulations 1.08, 1.19, 1.25, and 1.31.B.; violations of Canons 1 and 6 of the General Order; and a violation of Article 22 of the city's human-resources policy. At the hearing, the Petitioner confirmed he had been terminated.¹¹ (Case File, Order Granting in Part and Denying in Part Respondent's Motion for Summary Determination, Findings of Fact, ¶¶ 14, 15; Testimony of Petitioner.)

24.

The SFPD's criminal investigations department identified criminal charges against the Petitioner related to the August 2020 incident, and the case was sent to the district attorney. However, nothing in the record indicates the Petitioner has been formally charged or convicted in connection to the incident. (Testimony of Maj. Gary Johnson; Testimony of Julie Bradley; Ex. R-1.)

¹¹ In closing arguments, the Petitioner's counsel questioned whether the appeal from the termination was still "active." This is presumably based on the Petitioner's testimony that he had never been provided the records he requested to properly defend himself for a termination appeal, and that he was supposed to have another date scheduled, presumably for a hearing. (Testimony of Petitioner.) But as noted above, the Petitioner himself testified he had in fact been terminated. Moreover, Major Johnson testified the Petitioner had failed to provide an appeal of his termination in a timely manner. (Testimony of Maj. Gary Johnson.) Accordingly, absent any probative evidence to the contrary, the Court finds the Petitioner has in fact been terminated from the SFPD.

POST Proceedings

25.

As required by law,¹² the Petitioner's termination from the SFPD was reported to POST, which proceeded to conduct its own investigation as to whether the Petitioner had violated provisions of the Act, or otherwise was fit for duty and suited to stay in law enforcement. Throughout this proceeding, the Petitioner submitted to POST signed and notarized statements, in March 2021, October 2021, and January 2022. In these statements, he defended his actions during the August 2020 incident and alleged his termination had been rooted in retaliation by the SFPD, as well as biased and unfair treatment. (Testimony of Julie Bradley; Ex. R-11.)

26.

As part of its proceedings, POST considered statements provided by the Petitioner, including the notarized statements, in addition to requested records from SFPD's internal affairs investigation, records on the Petitioner's prior disciplinary history, and the incident report. POST also reviewed the Petitioner's body-worn camera footage from the August 2020 incident. (Testimony of Julie Bradley; Ex. R-11.)

27.

At the close of the investigation, the Petitioner's case was turned over to the Probable Cause Committee, which is a subcommittee of the full POST council. The Probable Cause Committee later submitted a case summary to the full council, stating as follows:

- The Petitioner was terminated from his position with SFPD for the following policy violations: "Off Duty Emergency Action"; "Unsatisfactory Performance"; "Performance of Duties"; and "Conduct Unbecoming."

¹² See Ga. Comp. R. & Regs. 464-3-.05(b), 464-3-.06(a).

- The termination arose from the August 2020 incident, when the Petitioner failed to secure a shell casing found at the scene, turned off his body-worn camera, and omitted information in a report about finding the shell casing.
- The Petitioner had a prior disciplinary history: a verbal reprimand for failing to activate his body-worn camera; a written reprimand for improper handling of evidence at a crime scene; a written reprimand for unsatisfactory performance in transporting an unstable person to the hospital; and a pending investigation into a reported failure to turn in a driver's license.
- The Petitioner was in violation of subsections (a)(6), (a)(7), (a)(8), and (a)(11) of Code Section 35-8-7.1.

The full Council agreed with the Probable Cause Committee's recommendation that the Petitioner's certification be revoked.¹³ (Testimony of Julie Bradley; Ex. R-10.)

28.

Julie Bradley is POST's director of operations who oversaw the hearings divisions during the investigation into the Petitioner. At the hearing, she testified that the Act, specifically Code Section 35-8-7.1, lays out the violations for which POST could sanction a certified officer; however, there are no written standards for determining what type of sanction should be imposed. Rather, POST considers the totality of the circumstances in each individual case when deciding on a sanction, including the egregiousness and seriousness of the offense, as well as mitigating and aggravating circumstances. (Testimony of Julie Bradley.)

Further Testimony of Petitioner

29.

At the hearing, the Petitioner testified he never denied making a mistake by not securing the shell casing during the August 2020 incident, and that it was "a bad judgment call." He also stated that standing by the shell casing to secure it was "easier said than done" given that people

¹³ Prior to this case's referral to this Court, the Petitioner also had a prehearing conference with a POST hearing officer. (Testimony of Julie Bradley.)

were rushing about, and he was concerned that someone had been shot. He also stated he did not have gloves or property bags with him, though he conceded both items were in his vehicle. The Petitioner further testified he walked away without collecting the shell casing because he thought CID and other on-duty officers would collect it. But, according to him, the on-duty officers never took control of the scene, and CID never arrived. (Testimony of Petitioner.)

30.

As an explanation for why he did not tell Detective Jackson during their interview that he had told the security guard to leave the casing, the Petitioner testified he had not yet reviewed the body-worn camera footage.¹⁴ He stated, however, that the same day as that interview, he went home and reviewed the footage, which included his statement about leaving the shell casing. The Petitioner testified that his wife, who is in law enforcement, also watched the footage, and they had a conversation about how his turning off the camera created a “perception problem” and was “not a good look.” However, the Petitioner did not return to Detective Jackson to amend his interview answers, as he “wasn’t thinking it was needed.” The Petitioner also testified that, a few days after reviewing the video, he attempted to show it to one of his co-workers, but the version available was shorter and did not include his statement about leaving the shell casing. The Petitioner testified he eventually told Detective Jackson and another detective named Triplett about the shortened footage, when the two came to his house.¹⁵ (Testimony of Petitioner.)

31.

Regarding his turning off his body-worn camera during the August 2020 incident, the Petitioner testified he did so to vent because he was upset about how the situation was being

¹⁴ The Petitioner also testified he should have told Detective Jackson he “believed” the security guard had picked up the shell casing. (Testimony of Petitioner.)

¹⁵ Neither of these detectives testified at the hearing.

handled. He stated he was particularly upset with his direct supervisor, Sergeant Carter. The Petitioner asserted he believed keeping the camera on would have shown his dissatisfaction and bring discredit on his agency; hence, turning it off was a way to assist the SFPD. He also testified he felt the footage would have made Sergeant Carter dislike him. (Testimony of Petitioner.)

32.

As to why he failed to mention the shell casing in his memorandum to internal affairs on August 5, 2020, the Petitioner testified his report was so short because he understood it to be about an officer shooting at a vehicle, and not about the incident he witnessed. (Testimony of Petitioner.)

33.

The Petitioner also made several assertions pertaining to unfair treatment by the SFPD. He testified that, at the time of the incident with the driver's license, the handling of the window screen during the May 2020 burglary "came back up." He stated that sequence of events then led to the disciplinary action, and the ensuing reports "made it seem like [he] was incompetent." The Petitioner also testified that during the August 2020 incident, he was far from the only SFPD officer on the scene who was not following proper policy. (Testimony of Petitioner.)

34.

The Petitioner described himself as a good officer who loved his job, but who had made mistakes during the August 2020 incident and other instances. He currently is doing foster care, though he stated he wants to keep his POST certification and eventually return to law enforcement. The Petitioner testified he would be willing to undergo additional training about handling crime scenes and crisis intervention, so he could have a second chance. (Testimony of Petitioner.)

Further Testimony of Major Johnson

35.

Major Johnson is a 29-year law enforcement veteran. At the hearing, he testified that CID did go out to the scene of the August 2020 incident. But regardless, if the Petitioner had been aware of a shell casing at the scene, he should have collected it, or he should have notified an on-duty officer or supervisor about the potential evidence related to the shots fired. Major Johnson also testified the body-worn camera should have stayed turned on “until the conclusion of that event,” to capture more evidence for aiding in the pursuit of the alleged shooter. He asserted that an officer omitting or leaving out information that is key to solving a crime creates “an issue.” Even assuming the Petitioner did tell the security guard to leave the shell casing where it was, Major Johnson still considered such conduct untrustworthy, and overall, he had a concern with keeping the Petitioner on at the department. (Testimony of Maj. Gary Johnson.)

36.

Major Johnson further testified that, prior to the instant hearing, he had not been aware of any allegations about the Petitioner’s body-worn camera footage being shortened or altered. He explained that the footage, once downloaded from the camera, is placed on a secure website where it cannot be edited or deleted. While footage can be pulled from the site and subsequently modified, the original footage on the site does not change. (Testimony of Maj. Gary Johnson.)

III. CONCLUSIONS OF LAW

1.

As POST seeks to revoke the Petitioner’s peace-officer certification, it bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

This Court's hearing and review of this matter is de novo in nature. Ga. Comp. R. & Regs. 616-1-2-.21(3).

Overview of Controlling Law

3.

The Peace Officer Standards and Training Council was established by the Georgia Peace Officer Standards and Training Act. O.C.G.A. § 35-8-3(a). POST has the authority to certify and train peace officers, as well as to discipline certified officers who have violated the Act. Id. §§ 35-8-7, 35-8-7.1(a), (b). See also Maner v. Chatham Cnty., 246 Ga. App. 265, 266 (2000); (recognizing POST has authority to discipline peace officers); Pellitteri v. Prine, 776 F.3d 777, 781 (11th Cir. 2015) (same).

4.

When POST determines that a peace officer should be disciplined, it may impose several different sanctions, including a private or public reprimand; a suspension of the certification for a specified period; limitation or restriction of the certification; or revocation of the certification. O.C.G.A. § 35-8-7.1(b)(1)(B)-(E). POST also may make an adverse finding but withhold imposition of judgment and penalty, or it may place the officer on probation, which may be vacated upon noncompliance with such reasonable terms as POST may impose. Id. § 35-8-7.1(b)(2). If a peace officer's certification is revoked, he cannot serve as a peace officer in Georgia unless his certification is restored and reissued by POST. Id. § 35-8-7.1(c).

POST's Proposed Action against Petitioner

5.

In this case, POST seeks to revoke the Petitioner's certification for violation of subsections (a)(6), (a)(8), and (a)(11) of Code Section 35-8-7.1,¹⁶ which provide, in pertinent part:

[POST] shall have authority . . . to discipline a council certified officer . . . under this chapter or any antecedent law upon a determination by the council that the . . . council certified officer . . . has:

...

(6) Engaged in any unprofessional, unethical, deceptive, or deleterious conduct or practice harmful to the public; such conduct or practice need not have resulted in actual injury to any person. As used in this paragraph, the term "unprofessional conduct" shall include any departure from, or failure to conform to, the minimal standards of acceptable and prevailing practice of an officer;

...

(8) Committed any act or omission which is indicative of bad moral character or untrustworthiness;

...

(11) Been suspended or discharged by the officer's employing law enforcement unit for disciplinary reasons.

O.C.G.A. § 35-8-7.1(a).

6.

The Court already has concluded the Petitioner violated subsection (a)(6) of Code Section 35-8-7.1, based on his unprofessional conduct in failing to secure the shell casing and turning off his body-worn camera during the incident on August 1, 2020.¹⁷ After carefully considering the

¹⁶ As noted supra, POST announced at the start of the hearing it would not proceed with the allegation of a violation of subsection (a)(7) of Code Section 35-8-7.1, which concerns violations of a law, rule, or regulation pertaining to the practice of an officer.

¹⁷ (See Case File, Order Granting in Part and Denying in Part Respondent's Motion for Summary Determination.)

evidence presented during the hearing, the Court concludes the Petitioner also violated subsections (a)(8) and (a)(11) of Code Section 35-8-7.1, as discussed below.

O.C.G.A. § 35-8-7.1(a)(8)

7.

Subsection (a)(8) of Code Section 35-8-7.1 allows POST to discipline an officer who has committed “any act or omission” that is indicative of “untrustworthiness.” The term “untrustworthiness” is not explicitly defined, nor does the word or its derivatives appear elsewhere in the Act. See generally O.C.G.A. § 35-8-1 et seq. To ascertain its meaning, the Court turns to the canons of statutory construction and applies the “fundamental rule” of giving words their “plain and ordinary meaning.” Ga. Dep’t of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 603 (2014) (citation and quotation omitted). See also Turner v. Ga. River Network, 297 Ga. 306, 308 (2015) (“Absent clear evidence that a contrary meaning was intended by the legislature, [the Supreme Court] assign[s] words in a statute their ordinary, logical, and common meanings.”) (citation and quotations omitted); O.C.G.A. § 1-3-1(b). The Merriam-Webster Dictionary defines “untrustworthiness” as “the quality or state of being untrustworthy.”¹⁸ “Untrustworthy,” in turn, is defined as “not dependable or worthy of confidence: not trustworthy.”¹⁹

8.

Here, a preponderance of the evidence shows the Petitioner’s actions and omissions on August 1, 2020, and immediately thereafter, were indicative of untrustworthiness. First, the conversation with the security guard, as captured on the body-worn camera footage presented to

¹⁸ MERRIAM-WEBSTER DICTIONARY, available at <https://www.merriam-webster.com/dictionary/untrustworthiness>, (last accessed Jun. 17, 2022).

¹⁹ MERRIAM-WEBSTER DICTIONARY, available at <https://www.merriam-webster.com/dictionary/untrustworthy>, (last accessed Jun. 17, 2022).

this Court, demonstrates a clear and intentional disregard by the Petitioner to properly identify and preserve the shell casing as evidence. Such disregard in the middle of a crime scene, where 16 to 17 shots had just been fired, shows serious poor judgment that reflects on the officer's dependability. Second, the Petitioner's decision to turn off his body-worn camera exhibits the Petitioner's unreliability in following through on crime scene investigations. A shell casing is highly material evidence in any shooting investigation, and actively shutting off his camera, immediately after a casing was located, prevented the collection of subsequent evidence. Third, the Petitioner's failure to mention the shell casing in his memorandum to Sergeant Carter constituted a blatant omission of a highly material detail. Such an omission speaks to the lack of confidence that could be placed in the Petitioner to make an accurate account of the event in question.

9.

At the hearing, the Petitioner testified at length that the video footage presented to the Court was incomplete, and that the original, longer version captured a statement about the shell casing being left where it was. However, no other evidence in the record corroborates this claim. Rather, the Petitioner's interview with Detective Jackson, conducted only a few days after the August 2020 incident, confirms what appears on the footage before this Court—i.e., that the security officer had *picked up* the shell casing.²⁰ Furthermore, even assuming, *arguendo*, the Petitioner had told the security guard to leave the shell casing where it was, the Petitioner still did nothing else to ensure the casing was collected or reported.²¹ Especially given the seriousness of the incident—multiple

²⁰ The Petitioner testified that, once he realized he had told the security guard to leave the shell casing, he did not think he needed to correct his interview statement with Detective Jackson. The Court does not find this explanation credible, given that (a) the Petitioner was advised repeatedly as to the importance of telling the truth during the interview; and (b) the Petitioner testified he and his wife discussed how the footage was “not a good look.”

²¹ The Petitioner laid out various reasons for not securing the shell casing himself, including the chaos of the scene; the lack of gloves and bags; and the necessity of checking for personal injuries or property damage. Even

shots fired, an officer struck by a fleeing suspect's car—a decision to effectively ignore the shell casing demonstrates untrustworthiness in the Petitioner's role as an officer.

10.

As for shutting off his body-worn camera, the Petitioner's explanations further underscore his lack of trustworthiness, as he prioritized protecting reputations—either his own with Sergeant Carter, or the agency's—over collecting evidence at the scene of a shooting, which the Petitioner himself described as a “serious situation.” Having an officer put such considerations above the integrity of an investigation demonstrates a concerning degree of unreliability.

11.

Lastly, the Petitioner testified he did not mention the shell casing in his memorandum to Sergeant Carter because he did not understand the ultimate scope of the investigation. The Court does not find this explanation credible, given that the internal-affairs investigation was still addressing a *shooting*, albeit a reported shooting by an officer.²² The Petitioner clearly knew the purpose of his memorandum, as its subject line was “Shooting in 5495 parking lot,” and he wrote that “multiple shots rang out.”²³ The fact the Petitioner did not find it necessary to mention a highly material fact indicates a lack of dependability in his reporting.

assuming these explanations had merit, they do not explain why he failed to report the shell casing's presence until five days later, when Detective Jackson explicitly asked him about shell casings during an interna-affairs interview.

²² See Interest of T. B. R., 224 Ga. App. 470, 475-476 (1997) (holding that trial court, sitting as factfinder, was required to assess witness credibility and was authorized to disregard witnesses' self-serving testimony).

²³ Whether the shell casing ultimately came from the suspect or an officer is irrelevant to its materiality in the shooting investigation. For example, determining the shell casing did *not* come from the suspect's gun or an officer's gun could have ruled them out from firing the shots.

O.C.G.A. § 35-8-7.1(a)(11)

12.

After carefully considering the evidence presented at the hearing, the Court further concludes the Petitioner violated subsection (a)(11) of Code Section 35-8-7.1, as a preponderance of the evidence shows the SFPD terminated the Petitioner's employment on disciplinary grounds, specifically his violation of policy during the August 2020 incident.²⁴ Major Johnson's recommendation, and the police chief's ultimate decision, also took into account the Petitioner's prior failure to properly handle evidence at the scene of a May 2020 burglary, which resulted in a written reprimand. Granted, Major Johnson's recommendation also cited the incident with the driver's license, which was still an ongoing investigation for which the Petitioner had yet to be formally disciplined. But even taking this into account, the evidence clearly shows the impetus for the Petitioner's termination was the seriousness of the violations that occurred during the August 2020 incident.

13.

The Petitioner has argued that the SFPD fired him as an act of retaliation, and that he was made the scapegoat for the SFPD's failures during the August 2020 incident. Apart from the Petitioner's uncorroborated testimony, however, there is no probative evidence pointing to an alternative motive for the termination. The Petitioner asks this Court to infer a retaliatory motive by pointing out (a) he received multiple, duplicative violations for the same conduct on August 1, 2020; (b) his reprimands were handed down some time after very minor infractions; (c) there were no other officers punished for the August 2020 incident, even though they also had violated policy;

²⁴ The SFPD's stated reasons for termination also referenced a violation of Rule and Regulation 1.25, "Criminal Acts," as well as a criminal matter being pursued against the Petitioner for his actions during the August 2020 incident. Although nothing in the record suggests the Petitioner was ever charged or convicted in a criminal matter, it remains clear the SFPD had determined at the time that such a violation had occurred.

and (d) the SFPD placed the blame on him in the press release. But as Major Johnson credibly testified, it is standard procedure to cite all relevant violations in disciplinary matters. The Court also finds no suspicious delays on any of the issued reprimands. Rather, the evidence clearly establishes the Petitioner had in fact violated policy to justify all three reprimands. The evidence also establishes he violated policy during the August 2020 incident, and that these violations were far from minor, but rather reflected poorly on his trustworthiness and capability as an officer. The absence of allegations against other officers, and the press release, do not discredit or throw into doubt these reasons for his termination. *Cf. Crawford v. City of Fairburn, Ga.*, 482 F.3d 1305, 1309 (11th Cir. 2007) (holding that, in the context of a Title VII retaliation claim, “[b]y failing to rebut each of the legitimate, nondiscriminatory reasons of the [employer], [plaintiff] has failed to raise a genuine issue of material fact about whether those reasons were pretext for discrimination”)

Sanction

14.

As the Petitioner has violated the Act, the question next turns to determining the appropriate sanction. But as an initial matter, the Court first shall address the Petitioner’s argument that the absence of written standards or metrics by which POST decides the sanction constitutes a violation of due process.²⁵ The Petitioner cites as support the opinion in *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

²⁵ In its closing argument, the Respondent argued the Petitioner had not properly raised this constitutional claim in writing, as required in the Georgia Civil Procedure Act (“CPA”), Code Section 9-4-7. This proceeding, however, is not controlled by the CPA, but by the Administrative Procedure Act (“APA”). *See* O.C.G.A. § 50-13-1 *et seq.*; Ga. Comp. R. & Regs. 464-8-.04. Moreover, this Court’s rules do not require a constitutional challenge to be presented in writing, but only that the laws or rules challenged and the relevant constitutional provisions are “stated with specificity,” and that the allegation is supported by a statement establishing its basis. *See* Ga. Comp. R. & Regs. 616-1-2-.22(3); *see also* O.C.G.A. § 50-13-40(c) (authorizing this Court’s chief judge to promulgate procedural rules and regulations).

15.

As Ms. Bradley testified, neither the Act nor POST’s regulations lays out enumerated factors or criteria for this Court to consider when deciding the type of sanction to impose. See O.C.G.A. § 35-8-1 et seq.; Ga. Comp. R. & Regs. 464-1-.01 et seq. Yet to the extent the Petitioner argues the Act or regulations—on their face and as a matter of law—violate due-process provisions under the Fourteenth Amendment, this administrative tribunal is barred from making such a determination. See Ga. Comp. R. & Regs. 616-1-2-.22(3) (stating this Court “is not authorized to resolve constitutional challenges to statutes or rules”).

16.

Moreover, in the event the Petitioner is arguing his due-process rights are violated by this Court applying the controlling law on sanctions, the undersigned does not agree. As stated in Hornsby, due process in an administrative licensing proceeding requires “adequate notice and a fair hearing,” and the deciding authority “may not base its decision on evidence which has not been specifically brought before it.” Hornsby, 326 F.3d at 608. Here, the Petitioner’s proceeding before this Court meets these requirements, as the Petitioner had the opportunity to respond to POST’s allegations, present his own evidence, and cross-examine POST’s witnesses. See id.; see also O.C.G.A. § 50-13-41(a); Ga. Comp. R. & Regs. 464-8-.04 (assigning this Court to hear POST matters). As described above, this Court made factual findings based on the evidentiary record, and then drew conclusions as to whether the Petitioner violated provisions in the Act that are subject to sanctions.²⁶ See O.C.G.A. § 35-8-7.1(a). Furthermore, both parties had the opportunity to present evidence pertaining to, and to argue for, what they believe is an appropriate sanction;

²⁶ Unlike in Hornsby, where no objective standards existed as to how to obtain a liquor license, in this case the Petitioner did have sufficient notice as to what standards needed to be met—or what conduct to avoid—to remain free of sanctions. See Hornsby, 326 F.2d at 611; O.C.G.A. 35-8-7.1(a).

this Court, in turn, has considered that evidence and those arguments in making its decision. See Hornsby, 326 F.3d at 608. Cf. Dollar v. Dep’t of Human Res., 196 Ga. App. 698, 700 (1990) (in an employee-discipline case, referring to “the principle that proper discipline always involves weighing numerous factors, and what is a minor offense in one work situation may well be major in another”); Loui v. Bd. of Med. Examiners, 78 P.2d 705, 711 (Haw. 1995) (in a medical-board case, noting that the “purpose actually served by the sanction” must be considered). Hence, the Court has not acted arbitrarily or capriciously in deciding the sanction here.

17.

That said, having reviewed the record, the Court concurs with POST’s recommendation for revocation. The Petitioner’s work history during his time at the SFPD reflects a failure to follow policies governing the conduct of officers. Arguably, the policy violations—considered in isolation—could be addressed with additional training and a probationary status, which the Petitioner is seeking here in lieu of revocation. But most concerning to the Court are the circumstances surrounding the violations from the August 2020 incident. The Petitioner showed complete disregard for collecting or promptly reporting the shell casing, despite the seriousness of the shooting incident. His deliberate decision to turn off his body-worn camera also raises concerns about his ability to incorporate feedback about his performance, given he had been reprimanded only three months earlier about leaving his camera off. His stated justification for turning off the camera—to avoid the agency or his superiors looking bad while he vented—further highlights how inappropriate his action was in that circumstance. And the Petitioner’s failure to mention the shell casing in his written report demonstrates how little concern he had for the investigations. In short, this lack of regard and respect for the integrity of a criminal investigation goes far beyond a lack of adequate training.

18.

Ultimately, the Court is not convinced the Petitioner meets the level of trustworthiness and professionalism needed to be a certified peace officer. While the Petitioner contends he has made mistakes that can be explained, these explanations do not diminish the gravity of these violations or restore confidence in his capacity to perform investigations with accuracy and integrity. For these reasons, revocation is the appropriate sanction.

IV. DECISION

For the foregoing reasons, the Respondent's decision to revoke the Petitioner's POST certification is **AFFIRMED**.

SO ORDERED, this 21st day of June, 2022.


Lisa Boggs
Administrative Law Judge

