STATE OF NEW JERSEY

In the Matter of Andrew Juttner,
City of Plainfield, Fire Department

CSC DKT. NO. 2021-541
OAL DKT. NO. CSV 11255-20

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JANUARY 19, 2022

The appeal of Andrew Juttner, Battalion Fire Chief, City of Plainfield, Fire Department, 20 working day suspension, on charges, was heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on November 18, 2021. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

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 on January 19, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. However, it did not uphold the recommendation to affirm the 20 working day suspension. Rather, the Commission imposed a 10 working day suspension.

DISCUSSION

In this matter, the appellant was charged with incompetency, inefficiency or failure to perform duties, neglect of duty and other sufficient cause. Specifically, the appointing authority alleged that the appellant improperly conducted a training session where smoke was released. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the Administrative Law Judge found that the credible evidence in the record supported the charges against the appellant and that, notwithstanding that the appellant had only previous minor discipline, that the 20

working day suspension was the proper penalty.

Upon its *de novo* review of the record, the Commission has no issue with the ALJ's findings regarding the charges in this matter.[1] However, it disagrees that the 20 working day suspension is the proper penalty.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relation to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this case, the appellant's actions are clearly serious, especially in a public safety setting. The appellant's failure to properly administer the training, especially in failing to account for the hazardous consequences that may have been caused by the timing of the training, clearly justifies a major disciplinary suspension. Nevertheless, given that the record indicates that the appellant has only prior minor discipline, much of which is remote in time, in his 25-year career, the Commission finds that a 10 working day suspension is the proper penalty and should serve as sufficient warning to the appellant that any future infractions could lead to a more severe disciplinary sanction.

As the appellant's suspension has been modified, he is entitled to 10 days of back pay, seniority and benefits. *See N.J.A.C.* 4A:2-2.10. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the

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[1] As the Commission only disagrees with the ALJ regarding the penalty, the appellant's exceptions, which, among other things, challenged the ALJ's credibility determinations and numerous other findings by the ALJ, and which were reviewed and considered by the Commission, but were ultimately found to be unpersuasive, will not be addressed in detail.

Commission, charges were sustained, and major discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore modified the 20 working day suspension to a 10 working day suspension. The appellant is entitled to 10 days of backpay, benefits and seniority as provided for in *N.J.A.C.* 4A:2-2.10. The amount of back pay awarded is to be reduced to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

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 19Th DAY OF JANUARY, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11255-20
AGENCY DKT. NO. 2021-541

ANDREW JUTTNER,
Petitioner,
vs.
CITY OF PLAINFIELD, FIRE DEPARTMENT,
Respondent.

Lawrence N. Lavigne, Esq., for Petitioner

Denise Errico Esmerada, Esq., for Respondent (Ruderman & Roth, attorneys)

Record Closed: September 28, 2021 Decided: November 18, 2021

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Andrew Juttner, appeals a Final Notice of Disciplinary Action (FNDA), dated October 28, 2020, imposing a penalty of a twenty work day suspension on sustained charges as follows: Charge #1) Incompetency, inefficiency or failure to perform duties; #7) Neglect of Duty; and, Charge #12) Other sufficient cause.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on November 25, 2020.

A prehearing conference was conducted on January 12, 2021, and a prehearing order entered on the same date by the undersigned.

A hearing was held on May 3, 2021 and May 6, 2021. The record was kept open for counsel to submit written summations. Written summations were received from both parties on September 28, 2021, whereupon the record was closed.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of a twenty working day suspension is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Kenneth Childress testified as follows:

He is the director of the Plainfield Fire Division and has been for two years. Prior to this position he was with the Fire Division for twenty-eight years. He retired as a Provisional Battalion Chief.

The Fire Division conducts training which involve evolutions and drills. An evolution is where a class is conducted first prior to a hands on drill.

He knows Appellant Juttner. Appellant plans and executes different training evolutions. Appellant is certified by the State of New Jersey.

On February 11, 2020, there was training being done using a smoke machine. The smoke machine was left unattended and smoke went into the hallways. He

prepared a written statement (R-9). This evolution was supposed to simulate firefighters in a smoke filled environment.

When the witness walked into the hallway there was so much smoke you could not see your hand in front of your face. He knew the smoke was simulated. There were employees working the day of the incident. Ms. Colely is a civilian clerk. She stated she did not feel well due to the smoke. Also working were the Director's secretary, Ms. Bell; Battalion Chief Reed, Deputy Chief Mark Smith, someone named Martino and Deputy Chief Franklin.

When the Director first detected the smoke he went to see Deputy Chief Franklin to ascertain what was going on. Deputy Chief Franklin did not know.

The Director saw Appellant in the hallway and inquired as to why he was conducting a smoke drill on the second floor. Appellant's response was "where else am I supposed to train". The Director admitted he was upset due to Ms. Colely not feeling well and that the drill should not have been on the second floor. There is no turnout gear allowed on the second floor.

Other locations are available to do training. It could have been done on the apparatus floor or at Engine 3 or Engine 4. There are no civilian employees at these locations.

The Director told Appellant to shut down the training. A video of the smoke in the hallway depicts what it looked like. The video was taken approximately one half hour later.

The pole holes in the floor were not closed during ventilation. They should have been to prevent someone from falling.

Appellant should have spoken with Deputy Chief Franklin prior to the training session to inform him of what he wanted to do. He should have submitted a lesson plan.

The Director reviewed a schematic of the second floor to point out where offices are located, where the training was to take place and where the smoke machine was set up. Members of the public are permitted in the area of the Bureau Fire Prevention.

Jackie Colely no longer works for the City. She was terminated for conduct unbecoming. She was showing favors to friends in reference to fire permits. Ms. Colely was treated at the City's medical facility, Concentra.

He testified that Appellant violated certain SOP of the Division. He was the instructor in charge for the drill. The drill can be done in occupied buildings, but should not have been done on the second floor of the fire house. Other locations were also mentioned that have no offices.

The Director reviewed the charges and explained, in his view, how Appellant violated SOP of the Division.

Joseph Franklin testified as follows:

He is the Deputy Chief of the Fire Division. He has been employed for twenty-five years. He has previously participated in training on the second floor of Headquarters. He did not recall if that training was with a smoke machine.

He recalled the incident of February 11, 2020. He was not advised in advance by Appellant that this training would occur. He was not provided with a lesson plan.

The Deputy Chief described what he observed regarding the training smoke. He saw Director Childress who asked him to find out what was happening. He then spoke with Appellant who advised him that he was trying to do a search drill. Appellant then turned off the smoke machine. It took approximately one-half hour to clear the smoke.

The Deputy Chief stated, if asked prior by Appellant, he would have suggested another location or the apparatus floor of Headquarters. He stated Appellant was trying

to get a realistic optic for search and rescue in an actual fire. If there is no safety officer designated the instructor in charge assumes that role.

Gear is not permitted on the second floor. Director Childress was very upset. The Deputy Chief determined that discipline of Appellant was appropriate and he put in a request for discipline. He described the disciplinary process.

He learned that Jackie Colely had some difficulty breathing due to the smoke.

He could tell the smoke was simulated.

He was second in command. If the Director was not present he too would have shut down the training. Usually, in the past, training of this magnitude was done on the weekend.

John Reed testified as follows:

He is a Battalion Chief. He has been a firefighter with the Division since 2005. He is a level two fire instructor. This is the same level as Appellant. He works with Appellant at the Middlesex Training Academy. He recalled the incident of February 11, 2020.

He observed a training exercise on the second floor using synthetic smoke, where his office is located. Appellant opened the door to his office and stated "Sorry for the smoke. I know you staff guys don't get to see smoke." He was not aware beforehand that training would occur. Thereafter Director Childress entered his office to inquire as to what was happening. He informed the Director of Appellant's comments.

He observed the smoke in the hallway. He knew it was training smoke. The smoke became thick enough in the hallway that you could barely see your hand in front of your face. He was asked by the Director to attend to Ms. Colely, who was sitting in a chair outside the Director's office.

Battalion Chief Reed stated that when running a training evolution one should take safety into consideration, especially when utilizing smoke. Accidental injuries should be avoided due to obscured vision. He would also have taken some consideration as to where it was conducted and how it was being conducted. He also would have asked for prior approval from Deputy Chief Franklin due to the location.

He observed the pole holes closed and secured. After the training was stopped they were opened to assist with smoke removal.

Whenever there is training the lead instructor is the safety officer if no one else is designated as such. He described how the smoke machine operates. He described the two different fluids used to simulate smoke.

The only turnout gear permitted on the second floor is turnout gear being washed and decontaminated.

He is aware that the smoke machine has been used for a number of years by the Fire Division in demonstration in the fire trailer. He does not recall anyone having an issue with being exposed to the simulated smoke.

Appellant's Case

Jason Lowry testified as follows:

He is a Lieutenant with the Plainfield Fire Division. He is a certified Level one and Level two instructor. He recalled the incident of February 11, 2020. He was working with Appellant in the training exercise. Prior to February 11, 2020, he was involved in this type of training. He is familiar with the smoke machine used by the Plainfield Fire Division. He spoke with Appellant prior to the training. It was to take place on both levels of Headquarters. He did not discuss with Appellant that the second floor should not be used. The training was to take place on the opposite side of the second floor from where the offices are located.

The purpose of using the second floor was to simulate a residence with multiple rooms where firefighters would look for potential victims in smokey conditions. This was in the dormitory and is not open to the public.

He did not set up the smoke machine. He assisted in hanging some tarps to contain the smoke to the area of the training. He felt this would contain the smoke. It seemed everything was ready. When he came back to the second floor the smoke had passed where the tarps were hung.

He saw Deputy Chief Franklin and Director Childress. He went to get a fan. He does not recall any smoke around the offices at that point. The smoke was heavy.

He is familiar with firehouse three and four. They are located on the other side of town. Headquarters is centrally located. Had the training taken place at either three or four, and a call came in, it would have taken longer to respond.

For this particular drill Headquarters would be better.

The pole holes were covered. He does not believe he opened any pole holes after the drill was shut down. Afterwards he worked on the forcible entry prop he prepared with different companies. That part of the training did occur.

He has set up training exercises during his career. He has never been required to submit a lesson plan. It is not a requirement that he knows of. He believes proper measures were set up for this training exercise.

Turnout gear is usually not brought up to the second floor. It used to be done all the time. More recently it has not. This is to avoid contamination. Turnout gear is stored on the second floor of Headquarters.

Training with smoke in the bedrooms of the second floor were often done in the past. He is familiar with the smoke machine being used in a trailer for public demonstrations.

He is unsure as to why the smoke escaped from its intended place. It is the responsibility of the instructor in charge to be sure precautions are in place.

Michael McCue testified as follows:

He is currently the fire inspector in the Township of Edison. Prior to that he was employed by the Plainfield Fire Division for forty-one years. He retired as a Deputy Chief. He was involved with training exercises. He has certifications as a Fire Instructor one and Fire Instructor two. In the past training has been done on the second floor of Headquarters using a smoke machine. This was on numerous occasions throughout his career. This has been done on weekdays. To the best of his knowledge there is no directive saying this type of training cannot be done on the second floor. He has never seen anyone have an adverse effect from simulated smoke. He is aware of the use of a trailer for public demonstrations with the smoke machine.

In his experience lesson plans were required to be submitted to Administration in advance of training. Sometimes they were submitted afterward.

Turnout gear is permitted on the second floor.

Andrew Juttner, Appellant, testified as follows:

He is a Battalion Chief with the Plainfield Fire Division. He described his duties as a Battalion Chief. Regarding training, he is certified Level two State Fire Instructor. He also listed his other credentials. He described the training required to obtain those credentials.

He has been conducting practical evolutions (training) since 1997.

The practical evolution of February 11, 2020 was a search and recover training using simulated smoke. The purpose of the training was to teach how to conduct a search for victims in a residential structure. In the morning he did a lecture to explain the techniques to be used. A lesson plan was not required for the lecture. The practical

evolution was to take place in the afternoon. There was to be a new technique called "oriented search". He described what this is.

He reviewed a photograph of a closet on the second floor and stated that is where turnout gear is stored. The prior testimony that turnout gear is not allowed on the second floor is incorrect. It is where the gear is stored.

Up to the point when the training was shut down by Director Childress he was the safety officer. Had the training taken place he would have assigned a safety officer on rotating basis for each company.

Lesson plans are done if there are multiple instructors and you want everyone on the same page. In this training he was the only training officer and he wasn't required to file a lesson plan. It is not common practice. Training plans done after an exercise are acceptable.

Deputy Chief Franklin asked him to prepare a lesson plan for this particular training after it was shut down, which he did.

Appellant described how he prepared the room for the training by placing tarps, darkening windows and setting up the smoke machine. He had determined that there was sufficient fluid in the reservoir of the smoke machine. After turning on the machine he went downstairs to inform the platoon that it was time to start. When he went back upstairs he realized the smoke had gotten past the tarp. He turned off the smoke machine, or he turned it down.

The smoke was starting to enter the hallway so he walked down to the Finance Office to advise them what was happening. They were not alarmed.

Director Childress then came through the double doors and asked why he was doing the training. Appellant responded by stating, "where else am I supposed to do it?"

Headquarters was the most suitable for searching in a residential structure. Doing it at the other fire houses would have increased response time had there been a call.

Appellant described the smoke condition in the hallway as "light". He stated there was no smoke in the offices.

He was going to continue the training at this point when Director Childress and Deputy Chief Franklin came back through the double doors. Director Childress was aggressive and accused Appellant of doing it on purpose. He then told Appellant to shut it down. Lieutenant Lowry then came upstairs and Director Childress yelled at him and Appellant at the same time. He and Director Childress do not have a cordial relationship, and have not over the years.

Appellant filed a grievance regarding the interaction with Director Childress. After the grievance was filed he received a notice of disciplinary action. The grievance was not substantiated. Appellant also filed a complaint with PEOSHA.

He and Michael McCue have filed a lawsuit against the City of Plainfield Fire Division.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common

sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

Director Childress saw what he saw and related those facts. He readily admitted he was upset by what transpired. While I may disagree with whether or not Appellant was guilty of the infractions the Director thought, I nonetheless found him to be direct and honest.

Deputy Chief Franklin too was direct and honest. He related what he saw in a straightforward manner.

Battalion Chief Reed was also direct and honest. He simply stated what he saw and heard.

Lieutenant Lowry was likewise straightforward and direct. He related his role in the training exercise and what he saw the day of the incident.

Mr. McCue was also a credible witness. Of particular use to the undersigned was his testimony that normally a lesson plan would be submitted in advance of a drill such as the one that occurred on February 11, 2020.

Appellant was a knowledgeable witness. He very well understood his position and was able to relay what his duties are. However, I found him a bit disingenuous in his testimony as to the density of the simulated smoke. All the other witness to the event described the smoke as thick. Appellant thought it minimal. Appellant proffered photographs that show the second floor more than two hours after the aborted drill. This was well after the building had been ventilated. It also belies the testimony of the other fact witnesses. I found this proffer self serving and deceiving.

STIPULATED FACTS

1. Battalion Chief Andrew Juttner ("BC Juttner" or "Employee") has been employed by the City of Plainfield in the Fire Division since 1994.

2. On Thursday, February 11, 2020, BC Juttner prepared a practical evolution (training) for trainees to simulate the search for a fire victim.

3. BC Juttner prepared the practical evolution to take place on the second floor of Headquarters during the day.

4. The practical evolution involved the use of a smoke machine.

5. BC Juttner set up the smoke machine to create a realistic effect.

6. The smoke machine emitted simulated smoke.

7. One civilian employee requested medical attention due to the smoke.

8. The smoke machine was shut down and ventilation was performed.

9. A Preliminary Notice of Disciplinary Action dated March 2, 2020 was served on BC Juttner.

10. A departmental hearing in connection with the Preliminary Notice of Disciplinary Action took place on July 2, 2020 and August 11, 2020.

11. A Final Notice of Disciplinary Action dated October 28, 2020 was served on BC Juttner.

12. On or about November 3, 2020, Mr. Juttner appealed the Final Notice of Disciplinary Action to the Civil Service Commission.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant was the safety officer for the practical evolution training he prepared to take place on February 11, 2020. This is so as he did not designate a safety officer prior to the commencement of the training. When this occurs the lead instructor is the safety officer.

2. Appellant had planned on designating safety officers from each company had the training taken place.

3. Appellant was responsible for the proper set up of the smoke machine that was used in the training.

4. Appellant failed to properly check which fluid was utilized in the smoke machine.

5. Appellant failed to properly tarp the area so as to prevent the smoke from escaping the dormitory, where training was to take place, into the public areas of Headquarters.

6. Appellant did not notify a superior officer of the scheduled training of February 11, 2020, and he should have done so given the type of training that was to take place.

7. Appellant failed to take into account what hazards may have been caused by scheduling the training during normal business hours.

8. The training could have been accomplished after regular business hours without any hazard to the general public or the civilian staff.

9. The safety date sheets for the two types of liquid that could be used in the smoke machine both indicate it may cause respiratory irritation.

10. The smoke machine has been used in the past in Headquarters for training.

11. The smoke machine has been used in the past for public demonstrations in the fire division trailer.

12. No one suffered respiratory irritation, other than Jackie Colely, a civilian clerk for the Fire Division.

13. There was potential for danger to the public due to the smoke filling the public portion of Headquarters.

14. Appellant failed to anticipate that the smoke could escape from the dormitory and enter the public section of Headquarters.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority

bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

In the instant matter, after a disciplinary hearing, three of the charges set forth in the PNDA were sustained, as set forth in the FNDA:

N.J.A.C. 4A:2-2.3(a)1 Incompetency, Inefficiency, or Failure to Perform Duties;
N.J.A.C. 4A:2-2.3(a)7 Neglect of duty; and,
N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause.

The charge of incompetency, inefficiency, and failure to perform duties applies to instances involving a lack of execution of job responsibilities and inadequate job performance. Klusaritz v. Cape May County, 387 N.J. Super. 305 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007).

There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by

the employee's position and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <http://njlaw.rutgers.edu/collections/oal/>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985).

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/. Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Also sustained were violations of the Code of Ethics 6.1-1b) Failure, either willfully or through negligence or incompetence, to perform the duties of their rank or assignment; and, Code of Ethics 6.1-1c) Violation of any rule, Administrative Policy, General Order or Directive of the Chief/Director.

Respondent argues in its closing summation brief that there were sustained violations of Standard Operating Procedures, as follows: SOP 3:15 Training Safety; and, SOP 6:1 Safety Policy. A fair reading of the hearing officers decision clearly indicates he did not make these findings. He stated as to both that they were "not an infraction per se." He refers back to sustained charges under N.J.A.C. 4A:2-2.3 and uses the SOP as the standard under which the violations under N.J.A.C. 4A:2-2.3 are evaluated. Accordingly, the undersigned will not treat the alleged violations of SOP as being sustained by the hearing officer, and therefore, not in the FNDA.

This forum has the duty to decide in favor of the party on whose side weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the

fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). 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, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Here it is clear that the evidence preponderates in favor of Respondent that Appellant is guilty of the sustained charges in the FNDA, as set forth above.

What now must be determined is whether a twenty working day suspension is the appropriate penalty.

An appeal to the Merit System Board[1] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offenses,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hernmann, 192 N.J. 19, 33-4 (2007) (citing Henry, supra, 81 N.J. 571).]

[1] Now the Civil Service Commission, N.J.S.A. 11A:11-1

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

The concept of progressive discipline has been used to reduce the penalty of removal in other cases involving a law-enforcement officer who used racist language in public but who otherwise had a largely unblemished employment record. In In re Roberts, CSR 4388-13, Initial Decision (December 10, 2013) adopted, Comm'n (February 12, 2014), <http://njlaw.rutgers.edu/collections/oal/>, for example, an on-duty police officer who, while arresting an uncooperative black suspect, shouted to his K-9 police dog, "Zero, bite that nigger," had his penalty modified from removal to a six-month suspension. The ALJ had found that his misconduct was "plainly aberrational,"

as his past record only included an oral reprimand for a motor-vehicle accident over the course of seven years of service and several of his minority co-workers credibly testified that he had otherwise treated citizens in an impartial and respectful manner. While the ALJ found that, due to mitigating circumstances, "termination is too severe a penalty," he nonetheless concluded that, despite a past record that included only an oral reprimand, the "fitting" penalty "is the longest suspension which the law allows: six months."

While concept of progressive discipline in determining the level and propriety of penalties imposed requires a review of an individuals prior disciplinary history a "clean" record may be out-weighed if the infraction had issued a serious in nature. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Carter v. Bordentown, 191 N.J. 474 (2007). Further some disciplinary infractions are so serious that removal is appropriate. Destruction of public property is such an infraction. Kindervatter v. Dep't of Envt'l Protection, CSV 3380-98, Initial Decision (June 7, 1999), http://lawlibrary.rutgers.edu/collections/oal/search.html.

In determining the penalty to be imposed, the court noted that none of the factors justifying mitigation of removal were present. Namely mistake, negligence, or remorse. The Court was compelled to hold that whatever the employee's motive, and regardless of the worth of the computer, she had to be subject to major discipline. While the goal of discipline is to either remove an employee unsuitable for public service or to impose some lesser sanction when the employee may be rehabilitated, the Court held that the extraordinary serious offense in this case could not be mitigated by a prior good-service record as that mitigation is reserved only for lesser offenses.

In the instant matter, Appellant has a limited prior disciplinary history consisting of minor discipline (ALJ-1). Most of the prior discipline spans the years 1995 to 2004. Presently there is a five-day suspension which Appellant has appealed. Respondent has certainly demonstrated by a preponderance of the credible evidence that Appellant is guilty of the sustained charges in the FNDA. The question becomes whether or not the incident of February 11, 2020 is an event that requires major discipline. Appellant has no substantial disciplinary history. The incident, while disruptive to the normal

operation of the Fire Division, did not result in any major injury or long term problems. However, there was potential for the same.

The undisputed facts in this matter demonstrate that Appellant planned a training evolution which entailed a morning lecture, followed by an afternoon drill using simulated smoke to practice finding victims in a fire. Appellant failed to properly prepare the area to contain the smoke. He failed to properly supervise the smoke machine. He failed to properly check which liquid was in the smoke machine. He failed to notify his superior as to what was about to transpire. He created a potentially hazardous condition by his actions. While it is true no one was actually injured or harmed, the potential was there. Only one person, Jackie Coley, required medical assistance. However, had there been members of the public in the building someone unfamiliar with simulated smoke might have panicked and been injured. In the end, there was no injuries, other than possibly Ms. Colely, and the building was cleared of the simulated smoke and normal business resumed. Had Appellant demonstrated some forethought the entire situation could have been avoided and the training could have been undertaken. In the final analysis, Appellant failed to properly insure that there would be no impact on the operation of the Fire Division's office functions.

Based upon the above, I **CONCLUDE** that Respondent has demonstrated by a preponderance of the credible evidence that Appellant is guilty of the sustained charges in the FNDA, and that the twenty day suspension is an appropriate penalty.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**; and,

It is further **ORDERED** that the Final Notice of Disciplinary Action, dated February 25, 2020, providing for a penalty of removal, effective October 28, 2020, is **SUSTAINED**.

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.

November 18, 2021

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Appellant:

Jason Lowry
Michael McCue
Andrew Jotter, Appellant

For Respondent:

Kenneth Childress
Joseph Franklin
John Reed

List of Exhibits

For Appellant:[2]

A-10 SOP 6:6
A-13 SOP Storage Procedures
A-15 SOP 6:1
A-18 Plainfield Fire Division Standard 6:6
A-19 Plainfield Fire Division Standard 3:15
A-22 & 23 Grievance Form
A-24 Response to Grievance
A-33 & 34 PEOSH Complaint dated 3/9/20
A-40 & 41 Plainfield Fire Division Lesson Plan dated 2/11/20
A-40 through 48 Licenses and Certifications held by Appellant
A-52 Photograph of smoke machine with Rosco container
A-53 Photograph of Jackie Coley's office
A-54 Photograph of doors in hallway
A-55 Photograph of site of training area (after smoke induced)

[2] Appellant's exhibits were referred to as P for Petitioner's exhibits during the hearing. The Appellant's trial exhibits were submitted using the reference A for Appellant. They are noted herein as A exhibits.

A-56 & 57 Photographs of Training area

A-60 Schematic of second floor of HQ building

A-61 Photo of Area

A-62 Marked up copy of A-55

A-63 Photograph of Fire Safety House

A-71 & 72 Newspaper articles regarding training using smoke machine (Done at the second floor of Fire HQ)

A-74 Plainfield Fire Division standard 3:2

For Respondent:

R-1 Statement of John Reed

R-2 Statement of Mark Smith

R-3 Statement of Andrew Juttner

R-4 Request for Disciplinary Review

R-5 Documents related to Jacky Colely injury

-Concentra Medical Center – Physician Work Activity Status Report and RTD, both dated 3/9/20

-Injury Notification Form 2/11/20

-WC – First Report of Injury or Illness

-Supervisor's Accident Investigation Report, 2/11/20

-WC Questionnaire, 2/11/20

-Concentra Medical Center-Physician's Work Activity Report and RTD, both dated 2/13/20

R-6 SOP 3:15 Training Safety

R-7 SOP 6.1 Safety Policy

R-8 Safety Data Sheet ST-10 XP

R-9 Statement of Dir. Childress

R-10 Fire Division Rules and Regs.

R-11 Picture Smoke Machine and Fluid

R-12 Picture Smoke Machine

R-13 Picture Rosco Fluid

R-14 Material Data Safety Sheet – Rosco

R-15 Invoices ST-10

R-16 Schematic

R-17 Video

Additional Documents[3]:

ALJ-1 Disciplinary History

ALJ-2 Hearing officer's decision dated 9/10/20 and 10/21/20

[3] Appellant's disciplinary history and the decision by the hearing officer from the departmental hearing, were requested by the ALJ. The disciplinary history was to be used if progressive discipline was to be utilized. The hearing officer decision was requested as the FNDA did not list the sustained charges, but referred to the attached decision.