STATE OF NEW JERSEY

In the Matter of Gerrell Elliott City of Newark, Department of Public Safety CSC DKT. NOS. 2020-696 & 2020-1549 OAL DKT. NOS. CSV 14510-19 & 18005-19 **(Consolidated)**	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: OCTOBER 21, 2020 BW

The appeals of Gerrell Elliott, Battalion Fire Captain, City of Newark, Department of Public Safety, six day and seven day suspensions, on charges, were heard by Administrative Law Judge Margaret M. Monaco, who rendered her initial decision on September 22, 2020. No exceptions were filed.

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, at its meeting on October 21, 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 affirms the Administrative Law Judge's granting of the appointing authority's motion for summary decision and dismisses the appeals of Gerrell Elliott with prejudice.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF OCTOBER, 2020

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
(CONSOLIDATED)
OAL DKT. NOS. CSV 14510-19
and CSV 18005-19
AGENCY DKT. NOS. 2020-696
and 2020-1549

IN THE MATTER OF GERRELL ELLIOTT, CITY OF NEWARK DEPARTMENT OF PUBLIC SAFETY.

Gerrell Elliott, appellant, pro se

Hugh A. Thompson, Assistant Corporation Counsel, for respondent City of Newark (Kenyatta K. Stewart, Corporation Counsel)

Record Closed: August 19, 2020 Decided: September 22, 2020

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

This matter involves disciplinary charges against appellant Gerrell Elliott, who is employed as a battalion chief with respondent, the City of Newark, Department of Public

Safety (the City). Appellant appeals from the City's imposition of two suspensions for six and seven days, respectively.

PROCEDURAL HISTORY

The City issued a Preliminary Notice of Disciplinary Action (PNDA) dated May 22, 2019, informing appellant of the charges against him alleging incompetency, inefficiency or failure to perform duties; neglect of duty; misuse of public property, including motor vehicles; and other sufficient cause; namely, violation of General Order (GO) A-3 and various rules and regulations of the Newark Fire Department (NFD). The charges stem from appellant's alleged attendance at a promotion and swearing in ceremony of the Orange Fire Department on May 16, 2019. The City issued a Final Notice of Disciplinary Action (FNDA) dated August 6, 2019, memorializing that the charges were sustained and providing for appellant's suspension for six days. The FNDA and attachment reflect that appellant requested a hearing; a disciplinary hearing was held on July 25, 2019; "[p]rior to the commencement of the hearing, a settlement agreement was reached, in which . . . [appellant] will serve a 6 day suspension (equal to 48 hours)"; and "[a]s per the agreement . . . [appellant] will be allowed to surrender a maximum of 24 hours of vacation or personal time, in lieu of suspension." Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed for determination as a contested case under OAL Dkt. No. CSV 14510-19 and assigned to the undersigned.

The City issued a PNDA dated June 19, 2019, informing appellant of the charges against him alleging conduct unbecoming a public employee and other sufficient cause; namely, violation of GO G-4 and various NFD rules and regulations. The charges stem from appellant's alleged posting of an inappropriate illustration on his Facebook account on May 23, 2019. The City issued a FNDA dated November 12, 2019, memorializing that the charges of conduct unbecoming a public employee, other sufficient cause, violation of GO G-4, and violation of one NFD rule and regulation were sustained and providing for appellant's suspension for seven days (equal to 56 hours) with one of the days (equal to eight hours) to be held in abeyance for six months. The FNDA reflects that appellant requested a hearing, and a disciplinary hearing was held on October 23, 2019. Appellant

filed an appeal, and the Civil Service Commission transmitted the matter to the OAL, where it was filed for determination as a contested case under OAL Dkt. No. CSV 18005-19 and assigned to Administrative Law Judge Elissa Mizzone Testa.

On January 13, 2020, I issued an order consolidating the matters and scheduling the hearing for April 24, 2020. The hearing was adjourned due to COVID-19 and rescheduled for October 5, 2020. Prior to the hearing, the City filed a motion for summary decision. In support of the motion, the City filed a brief accompanied by various exhibits, including transcripts of the July 25 and October 23, 2019 hearings; GO G-4; and certifications of Caption John Meixedo (Meixedo Cert.); Assistant Director of Public Safety Raul Malave (Malave Cert.); Assistant Corporation Counsel Joyce Clayborne (Clayborne Cert.); and Senior Administrative Analyst Erin Rivers (Rivers Cert.).[1] Appellant opposed the motion and submitted a letter and various exhibits in support of his position, after which the City filed a reply brief.

FINDINGS OF FACTS

Based upon a review of the documentation submitted, including the various certifications, I **FIND** the following undisputed material **FACTS**:

CSV 14510-19

Appellant requested a departmental hearing regarding the charges in the May 22, 2019 PNDA, which was scheduled for July 25, 2019. Prior to the hearing, and on or about July 22, 2019, Captain Anthony Tarantino, the President of the Newark Firefighters Officers Union (the union), advised union representative Captain John Meixedo that a settlement had been reached between appellant and the City regarding the charges pursuant to which appellant accepted a six day suspension. (Meixedo Cert at ¶ 6.) Appellant attended the July 25, 2019 departmental hearing and was represented by Captain Meixedo. (Malave Cert. at ¶ 8; Clayborne Cert. at ¶ 7; Rivers Cert. at ¶ 8.) Captain Meixedo attended the hearing with appellant to place the terms and conditions

[1] The City submitted two certifications by Mr. Malave, Ms. Clayborne and Ms. Rivers, respectively.

of the settlement on the record. (Meixedo Cert. at ¶ 7.) Assistant Public Safety Director Raul Malave and Special Assistant to the Public Safety Director Corrine Rivers were on the Trial Board, and Assistant Corporation Counsel Joyce Clayborne represented the City. (Malave Cert. at ¶¶¶ 6-7, 9; Meixedo Cert. at ¶ 8; Clayborne Cert. at ¶¶ 5-6; Rivers Cert. at ¶¶ 7, 9.) Senior administrative analyst Erin Rivers recorded appellant's hearing. (Rivers Cert. at ¶ 6.) There was an offer to settle the matter for a six-day suspension in lieu of a full evidentiary hearing. (Meixedo Cert. at ¶¶ 9-10.) Captain Meixedo discussed this offer in full detail with appellant, and appellant understood the terms of the plea to Captain Meixedo's knowledge. (Id. at 11-12.) Assistant Corporation Counsel Clayborne witnessed appellant conversing with his union/attorney through the glass panels of the hearing room. (Clayborne Cert. at ¶¶ 9-10.) In lieu of a full evidentiary hearing, appellant agreed to a plea, which was recorded. (Rivers Cert. at ¶¶ 10-11; City's Exhibit E, transcript of hearing.) In the presence of Malave, Clayborne, Meixedo and Rivers, with the advisement of his union representative, appellant pled guilty and agreed on the record to a settlement in which he would receive a six-day suspension. (Meixedo Cert. at ¶ 13; Malave Cert. at ¶ 10; Clayborne Cert. at ¶ 11; Rivers Cert. at 12; City's Exhibit E, transcript of hearing.) Appellant requested to use three vacation days to offset three of the suspension days, thereby only serving three suspension days, which was granted. (Meixedo Cert. at ¶ 14; Malave Cert. at ¶ 12; Clayborne Cert. at ¶ 12; Rivers Cert. at ¶ 13; City's Exhibit E, transcript of hearing.) Prior to the acceptance of appellant's plea, Assistant Corporation Counsel Clayborne voir dired appellant to ensure that he understood the terms of the offer and that he was entering the plea knowingly and voluntarily. (Malave Cert. at ¶ 11; Clayborne Cert. at ¶ 13; City's Exhibit E, transcript of hearing.) The transcript of the proceedings reflects the following colloquy between Assistant Corporation Counsel Clayborne (JC) and appellant (GE):

JC: Yes, Battalion Chief, do you knowingly, willingly accept this plea?
GE: Assuming this ends this matter for my punishment, yes.
JC: Did you fully discuss this with your union Mr. McSedo [sic]?
GE: No, I discussed this with the president, Tarentino (Phonetic).
JC: Would you like to take it . . .
GE: And I also discussed with him previously, yes.

JC: Would you like to take a minute to fully understand the terms since you did not discuss it directly with Mr. McSedo [sic]?
GE: No, I'm happy with the conversation we had.
JC: So you're happy with his representation today?
GE: Yes.
JC: Are you in full agreement of the plea?
GE: Yes.
JC: Okay, are you under any intoxicating substances today?
GE: No.
JC: Any over the counter medication?
GE: No meds, no.
JC: Okay, the City accepts your plea.

(City's Exhibit E, transcript of hearing; see Clayborne Cert. at ¶ 13.)

CSV 18005-19

Appellant requested a departmental hearing regarding the charges in the June 19, 2019 PNDA, which was scheduled for October 23, 2019. Appellant attended the October 23, 2019 departmental hearing and was represented by Union President Captain Tarantino. (Clayborne Cert at ¶ 7; Malave Cert. at ¶ 8; Rivers Cert at ¶ 8.) Assistant Public Safety Director Raul Malave and Special Assistant to the Public Safety Director Corrine Rivers were on the Trial Board, and Assistant Corporation Counsel Joyce Clayborne represented the City. (Malave Cert. at ¶¶¶ 6-7, 9; Clayborne Cert. at ¶¶ 5-6; Rivers Cert. at ¶¶ 7, 9.) Senior administrative analyst Erin Rivers recorded appellant's hearing. (Rivers Cert. at ¶ 6.) In lieu of a full evidentiary hearing, appellant agreed to a plea, which was recorded. (Rivers Cert. at ¶¶ 10-11.) In the presence of Clayborne, Malave and Rivers, with the advisement of his union representative, appellant plead guilty and agreed on the record to a settlement in which he would receive a seven-day suspension with one day held in a six-month abeyance. (Clayborne Cert. at ¶ 8; Malave Cert. at ¶ 10; Rivers Cert. at ¶ 12; City's Exhibit H, transcript of hearing.) The agreement also included the removal of two charges in the PNDA (i.e., Article 11, Personal Example, and Article 59, Official Inefficiency and Incompetence). (City's Exhibit H, transcript of hearing.) Prior to the acceptance of appellant's plea, Assistant Corporation Counsel Clayborne voir dired appellant to ensure that he understood the terms of the offer and that he was entering the plea knowingly and voluntarily. (Malave Cert. at ¶ 11; Clayborne

Cert. at ¶ 9.) The transcript of the proceedings reflects the following colloquy between Assistant Corporation Counsel Clayborne (JC) and appellant (GE):

> JC: Yes, Battalion Chief Elliot, do you knowingly, willingly and voluntarily accept this plea?
> GE: Yes.
> JC: Were you counseled by your union?
> GE: Yes.
> JC: Do you understand what the plea is about?
> GE: What the plea is about, yes.
> JC: Okay, do you need to counsel with Tarantino any further?
> GE: No.
> JC: Okay, are you under duress in any way?
> GE: No.
> JC: Did anyone make any promises or threats?
> GE: No.
> JC: Are you under any intoxicating substances today?
> GE: Negative, no.
> JC: Okay, the City accepts your plea.
>
> (City's Exhibit H, transcript of hearing; see Clayborne Cert. at ¶ 9.)

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the

> non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court has cautioned that, "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . '[f]anciful, frivolous, gauzy or merely suspicious' . . ., he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Judson, 17 N.J. at 75 (citation omitted). Stated differently, "[b]are conclusions . . . without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App.Div.1961). Likewise, unsupported and self-serving statements, standing alone, are insufficient to create a genuine issue of material fact. Heyert v. Taddese, 431 N.J. Super. 388, 413-414 (App. Div. 2013). And, the "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid.; Worthy v. Kennedy Health System, 446 N.J. Super. 71, 85-86 (App. Div. 2016), certif. denied, 228 N.J. 24 (2016). Rather, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments,'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted), and the party opposing the motion "'must do more than simply show that there is some metaphysical doubt as to

the material facts.'" Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013), certif. denied, 214 N.J. 119 (2013) (citation omitted).

Judged against these standards, I **CONCLUDE** that there is no genuine issue as to any material fact and that the matter is ripe for summary decision.

It is well settled that the "'[s]ettlement of litigation ranks high in [the] public policy'" of New Jersey. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961), certif. denied, 35 N.J. 61 (1961)). See Lahue v. Pio Costa, 263 N.J. Super. 575, 595 (App. Div. 1993), certif. denied, 134 N.J. 477 (1993); Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983), certif. denied, 94 N.J. 600 (1983). There is a strong public policy in this State in favor of settlements. Department of the Public Advocate, Division of Rate Counsel v. N.J. Bd. of Public Utilities, 206 N.J. Super. 523, 528 (App. Div. 1985); Bistricer v. Bistricer, 231 N.J. Super. 143, 147 (Ch. Div. 1987). This "strong policy of enforcing settlements is based upon 'the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone.'" Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (citation omitted). In furtherance of this policy, "courts will strain to give effect to the terms of a settlement wherever possible." Department of the Public Advocate, 206 N.J. Super. at 528. And, second thoughts by a party unhappy with the bargain reached "are entitled to absolutely no weight as against our policy in favor of settlement." Id. at 530.

The courts have recognized that an agreement to settle a lawsuit is a contract. Nolan, 120 N.J. at 472; Pascarella, 190 N.J. Super. at 124. Equally recognized is that settlement agreements should be honored "absent a demonstration of 'fraud or other compelling circumstances' . . . " Pascarella, 190 N.J. Super. at 125 (citation omitted). The courts "have refused to vacate final settlements absent compelling circumstances" and require "clear and convincing proof" that a settlement agreement should be vacated. Nolan, 120 N.J. at 472. Further, a court "will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a compromise settlement fairly and deliberately made." Pascarella, 190 N.J. Super. at 125. That an agreement to settle is orally made is of no consequence. Id. at 124. Rather, "an 'agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court and even in

the absence of a writing.'" Ibid. (quoting Green v. John H. Lewis & Co., 436 F.2d 389, 390 (3d Cir. 1971)). See also Good v. Pennsylvania Railroad Co., 384 F.2d 989, 990 (3d Cir. 1967) (holding that a "settlement agreement which was entered into by duly authorized counsel expressed the intention to settle the case for the agreed amount and was valid and binding despite the absence of any writing or formality"); Williams v. Vito, 365 N.J. Super. 225 (Law Div. 2003) (ruling that plaintiff's authorization of his attorney to accept defendant's settlement offer and the attorney's communication of the acceptance to the opposing counsel and the court created an enforceable settlement agreement, irrespective of whether a subsequent writing was contemplated).

Against this backdrop, the foundation of the City's summary decision motion is that appellant "willfully, knowingly, and intelligently" entered into a settlement agreement regarding the disciplinary charges, which should be honored and enforced. In opposition, appellant does not challenge, by way of affidavit, the facts, the series of events or the documentary evidence submitted by the City. Rather, the crux of appellant's position is that the Union did represent his best interest, stating that "Mr. Tarantino may have spoke[n] to the [C]ity representative Assistant Director Malave but it was for my demise and not my betterment." Appellant further controverts that his suspensions were "just and fair," and appellant's submission addresses disciplinary action taken against other employees.

The undisputed facts disclose that a dispute existed between the parties in May and June 2019 regarding appellant's attendance at the Orange Fire Department ceremony and his post on Facebook. The City afforded appellant departmental hearings concerning the charges in the May and June 2019 PNDAs, including the opportunity to defend against the charges and be represented by counsel or his union. Appellant appeared at both hearings with a union representative. The transcripts of the hearings, along with the various certifications, further demonstrate that appellant agreed to a plea in lieu of a full evidentiary hearing regarding both matters. The terms of the settlement reached are memorialized in the transcripts of the hearing and the FNDAs. Pursuant to the settlements, appellant plead guilty to certain charges and the City agreed to suspensions of six days and seven days, respectively, as penalties for the infractions. Prior to accepting appellant's pleas, appellant explicitly confirmed on the record that he

understood the pleas, that he had the opportunity to discuss the pleas with his union representative, and that he knowingly and willingly accepted the pleas. The record is bereft of any competent evidence suggesting that appellant objected to the terms of the settlements or that appellant did not enter into the settlements free of fraud or other compelling circumstances.

The terms of the settlements are clear and unambiguous. The existence of the disputes between the City and appellant established consideration to support the settlements reached. Following the dispute between the parties, appellant agreed to the pleas and the suspensions instead of pursuing full evidentiary hearings and, in turn, the City relinquished its claim for appellant's removal as stated in the PNDAs. It is further apparent that the intendment of the settlements was to provide a full and final resolution of the two disciplinary actions. Clearly, the City's consideration for its concession to dismiss two of the charges and not to seek termination or a lengthy suspension included freedom from future litigation concerning the disciplinary charges. I afford no weight to appellant's claim regarding his union representation. Indeed, the record reveals that appellant was facing possible termination for his actions and, based on the agreements that the union negotiated on appellant's behalf, appellant was subject to only a six-day suspension with the ability to use twenty-four hours of vacation or personal time in lieu of suspension, and to seven day suspension with one day held in abeyance for six months, in addition to the dismissal of two disciplinary charges. Appellant's assertion is further belied by his representations at the hearings that he was knowingly and willing entering into the pleas. And, the transcript reveals that applicant specifically articulated his satisfaction with his union representation at the July 25, 2019 hearing. Equally unavailing is appellant's reliance on discipline imposed on other employees. In short, discipline that may have been imposed on other employees is simply immaterial as to whether appellant agreed to a plea and settlement and the appropriateness of appellant's discipline for the charges.

Based upon the foregoing facts and the applicable law, I **CONCLUDE** that appellant has failed to raise any genuine issue of material fact that would operate to preclude summary decision and necessitate an evidentiary hearing. I **CONCLUDE** that the parties entered into valid settlement agreements regarding the underlying disciplinary

charges; the agreements are binding upon the parties; and the settlements reached and fulfilled bar appellant's appeals. The settlements between the parties are not only enforceable but they should be enforced. "If later reflection were the test of the validity of such an agreement, few contracts of settlement would stand." Pascarella, 190 N.J. Super. at 126. The failure to give a clear settlement the conclusive effect intended would discourage parties from resolving disputes amicably by mutual consent and lead to unnecessary litigation and expense.

ORDER

It is **ORDERED** that respondent's motion for summary decision be and hereby is **GRANTED**.

It is further **ORDERED** that appellant's appeals from the Final Notices of Disciplinary Action dated August 6 and November 12, 2019 be and hereby are **DISMISSED WITH PREJUDICE**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO 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.

September 22, 2020
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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