



STATE OF NEW JERSEY

In the Matter of Joseph Downar
City of Newark Fire Department

CSC DKT. NO. 2018-2876
OAL DKT. NO. CSR 00421-19

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 17, 2020 BW

The appeal of Joseph Downar, Fire Fighter, City of Newark Fire Department, removal effective December 8, 2018, on charges, was heard by Administrative Law Judge Irene Jones, who rendered her initial decision on February 28, 2020. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 15, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Joseph Downar.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF APRIL, 2020

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 00421-19

AGENCY DKT. NO. N/A

**IN THE MATTER OF JOSEPH DOWNAR,
ESSEX COUNTY, CITY OF NEWARK,
FIRE DEPARTMENT.**

Frank C. Cioffi, Esq., for appellant (Sciarra &, Catrambone, attorneys)

John J. Zidziunas, for respondent (John J. Zidziunas & Associates, attorneys)

Record Closed: January 13, 2020

Decided: February 28, 2020

BEFORE IRENE JONES, ALJ (Ret. on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals his removal from his position as a Firefighter for the City of Newark, effective December 8, 2018. The respondent, City of Newark Fire Department removed the appellant on charges of conduct unbecoming; inability to perform duties; conviction of a crime; and other sufficient cause in violation of Departmental rules and regulations.

A Preliminary Notice of Disciplinary Action (PNDA) was issued to the appellant on December 12, 2017. (R-1.) A departmental hearing was held on March 15, 2018,

wherein the charges were sustained. A Final Notice of Disciplinary Action (FNDA) was issued on March 16, 2018, sustaining the removal, effective December 8, 2018. (R-4.)

On December 20, 2018, the appellant filed a notice of appeal and on January 9, 2019, the matter was transmitted to the Office Administrative Law for hearing as a contested case. A prehearing conference was held on February 13, 2019, wherein hearings were scheduled for April 17 and 18, 2019. However, those dates were adjourned and the matter was heard on October 18 and 19, 2019. The parties filed post-hearing briefs on January 10 and 13, 2020, at which time the record closed.

STIPULATED FACTS

The parties have stipulated the following as **FACTS**:

1) Appellant Joseph Downar (Mr. Downar) was a Firefighter with the City of Newark in July 2016.

2) On or about July 30, 2016, Mr. Downar was involved in an assault at the Darby Road Restaurant in Scotch Plains, New Jersey, wherein he punched Michael Avila in the head and was arrested.

3) According to the criminal documents, Mr. Downar and Mr. Avila had no prior knowledge of each other.

4) According to the criminal complaint documents, as a result of the force of Mr. Downar's punch, Mr. Avila's head hit the wall and he required medical attention.

5) According to medical records referenced in the criminal complaint documents, Mr. Avila suffered a laceration to his forehead and zygomatic arch fracture (fracture of the cheekbone).

6) On January 4, 2017, Scotch Plains Police arrested Mr. Downar on the charge of Aggravative Assault, a crime of the third degree, in violation of New Jersey Criminal Code 2C:12-1B(7).

7) Between January 4, 2017, and December 8, 2017, the Newark Fire Department did not have knowledge of Mr. Downar's arrest of the criminal charges pending against him.

8) On December 8, 2017, Mr. Downar was found guilty of third-degree aggravated assault by the New Jersey Superior Court. He received a sentence of 364 days in the Union County Jail. (J-1.)

TESTIMONY

In support of its case, the Appointing Authority presented the testimony of the Assistant Public Safety Director of the Newark Fire Department, Raul Malve (Malve or Assistant Director). The Assistant Director recounted his twenty-four years employment history with the department. He was a Captain and a Battalion Chief prior being appointed to his current position as Assistant Director of Public Safety. As the Assistant Director, he works "hand and hand" with Director Ambrose on disciplinary matters. On December 12, 2017, a call came into the office late in the day from the Union President, Charles West (West), alerting them that Joseph Downar, a union member, was incarcerated and would not be reporting to work the next day. West related that he was just informed of the matter and would fax over the related paperwork. After the facsimile was received, he spoke to Director Ambrose who told him to go to Realtime Crime for further information. While on the Realtime Crime website, he was able to review the legal documents which he reported to Director Ambrose. The Director told him to immediately suspend Downar and have Deputy Chief Robert Gail prepare a PNDA. After he reviewed the PNDA, he gave it to Director Ambrose for his signature.

The facsimile that Union President West sent to the department was copy of the Criminal Complaint filed against Downar. (R-2.) The complaint revealed that Downar was charged with committing an aggravated assault in the third degree against a victim

in a bar in Scotch Plains on July 30, 2016. The assault caused the victim significant bodily injury, to wit, a laceration to the forehead and a fracture of the cheekbone. Although the offense occurred one year and a half ago, the Department had no knowledge of it. Nor was the Department aware that Downar had been criminally charged and pled guilty at trial on December 8, 2017. It was only when West called the office on that day (December 12, 2017) that they learned of the matter. Initially, Malve thought West meant that the assault had just occurred but West corrected this misunderstanding and informed him that Downar had completed the entire process and was sentenced on that day to 364 days in the county jail. Thus, Downar had worked for the entire time without reporting the incident to the Department. The Realtime Crime report supported that the assault occurred in July 2016. A subsequent investigation revealed that while the incident occurred in July 2016, Downar was not arrested until January 2017. The criminal complaint was signed by the complainant on January 4, 2017.

Malve then reviewed R-1, the PNDA, noting that since Downar was incarcerated he was charged with inability to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(3); and he was charged with conviction of a crime as he was convicted of aggravated assault in violation of N.J.A.C. 2-2.3(a)(3); and Conduct Unbecoming a Public Employee having engaged in fighting; and Cover-Up by not reporting the July 2016 assault. Further, Malve noted that the Fire Department is a paramilitary organization with Rules and Regulations and General Orders. The Rules and Regulations and Orders require that members of the Department must file a written report of any interaction with law enforcement or the court(s) to the Department. This includes any action from a minor traffic summons to a marital dispute or simply being a witness in a matter. He was also charged with Other Sufficient Cause, Article 3, for violation of departmental Rules and Regulations and General Orders. And with neglect of duty in violation of Article 6 in that he violated the Oath of Office. Further, his incarceration prohibited him from reporting to work.

Appellant also violated Article II of departmental rules and regulations which requires him to set a personal example to subordinates and peers. At the time of incident, appellant was intoxicated and punched someone in the face causing bodily

harm in violation of Article II. Malve's testimony was comprehensive on the violations set forth in R-1. After receipt of documentation from Realtime Crime and the faxed documents from West, the Department commenced an Internal Affairs (IA) Investigation. R-3 is the written IA Preliminary Investigation Report dated December 30, 2017.

The IA preliminary report provided that appellant was at the Darby Road Pub, 450 Park Avenue in Scotch Plains on July 30, 2016. He was involved in a physical altercation with one Michael A. Avila, a patron at the pub. The Scotch Plains Police responded to a call at 00:08 hours for a fight in progress. The fight had concluded by the time police arrived and the two had separated. Avila reported to the police that he was sitting at the bar having a discussion with the appellant, which became heated and appellant punched him in the head causing a laceration to his forehead and to his cheekbone. Appellant confirmed the discussion and said that Avila also struck him. The two were advised of the complaint process and offered medical treatment. Downar refused medical attention and did not want to pursue the matter any further. Avila wanted medical treatment and was taken to Overlook Hospital. He also related that he wanted to pursue the matter because of the assault.

On December 29, 2016, Avila reported to the Scotch Plains Police Department and gave a sworn statement as to the July 30, 2016, altercation. The statement detailed the incident with more detail than was given at the pub. Specifically, Avila noted that he was discussing sports with two other patrons who were sitting at the bar. There was a difference of opinion and Downar became loud. He decided to end the conversation and told Downar "lets agree to disagree and I'm going to sit here and finish my drink." He then turned to face the bar and went to sip his drink when he was punched on the side of his face causing his head to hit the wall. He sustained injuries to his face. The Scotch Plains Police Department obtained his medical records from the hospital and a video surveillance from the pub showing the assault. Appellant was arrested on January 4, 2017, and charged with aggravated assault, a crime of the third degree.

The appellant requested and was granted a departmental hearing, which was held on March 15, 2018, after his early release from jail. The charges in the PNDA were sustained and a FNDA issued on March 16, 2018. The appellant was terminated, effective December 8, 2016. (R-4.)

Under cross-examination Malve conceded that after the assault and prior to his incarceration the appellant did receive an "outstanding" on his personnel evaluation. He further admitted that at no time did the appellant seek to evade the police. However, he maintained that notwithstanding those facts, the appellant was in violation of Departmental rules and regulations.

All officers are required to report their interaction with law enforcement and the courts to the Department. The appellant's union representative reported this incident on December 12, 2017. Malve also conceded that a January 4, 2017, memo requires an officer to report an incident on his first back to work date.

Malve further acknowledged that one can apply for a firefighter's position notwithstanding a criminal record. However, he notes that the applicant may not be hired. He is not aware of anyone in the department who has a fourth-degree conviction.

Michael Petrone (Petrone), a former Newark Fireman testified on behalf of the appellant. He worked for the Fire Department for twenty-eight years. During his tenure, he worked with the appellant. He found him to be a good fireman who was willing to perform all duties. He was not aware of the current "incident" and did not see any change in the appellant's performance during the pendency of this matter.

He has personally heard of other firemen who have been charged with various offenses, such as, theft, domestic violence, abuse, and driving while under the influence (DWI). In those cases, the fireman continued to work for the Department.

Under cross-examination, Petrone conceded that the appellant never told him about this "incident." He admits that he does have a social relationship with the appellant. Indeed, he was at the bar with the appellant when the fight occurred. While

he did not see the fight, he did admit seeing the appellant and the victim being separated. He did not call the local police.

James Pierson, a former Newark fireman, also testified for the appellant. He worked with Downar for years and found him to be an outstanding employee. He was not aware of the fight and knowing about it now has not changed his opinion of him.

He, too, is aware of other firemen who were charged with a crime but did not immediately report it to the department. In those cases, the firemen would wait to learn of the disposition of the matter. Indeed, in 1993 he was charged with aggravated assault which was subsequently downgraded to a simple assault. Thereafter, he reported the conviction to the department. He retired from the department in 2018.

The appellant testified that he is thirty years old and began his career in June of 2013. Prior to becoming a fireman, he worked at the Essex County Department of Corrections from April 2010 until his departure in June 2013. At the time that he was hired, he was ranked as 51. He was assigned to Ladder 8, 2nd Tour. His probationary period was non-eventful.

He knows why he was terminated. Further, he admits that he was inebriated on the night of the fight. He tried to help the victim immediately after the fight. When the police arrived, he explained that a verbal disagreement turned into a fight. This was his first and only bar fight. After the victim signed a complaint, he was given a summons for a simple assault. The victim urged the prosecutor to upgrade the charges to aggravated assault. In January 2017, his attorney advised him to turn himself into police as the charges were upgraded.

He did not tell the department of his arrest because he was unaware that this was required. Moreover, he did not tell his family or his girlfriend. He does not recall the number of days that he took vacation/personal time to appear in court on the charges. He applied for PTI but was denied. He took a plea and was sentenced to a year of incarceration. He actually served 120 days due to credit for good behavior and

workdays. He was released on parole on March 13, 2018, and his departmental disciplinary hearing was held on March 15, 2018.

Subsequent to his release, he retained a new attorney who moved for reconsideration of this matter in the Superior Court. The motion was granted and the charges were downgraded from a third-degree to fourth-degree crime. Since his release, he has been employed by the District Council of Bridge Painters Union. He has been released from parole and probation. He continues to drink socially.

Under cross-examination, appellant admits he attended Alcoholic Anonymous on voluntary basis. He is more active in church than he was prior to this incident.

DISCUSSION, FINDINGS AND CONCLUSIONS

Under the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, the appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560-61 (1982). Precisely, what is needed to satisfy this standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 274-75 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily depending on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47, 49 (1975).

Major discipline includes removal or suspension of more than five working days. N.J.A.C. 4A:2-2.2. Appeals before the Commission are conducted as hearings de novo. Borough of Park Ridge v. Salimone, 36 N.J. Super. 485, 498 (App. Div. 1955), affirmed, 21 N.J. 28 (1956); Sullivan v. Roe, 18 N.J. 156, 161 (1955). The de novo review of a penalty requires the development of a new evidentiary record and allows the Commission to substitute their opinion for that of the appointing authority as if no decision had been previously rendered. Henry v. Rahway State Prison, 81 N.J. 571, 576 (1980); Housing Auth. of Newark v. Norfolk Realty Co., 71 N.J. 314, 326 (1976).

I **FIND** that the Appointing Authority has met the required burden of proof that the appellant is guilty of the charges set forth in FNDA. The general causes for discipline of a public employee are set forth in N.J.A.C. 4A:2-2.3(a). Here, the appellant is charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, as a result of his being charge and convicted of a crime, specifically, aggravated assault in the third degree. Conduct unbecoming has been described as an “elastic” phrase that includes “conduct which adversely affects the morale or efficiency” of the public entity or “which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); c.f. Karins v City of Atl. City, 152 N.J. 532 (1998). Thus, conduct unbecoming 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.” See City of Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955). In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). Courts have held that conduct of public employee was unbecoming “[w]here the personal behavior is illegal per se or becomes public through arrest.” See In re Neshan, CSV 03285-08, Initial Decision (July 14, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>. Indeed, it has been recognized that there is a higher standard expected or imposed on firefighters and police officers than other non-law enforcement civil servants. See In re Lopez, CSV 08205-08, Final Decision (Feb. 24, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>.

As a firefighter, appellant is a special kind of public employee, and he is subject to a higher standard of conduct and responsibility than is required of most other public employees. See Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). Consequently, fire fighters hold very unique positions, and any disregard for the law is unacceptable. See In re Giaconia, MSB (February 22, 2006); In re Alessio, MSB, (March 9, 1999).

I **FIND** that the appellant engaged in conduct unbecoming a public employee by engaging in a fight that result in serious injury to the victim and a conviction of a third-degree crime. Inability to perform duties is defined as being unable to perform one’s

duties because of a physical or psychological limitation. See 95 N.J.A.C. 2d (CSV) 374, In re Rankin, A-5566-04T5 (App. Div. April 23, 2007), <http://njlaw.rugters.edu/collections/courts/>. Here, the appellant was physically incapable of working as he was incarcerated for 120 days. Thus, I **FIND** that the appellant was unable to perform his duties due to his incarceration.

I **FIND** that the appellant is guilty of neglect of his duties as a fireman in violation of N.J.A.C. 4A:2-2.3(a)(7). Although, not defined by the regulation, the charge is generally understood to mean that an individual has failed to perform his duties or may have been negligent in the discharge of his duties. Here, the appellant's incarceration prevented him from performing his duties.

N.J.A.C. 2C:5 1-1 provides for the forfeiture of public employment when a public employee has been convicted of a crime of the third-degree or above. In this matter, the appellant pled guilty to the third-degree aggravated assault. After having served his time, he hired a new attorney and had the charge downgraded to a crime of the fourth degree, thus avoiding the forfeiture statute. Nevertheless, N.J.A.C. 4A:2-2.3(a)(5) provides for disciplinary action for conviction of a crime. I **FIND** that the appellant pled guilty to aggravated assault in the third-degree that was subsequently downgraded to a fourth-degree crime and he therefore violated N.J.A.C. 4A:2-2.3(a)(5) as charged.

I further **FIND** that appellant has proved by a preponderance of the evidence that the appellant violated the department's Rules and Regulations. Article 23 of the Rules and Regulations, conduct of members, requires that member of a fire department shall not engage in altercations, improper indecent, or immoral conduct. Members are always required to conduct themselves in an orderly and civil manner and to refrain from discredit on the department. Further, Article 23, paragraph 1 provides that an officer will be held liable for any disorderly conduct or violation of any law whether on or off duty.

Article 6 of the Rules and Regulations provides that a firefighter shall not violate the Oath of Office, nor be guilty of neglect or cowardice or shirk any duty. The respondent argues that appellant violated Article 6 by failing to disclose the pending

criminal charges against him to the department. The appellant contends that he was not aware of the any obligation to report the criminal charges against him. I do not **FIND** the appellant's testimony to be credible. Nor I am persuaded by the hearsay testimony of his character witnesses. I **FIND** that the appellant was required to report to the fire department any interaction that he had with law enforcement and or the judicial system.

The only remaining issue is whether the penalty of removal is appropriate. It is well-established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See W. New York v. Bock, 38 N.J. 500 (1962). The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial Decision (October 10, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 49 N.J.A.R. 2d (CSV) 463, 465. "[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>.

I **FIND** that the appellant's underlying conduct warrants termination. The Commission has long recognized that fire fighters, all of which are part of a paramilitary organization, hold very unique positions, and any disregard for the law is unacceptable. See Giaconia, MSB (February 22, 2006); Alessio, MSB (March 9, 1999). Fire fighters "are not only entrusted with the duty to fight fires; they must also be able to work with the general public and other municipal employees." Karins, 152 N.J. at 552.

Based upon the above facts and applicable law, I **CONCLUDE** that appellant's employment was properly terminated on charges of conduct unbecoming an employee and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(6) and (11), as well as violation of the

Rules and Regulations in Article 6, paragraph 1, Article 23, paragraph 1 and 2 and Articles 58, 59, paragraphs 1 and 2.

ORDER

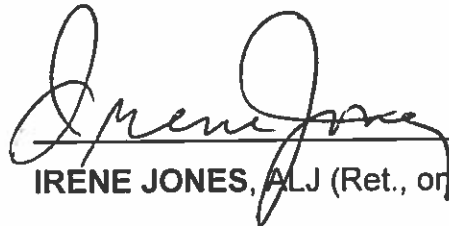
Therefore, it hereby **ORDERED** that appellant's appeal be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

February 28, 2020
DATE


IRENE JONES, ALJ (Ret., or recall)

Date Received at Agency: February 28, 2020

Date Mailed to Parties: 3 | 3 | 20
mm/sej

APPENDIX

WITNESSES

For Appellant:

James Pierson
Michael Petrone

For Respondent:

Raul Malave

EXHIBITS

For Appellant:

- P-1 Memo from Director Ambrose, dated January 4, 2017
- P-2 Evaluation Forms
- P-3 Letter from Victim to Court

For Respondent:

- R-1 PNDA
- R-2 Criminal Complaint
- R-3 Administrative Submission
- R-4 FNDA