

need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. See *N.J.S.A. 52:14B-10(c); Cavalieri u. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C. 4A:2-2.10*. However, the appellant is not entitled to receive back pay, benefits and seniority for the entire period from the date of his removal to the date of his reinstatement. In this regard, the Commission notes that the appellant was still in his working test period when he was removed. Specifically, he received a regular appointment effective October 7, 2019, and was removed effective November 1, 2019. Since it cannot be assumed that the appellant would have completed his working test period, he should only receive back pay from November 1, 2019 through October 6, 2020, which is the remainder of the working test period he did not complete. See *In the Matter of Justin Miller* (CSC, decided June 18, 2014); *In the Matter of Terrell Twigg*s (MSB, decided May 9, 2007), *In the Matter of Jennifer Mortimer* (MSB, decided April 26, 2006) and *In the Matter of Rosalind Candelaria* (MSB, decided November 10, 1998). Any time after October 6, 2020, until the appellant's actual date of reinstatement shall be recorded as a leave of absence without pay. Further, upon his reinstatement, the appellant is required to complete the remainder of his working test period (approximately 10 months and three weeks) which shall include re-enrollment in the next available Fire Academy not under the auspices of Morris County. Moreover, as the removal has been reversed, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Mina Ekladious. The Commission further orders that the appellant be granted back pay, benefits, and seniority from November 1, 2019 through October 6, 2020. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF SEPTEMBER, 2022

Dolores Gorczyca

Dolores Gorczyca
Presiding Member
Civil Service Commission

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 01300-20

AGENCY DKT. NO. 2020-1768

**IN THE MATTER OF MINA EKLADIOUS,
CITY OF JERSEY CITY, DEPARTMENT
OF PUBLIC SAFETY.**

Michael Prigoff, Esq., for appellant Mina Ekladios (Lebson & Prigoff, LLC,
attorneys)

James B. Johnston, Assistant Corporation Counsel, for respondent Jersey City,
Department of Public Safety (Peter J. Baker, Corporation Counsel)

Record Closed: May 5, 2022

Decided: July 22, 2022

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Mina Ekladios appeals his removal as a firefighter by Jersey City (the City) due to an alleged failure to complete training at the Morris County Public Safety Academy (the Academy). The issue is whether the City has satisfied its burden of establishing by a preponderance of the credible evidence that appellant failed to successfully complete the Academy training, and thus the City was within its rights to terminate appellant from his employment.

The County of Morris, Department of Law and Public Safety, Fire Training Division, issued a Dismissal Notice on November 1, 2019, informing the appellant of the following:

This is to inform you that in accordance with the provisions of the New Jersey Division of Fire Safety Regulation, N.J.A.C. 5:73-4.3 along with the Rules and Regulations of this Academy, you are being dismissed, as of this date, from the course you are attending for the following reasons(s):

Recruit was unable to meet the minimum [physical training (PT)] assessment set forth by the Morris County Public Safety Training Academy Fire Training Division. After failing the initial PT assessment, the recruit received nine additional PT days and reassessed on the 10th day. The recruit again failed to meet the minimum PT requirements set forth by the Morris County Public Safety Training Academy Fire Training Division.

You and your agency have the right to review all reports and documents that relate to the reason(s) for your dismissal. These documents include, but are not limited to, the following: written examinations, including the correct answers to the examinations, attendance sheets, quizzes, and session summary sheets and physical training sheets.

[R-5.]

Subsequently, the Jersey City Fire Department issued a Final Notice of Disciplinary Action dated December 26, 2019, sustaining the following charges and providing for appellant's removal effective November 1, 2019:

Charge #1: Conduct not becoming a Firefighter

Charge #2: Incompetency and incapacity, mentally or physically

Charge #3: Not properly performing duty

The incidents giving rise to the charges were set forth as follows:

As of November 1, 2019, Probationary Fire Fighter Ekladius Mina exceeded the number of Zeros allowed and twice failed

the physical assessment test. He failed to meet the requirements set forth by the Academy of Morris County Safety Training Academy Career Firefighter Program, resulting in his dismissal from the Academy.

[R-1.]

Appellant filed an appeal, and the matter was transmitted to the Office of Administrative Law, where it was filed for determination as a contested case. Telephone conferences were held on August 6, 2020, September 17, 2020, November 24, 2020, December 9, 2020, February 5, 2021, and March 25, 2021. The hearing was scheduled for April 5 and April 6, 2021; however, those dates were adjourned due to discovery issues, and the hearing was rescheduled for August 26, 2021. A telephone conference was held on May 6, 2021, and the August hearing was adjourned, as respondent's witness was not available. The hearing was rescheduled for December 14, 2021, and was held via Zoom on that date.

At the conclusion of the hearing, the parties requested the opportunity to submit post-hearing briefs. Following receipt of those briefs in February 2022, a telephone conference was held and additional briefing requested as follows:

1. Is a firefighter recruit, who has been provisionally hired, a "person aggrieved" by the Department of Community Affairs pursuant to N.J.A.C. 5:73-1.5(c)?
2. If the answer to #1 above is yes, why does the County of Morris, Department of Law and Public Safety, Fire Training Division, Dismissal Notice (R-5) not advise the dismissed recruit how and when to appeal?
3. Whether the Office of Administrative Law (OAL) has jurisdiction over a fire academy dismissal only through a transmittal from the Civil Service Commission, or whether there is a separate and distinct avenue for an administrative appeal to the OAL from the fire school or academy?
4. If there is no regulation providing for an appeal from a fire training program, does that mean by process of elimination that the only avenue of appeal is to

the Civil Service Commission following termination by the recruit's provisional employer?

TESTIMONY

What follows is not a verbatim accounting of the testimony, but rather a summary of the testimonial and documentary evidence I found to be relevant to resolving the issue in this matter.

Joseph Vallo has been a battalion chief at the Jersey City Fire Department for four years. He has been with the department for thirty years and is currently the field training officer. He previously served as the chief of training.

Vallo testified that all candidates have to complete the training and that no prior certifications are accepted in lieu of the academy training. Appellant was assigned to the Morris County Fire Academy because they do not have a firefighter training academy in Jersey City. Vallo indicated that they sent forty-three to forty-five individuals to that academy in appellant's class.

He described the training as quasi-military, with paramilitary parameters included as physical training because firefighting is a physical job. Individuals have to exert themselves carrying apparatus, dragging hoses, and potentially dragging firefighters or victims. He described the job as very physical. He learned that appellant was less than successful, but indicated that even if someone is struggling, they do not pre-judge a recruit.

Vallo indicated that appellant had signed a conditional offer of employment (R-2), requiring that he successfully complete the requirements of the course. Vallo noted that the criteria for firefighter training, N.J.A.C. 5:73-4.1 and -4.2, are the minimum requirements, but that additional requirements can be imposed. No prior training meets the requirements and the course must be completed within the dates specified. Paragraph 5 provides that if the course cannot be completed, the individual is terminated.

Appellant agreed to these conditions and requirements. Vallo indicated that appellant also had several disciplinary issues at the academy.

The dismissal notice from the Morris County Fire Training Division (R-5) is the document used for all recruits that are dismissed, and appellant refused to sign it. Vallo noted that appellant had received written warnings on several occasions, all signed by the lead instructor, Captain Hamilton.

Vallo testified that he did not recall Captain Hamilton telling the class that 10 percent of them would fail, and also did not recall the number who did in fact fail. He manages the program but does not micromanage it. If there is an issue he would get involved, and in this case appellant brought him in after complaining that he was being written up. Appellant also reached out to him during the second week of the course because the wrong-size uniform had been ordered for him.¹

Vallo did not recall Hamilton telling appellant, during an October 23, 2019, meeting between appellant, Captain Hamilton, and him, that he would not make it through the course, and he did not recall appellant saying that he was being treated unfairly. He observed all candidates on a consistent basis when he was there, but noted that he is responsible for training a 700-person department, and he would not have committed to come watch one person.

Appellant's second assessment, on November 1, 2019, was conducted because he had failed previously, and they only test the areas they had failed. If one assessment is again failed, they are terminated, and no further assessments are done.

Vallo indicated that he was aware that the City may make determinations regarding recycling people, but that is not his decision. Vallo indicated that he did not understand why appellant may have been asked to sign a resignation letter, because he was not yet a member of the department, so there was no need to ask him to resign. Vallo added that he has no authority to issue a letter to recycle someone, and that has to come from

¹ Vallo offered no explanation as to how or why the wrong-size uniform "had been ordered for him," and no explanation as to why appellant never did receive a uniform that fit him.

the City or the director's office. He said that appellant received the same opportunity as recruit Lucas, who made an agreement with the City and was recycled, but that appellant did not meet the criteria and was not recycled. He does not know what the criteria would have been, as that is all up to the director and HR and not his call. Vallo indicated that appellant may not have been recycled because he did not repay an overpayment in salary that he received. He noted that appellant and Lucas were in the same room the entire time and everything was discussed with both, and that the only time that appellant left the room was to call counsel.

Lucas failed the second assessment as well but was recycled, and is now a Jersey City firefighter.

Mina Ekladios testified that he had worked for nine years as a firefighter in Wallington, New Jersey, before attending the Jersey City Academy. He completed the Bergen County fire academy in 2013 and has a Firefighter I New Jersey State Certification. He has been an EMT in Lyndhurst for the last five and a half years. He has also been on an emergency squad for ten years and has been an EMT since 2014. He testified that he had no issues, no discipline, and no problems at all at his prior academy or in any department or job he has worked at.

Appellant testified that on August 20, 2019, he began intensive training five days a week for the academy, to include four days a week of running. He did weight training and runs and sprints, and learned what the time requirements were at orientation. His average for a one-and-a-half-mile run was fourteen and a half to fifteen minutes. The video shown at orientation indicated that there were five requirements according to the Police Training Commission (PTC) standards, as follows:

- 1.5-mile run in 15.55 minutes;
- 24 push-ups in one minute;
- 15-inch vertical jump;
- 28 sit-ups in one minute;
- 300-meter sprint on a flat in 70.1 seconds.

The orientation at the academy run by the Morris County Department of Public Safety was run by Captain Hamilton, who called him names including "fatty." He told him

to go back to Lyndhurst and be an EMT, and said that five people would fail the course. In orientation he also addressed him by saying "fatty stand up," to show the class that he was in proper attire, unlike many others. No other recruits were called names, and appellant agrees that he is a large 6' 4", 340 pounds.

Appellant indicated that he passed the 15-inch vertical jump and did 32 sit-ups, and that the other recruit holding his ankles counted them. However, the instructor said that he had only done 12 and that his shoulders did not touch the mat. The other recruit said he did do 32 as he said; however, Instructor Boyle failed him.

The 300-meter sprint was done in a field with turf and cones. Recruits could not line up because the area was too small, and so he was behind many of the others and had to cut corner turns, speed up, and slow down. He indicated that it was very slippery and they were wearing sneakers. There were twenty-seven at a time running on this small slippery field, and he scored 72 seconds. The passing score was 70.1. Only Captain Hamilton was timing them and no one else was observing the stopwatch.

He testified that push-ups were done outside, four recruits at a time. Instructor Boyle and Hamilton were checking the times. He did 40 push-ups until they stopped the time, but then Boyle said he had "maybe 5 good ones." Hamilton said, "give him a zero," and so he failed the push-ups.

On the 1.5-mile run, it was a turf-field track, which was slippery, and they had to do five laps. He was half a lap or one lap behind another recruit named Raimondo and at least one other recruit, who stopped and then restarted and failed, but they were not terminated. He was also told he had taken eighteen minutes to do the run; however, those only a half lap ahead of him were scored at twelve minutes. Appellant offered a picture of a recruit who had lost a shoe (P-1), but indicated that he had not walked at all, so he could not possibly have taken eighteen minutes and nineteen seconds when those who finished a mere one-half lap ahead of him were scored at twelve minutes. He had been running fourteen- or fifteen-minute 1.5-mile runs, and did not stop running, and never fell out of place.

Appellant indicated that the drill instructors treated him the same way the captain had, and felt that they knew how the captain felt about him so they treated him the same way. There was also hazing if anyone was late, and they had to do more push-ups or more running so that everyone was punished if one person messed up.

Appellant testified that he was also written up for not shaving, which made no sense because he was cleanly shaved every day. He also got to class an hour early. He never slept in class but was written up for blinking his eyes by Captain Hamilton, who had not been in the class. Vallo told him, "don't worry it's just a verbal warning," but then he was written up. When the captain yelled at him to sign the written warning, Vallo interjected and said "no, it's a verbal" and "I will take care of it."

He participated in everything, every day, and never stopped during any activity. He also lost thirty pounds in three weeks. During an October 23, 2019, meeting with Captain Hamilton and Chief Vallo in Hamilton's office, Hamilton told him that he had six or seven zeros and that if he received ten zeros he would be dismissed. Appellant conveyed at the meeting that he was being treated unfairly, and had worked so hard, and was not going to quit even though that is what they wanted. Vallo indicated in that meeting that appellant had been working hard and doing better. Appellant asked Vallo to come watch at 7:00 a.m., but Vallo never did come to watch, even though he indicated he would and was assigned to do that.

The bunker pants ordered for him, which have three layers to protect legs from fire, were ordered in the wrong size for him and did not fit. As a result, he could not maneuver well. A staff member remarked that it did not matter, as he was not going to pass anyway, a comment that Hamilton laughed at. The correct-size pants were never ordered for him, and he had to wear the ill-fitting ones throughout, which significantly hampered his movement.

During a drill known as a consumption drill, he did not run out of air until 16.45, the third best score in the group. This was a drill requiring recruits to go up and down stairs with full gear, full PPE, and with a "high-rise pack." His score was the third best out of eight. The average time on this drill is thirteen minutes, meaning most recruits use more

air and ran out at thirteen minutes. His air lasted 16.45 minutes, meaning he was not using as much air from his self-contained breathing apparatus. He was actually able to help other recruits because of his prior experience.

During an October 25 search drill, his partner was lost but he was not. On October 28 he also had no problems with searches. On October 31 he did have duck-walk issues related to the wrong-size gear, because he could not maneuver in the pants that he had been issued, which were the wrong size.

On October 31 he was also used as an anchor on a hose with no issues. That same day he had no issues with a Vent-Enter-Isolate-Search exercise, because he has done it multiple times. This involves climbing through a window, doing a rapid search, and climbing back out.

At his November 1 second physical assessment he was told he failed the 300-meter run. He had supposedly failed sit-ups the previous time, so he did over forty just in case, and passed because the minimum is thirty-two. He went to the second assessment with recruit Lucas and recruit Baron, and again Captain Hamilton did the timing on his own. There were the same conditions at the field, as it had rained and it was wet and slippery. Lucas and Baron failed their push-ups at that field. Others had passed them indoors, and it was cold outside at the field. Baron passed the sprint and he was a car length behind her and kept up, but was failed. He was told he had timed 76 seconds, yet that is worse than the score purportedly achieved the first time, and he had improved across the board. He would not sign the paperwork, as he disagreed with the assessments.

On November 13, Deputy Chief Menendez asked him via email whether he was interested in another shot at the academy, along with recruit Lucas. He was to answer the email if interested and was told he could serve as a fire dispatcher or inspector in the interim. Appellant responded indicating that he was interested. (P-4.) Thereafter, he and Lucas met with McGill, Vallo, and Menendez and were told they could go to the next class. Lucas had "made a phone call." They shook hands and Vallo called and asked him to come back to sign the paperwork, and he returned and was given the voluntary

resignation to sign. Appellant indicated that he wanted an agreement in writing that he would be able to go into the next class, and Vallo indicated that he was not authorized to provide that. Appellant felt he could not risk signing a resignation without an agreement, so he called his attorney, and ultimately was not recycled in the next class as promised. He felt that he was treated very differently, and that others were sworn in after failing the EMT test three times and therefore not meeting the conditional offer. Raimondo was passed after he had stopped running and is a firefighter now. The ten that failed the EMT test twice were sworn in, and all others were given extra opportunities.

Appellant did not recall any unrelated issue regarding overpayment of salary until he saw the exhibits a few days before hearing, and was never contacted by anyone regarding an overpayment, but he testified that he would not lose an opportunity to be recycled for \$1,300. He was the only one called names out of fifty-two recruits. The class was called names as a group, but only he was insulted individually. Appellant asserts that his time being recorded as eighteen minutes on the run is a record falsified by Hamilton, and that the assertions that he did not shave or fell asleep are lies.

I found Ekladius to be a credible and reliable witness.

Dominick Ciccarelli testified that he took the same course as appellant but left early due to an injury. He met appellant at the academy, and appellant was slower in some areas but did most of the physical things. There were issues with his push-up form. Ciccarelli testified that appellant was treated very badly by the staff since day one and that multiple derogatory remarks were made to him, including the following:

You have no chance.
You're not going to make it.
What are you doing here?
Why are you wasting our time?
Why are you wasting your time?

They made fun of his weight and criticized everything he did and were very tough on people who were not in the best of shape. Ciccarelli indicated that appellant did what was asked of him and struggled in some areas, but never quit and always kept going.

I found Ciccarelli to be a credible and reliable witness.

Captain David J. Hamilton testified that he is the lead instructor in the firefighter course. Each class has a lead instructor who organizes the class and runs it. He has been a lead instructor for six years, and also handles other courses.²

Two assessments are scheduled, and if either one is failed, a recruit receives nine PT days and then gets tested again on areas they failed. If they fail the same section again they are out. He testified that the PTC recommends initial, interim, and final assessments; however, the police do a twenty-week class and fire does what corrections does, which is two assessments because the course is shorter. Their academy adopted this standard as others have before and after them.

When the October 2019 class started, it was mostly recruits from Jersey City, with some from Hoboken and some from West Orange, for a total of fifty-two recruits. He tells them that approximately 10 percent of the class does not finish due to the physical requirements, testing, or other issues. He testified that he did not recall calling appellant "fatty." He does recall saying they would not be able to weigh him on their scale, which only went up to 400 pounds. He also does not recall feeling, as alleged, that appellant would fail from day one. If someone does not pass the assessments they do not pass the academy. At some point appellant had six zeros (R-6), but then failed the PT reassessment. Hamilton also testified that he is not the only timer, there are three people timing recruits. Hamilton testified that there is not an orientation video of PT showing a track or anything, and that any area they use for assessments has to be PTC approved.

On recall, appellant testified that he was 355 pounds when he started the academy, and therefore under 400 pounds, notwithstanding Hamilton's comment regarding the scale.

² Juan Fernandez appeared for Captain Hamilton (special counsel to the Morris County Counsel's office in this matter).

FINDINGS OF FACT

The following facts are NOT in dispute:

1. On September 9, 2019, Mina Ekladius signed a Conditional Offer of Employment ("Conditional Offer") with the City's Department of Public Safety, Division of Fire.
2. On or about October 7, 2019, the Jersey City Fire Department (JCFD) hired appellant as a provisional firefighter. (R-9.) Appellant's hiring was contingent on him successfully completing the Fire Fighter 1 and 2 Training Courses at a New Jersey State Division of Fire Safety accredited Tier 1 Fire Academy.
3. By signing the Conditional Offer, appellant agreed that if he could not successfully complete the required training, he would be terminated and removed from Jersey City's employment status.
4. Appellant was enrolled in the Morris County Public Safety Training Academy ("the Academy") in Morristown, New Jersey, where he was required to successfully pass the Academy's physical assessments in order to graduate.
5. On October 16, 2019, appellant received a Written Warning for sleeping in class, and a Warning Slip for failing to properly shave.
6. On October 21, 2019, appellant received a "Notice of Failure to Fully Participate," stating that if he failed to pass the physical reassessment on November 1, 2019, he would be dismissed from the Academy.
7. On November 1, 2019, appellant was reassessed for the Academy's physical assessment.

8. On or about November 1, 2019, appellant was dismissed from the Academy for allegedly failing the physical assessments. Appellant refused to sign the Dismissal Notice.

9. On December 5, 2019, appellant received a Preliminary Notice of Disciplinary Action. The City offered to "recycle" appellant in the next training course, along with another firefighter who also had been dismissed. When the City requested that appellant first resign his position in writing and then refused to provide written confirmation of its offer to recycle, the City proceeded with the removal.

10. On December 26, 2019, appellant received a Final Notice of Disciplinary Action for "exceed[ing] the number of Zero's allowed and twice fail[ing] the physical assessment test."

11. The Final Notice stated that appellant failed to meet the requirements set forth by the Academy, resulting in his dismissal. The sustained charges were listed as (1) conduct not becoming a firefighter, (2) incompetency and incapacity, mentally or physically, and (3) not properly performing duty.

ADDITIONAL FINDINGS OF FACT

I also find the following additional facts.

Appellant previously served for nine years as a firefighter in Wallington, N.J. He completed the Bergen County Firefighter Academy in 2013 and has a Firefighter I New Jersey State Certification. He has also been an EMT since 2014.

Appellant attended orientation at the Academy, where he was addressed as "fatty" and other derogatory and insulting names. Captain Hamilton said things to him like, "fatty stand up." Appellant was written up for not shaving, yet was clean shaven every day.

Recruits were told at orientation that 10 percent of them would fail, and other recruits were told that appellant would be one of the 10 percent.

During the push-up time outside, appellant was timed by Instructor Boyle and Captain Hamilton until the time expired. Appellant's co-recruit, who was holding his ankles and counting the sit-ups appellant did, counted 32 sit-ups. Boyle, however, stated that appellant "had maybe 5 good ones,"³ and Captain Hamilton then instructed Boyle to "give him a zero."

On the 300-meter sprint, only one instructor, Captain Hamilton, was doing the timing. Appellant was scored at 72 seconds, and the passing score was 70.1. No one else was timing appellant or observing the stopwatch.

Uniforms that offer protection from fire were ordered for all recruits. Appellant's was ordered in the wrong size, and it did not fit him. He could not maneuver properly in the ill-fitting pants. A staff member remarked, "it doesn't matter, you're going to fail anyway." Hamilton was present and laughed at this comment made to appellant. The correct-size pants were never ordered for appellant throughout the course, and yet he was expected to run, train, and otherwise perform successfully, which he did.

LEGAL DISCUSSION AND CONCLUSIONS

The City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

³ Physical training should not be measured by "maybes."

Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis. The City charged appellant with conduct not becoming a firefighter; incompetency and incapacity, mentally or physically; and not properly performing duties.

Not properly performing 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, 2001 N.J. AGEN LEXIS 654 (Sept. 10, 2001), adopted, 2001 N.J. AGEN LEXIS 1323 (Dec. 27, 2001); see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), aff'd on other grounds, 99 N.J. 1 (1985). Conduct unbecoming a public employee 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) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain, or produce effects or results necessary for adequate performance. Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315 (1980).

Appellant urges that his termination was arbitrary and unreasonable, as well as faulty and discriminatory. He was treated differently from the start of the course by Captain Hamilton; he was called derogatory names, written up on bogus charges, and given equipment that did not fit, which clearly hampered his performance.

The City argues that this matter is a "simple Academy dismissal matter," urging that appellant was on full notice that the City would terminate his employment if he failed Academy training, and that neither the Academy nor the accrediting agency are parties to this case, and thus the only issue is appellant's termination of employment from the JCFD.

I **FIND** that this case is anything BUT a simple Academy dismissal matter. Indeed, the parties concur that searches for New Jersey cases involving fire-academy dismissals have been fruitless.⁴

The New Jersey Department of Community Affairs, Division of Fire Safety, is responsible for developing and enforcing the State Uniform Fire Code, public education programs, and firefighter training programs. Within the Division of Fire Safety, the Office of Training and Certification (OTC) adopts training programs, policies, procedures, and forms; establishes and administers exams; establishes instructor qualifications and train-the-trainer programs; and evaluates educational programs submitted by applicants to determine equivalency towards issuance of certifications. N.J.A.C. 5:73-4.2(d). Respondent concurs that the OTC's jurisdiction includes firefighter recruits and academy instructors.

Adopted training programs must comply with the current edition of the adopted National Fire Protection Association (NFPA) 1001 standard. N.J.A.C. 5:73-4.2(d)(1). Additional instruction must be incorporated into adopted training programs using the N.J.A.C. 5:73 Appendix, the Developmental Disabilities Awareness Act, and "[a]ny additional instructional topics approved and/or directed by the Office of Training and Certification." N.J.A.C. 5:73-4.2(d)(2). General standards for training firefighter recruits are in N.J.A.C. 5:73-2.1 and provide that:

⁴ There are multiple Police Training Commission cases upholding termination of recruits for failing to complete the required training; however, those cases are easily distinguishable, as the participation failures were well documented by multiple instructors. In In re Gundry v. Union County Department of Public Safety, 2019 N.J. AGEN LEXIS 211 (April 25, 2019), adopted, 2019 N.J. AGEN LEXIS 353 (June 10, 2019), academy trainers documented through notices and videotapes the training sessions that the recruit failed to fully participate in, along with dates and witness testimony identifying the notices that were prepared on twenty separate occasions.

In In re Reece, City of Passaic, Department of Public Safety, 2018 N.J. AGEN LEXIS 229 (April 5, 2018), adopted, 2018 N.J. AGEN LEXIS 1264 (July 20, 2018), the dismissal was based on significant evidence, including seventeen Physical Training Non-Participation Reports by instructors, as well as corresponding Trainee Report forms for each of the seventeen dates.

In In re Damon, Union County, Department of Public Safety, 2017 N.J. AGEN LEXIS 155 (March 16, 2017), adopted, 2017 N.J. AGEN LEXIS 1025 (July 28, 2017), academy trainers meticulously documented, through notices and videotapes of training sessions, where it was clear on the tapes that Damon was not accomplishing the exercises, "whether it was running, push-ups, or scaling a wall."

Martin v. Jersey City Police Academy, 2007 N.J. AGEN LEXIS 699 (Oct. 3, 2007), included evidence in the record detailing Martin's deficiency areas in physical training, twenty-two Physical Training Violation Reports to the academy director, as well as the fifteen citations she acquired for nonproficiency.

- “Programs for firefighters must meet certain standards to ensure firefighters have the necessary skills and knowledge which the specialized and hazardous nature of fire fighting requires.” N.J.A.C. 5:73-2.1(a)(1).
- “[T]he Commissioner . . . adopts the . . . NFPA 1001, 2013 Edition, Standard for Fire Fighter Professional Qualifications, as the Firefighter I and II training standard in the State of New Jersey. . . .” N.J.A.C. 5:73-2.1(b)(4).

Organizations (i.e., training academies) that offer training programs are grouped into a three-tier system. To qualify as a “Tier-1 Eligible Organization,” they must provide training facilities and capabilities as specified in N.J.A.C. 5:73-2.4. See N.J.A.C. 5:73-2.2(c)(1). Tier-1 eligible organizations and their facilities are permitted to establish additional local jurisdiction operational requirements regarding the use and training conducted in accordance with the regulations. Local jurisdiction requirements must not conflict with the intent of the training procedures or forms adopted by the Office of Training and Certification. N.J.A.C. 5:73-4.2(d)(5).

Upon successful completion of a training program, an individual becomes eligible to apply for State certification. N.J.A.C. 5:73-4.2(a)(1). Applicants for certification must demonstrate competency of the adopted standards by completing written and practical examinations. N.J.A.C. 5:73-4.4(a). If they pass the written portion of the New Jersey Fire Fighter Examination (NJFFE), their name will appear on all lists for which they qualify based on veteran status, rank (written test score), volunteer points, and residency (referred to as Eligible Lists). If one’s rank is high enough on the list and there are vacancies in the residency jurisdiction, the individual’s name may be certified (i.e., sent for consideration) to that jurisdiction’s appointing authority (AA). An AA is any State government department or local Merit System jurisdiction or autonomous agency persons having power of appointment and removal.

Candidates who have been certified will be required to take and pass the Physical Performance Test (PPT) to be officially appointed as Firefighter I. The physical performance examination is designed to measure physical fitness; emphasis is placed on physical strength, endurance (cardiovascular efficiency), and speed. Success in passing

the PPT is determined by the ability to complete the obstacle course, ladder climb, and darkened maze crawl. Thus, certification is granted to an individual who, pursuant to N.J.A.C. 5:73-4.2(a):

- (1) has submitted an application for certification to the OTC;
- (2) is at least 18 years of age;
- (3) has successfully completed the adopted State instructional program for the certification title applied; and
- (4) has successfully passed the State exams that evaluate the Job Performance Requirements and components of requisite knowledge and skills in the NFPA 1001 and NFPA 472.

Being certified does not automatically mean that an eligible candidate will be interviewed and appointed to a position. Rather, it means that they may be scheduled to take the PPT portion of the examination. If the candidate passes, the AA may request a background investigation, potentially including (but not limited to): medical screening, psychiatric testing, drug screening, etc. Depending on the number of vacancies, and the results of the PPT tests and background investigations, the candidate may be interviewed or considered for appointment. Each jurisdiction has its own AA for the selection process.

The regulatory scheme dictates that the Commissioner of the Department of Community Affairs is required to implement training and education programs for the fire service and the public. N.J.S.A. 52:27D-25d. Chapter 73 of the regulations governs the standards for firefighter training and certification, which is overseen by the Division of Fire Safety's Office of Training and Certification (OTC). N.J.A.C. 5:73-1.3. The OTC has exclusive authority over firefighter certification standards. N.J.A.C. 5:73-1.5(b)(1). Further, according to the official Civil Service Commission job description, firefighter recruits must complete a firefighting program approved by the Department of Community Affairs. The Academy is Jersey City's chosen training program for firefighter recruits and considered a Tier-1 organization. Thus, for appellant to become eligible to take the Civil Service exams and become a full-time firefighter, he must graduate from the Academy's training program and pass all assessments.

N.J.A.C. 5:73-1.5 provides, in salient part:

(a) There is hereby established in the Division of Fire Safety an Office of Training and Certification. . . .

. . . .

(c) Any person aggrieved by any notice, action, ruling, or order of the Commissioner, with respect to this chapter, shall have a right to a hearing before the Office of Administrative Law, in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. The final decision in any such case shall be issued by the Commissioner.

In this matter, Jersey City seeks to terminate appellant's employment predicated on his failure to pass the Academy's physical assessments. The City submits that "the only issue facing this Court is the Respondent's termination of Appellant's employment," and whether the disciplinary charges set forth in the FNDA are to be sustained. The FNDA lists three charges for his removal: (1) conduct not becoming a firefighter; (2) incompetency and incapacity, mentally or physically; and (3) not properly performing duty. (R-1.) Jersey City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958).

The City avers that the Academy "does not operate under the control of the JCFD," but rather is under the control of the OTC. The Division of Fire Safety accredits the fire academy. The instructors are not employees of the City, and the City has no input as to the credentials or qualifications of fire-academy instructors, asserting "[b]y regulation and statute, that role rests with the OTC," and the entities are separate and distinct. The OTC has control over the Academy, not the City. N.J.A.C. 5:73-1.3.

There is no dispute that while enrolled at the Academy, appellant was required to fully participate in the physical-fitness program and successfully pass the assessments.

Appellant does not dispute that he received a Notice of Failure to Fully Participate on October 21, 2019, informing him that failure to pass the reassessment would trigger his dismissal. Appellant does dispute the assertion that he failed the physical reassessment, as well as the claim that he failed to successfully pass a single physical assessment at the Academy.

It is clear from the hearing testimony that there is a factual dispute between Joseph Vallo (battalion chief at JCFD), Captain Hamilton (lead instructor at the Academy), and appellant regarding his performance on the assessments. Dominick Ciccarelli testified on behalf of appellant, asserting that appellant was “treated very badly by the staff since day one” and that appellant was “slower in some areas but did most of the physical things.” Appellant’s testimony describes his experiences at the Academy, and the disparate manner in which he was treated in comparison to the other recruits. He notes that only Captain Hamilton was timing recruits for the 300-meter sprint. The only evidence in the record detailing appellant’s physical performance at the Academy is an untitled, unsigned, and undated document purporting to list appellant’s results and disciplinary charges.⁵ (R-6.)

In view of the divergent accounts surrounding appellant's Academy training, it is necessary to assess and weigh the credibility of the witnesses to make factual findings regarding appellant’s treatment and performance at the Academy. “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself” in that “[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Perrone, 5 N.J. 514, 522 (1950). A fact finder “is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” Id. at 521–22. Similarly, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is

⁵ The City “takes no position” as to appellant’s claims of disparate and unequal treatment at the hands of the Academy instructors, asserting that neither the Academy nor its staff are parties to this matter, and that the OTC has jurisdiction over the Academy, and not the City.

to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied., 10 N.J. 316 (1952).

Appellant was given one opportunity to complete the required training. I **FIND** that the City has failed to establish that he did not do so. I **FIND** that appellant was treated badly from day one by staff, who made fun of his weight and criticized him relentlessly; the criticism came primarily from the only person holding a stopwatch. I **FIND** that appellant testified credibly regarding his performance on the assessments, partially supported by the credible testimony of Dominick Ciccarelli. Ciccarelli also confirms the poor treatment of appellant by the Academy instructors. I **FIND** the testimony of appellant and of Ciccarelli to be more credible than the testimony of the others, and **CONCLUDE** that the City has failed to prove, by a preponderance of the credible evidence, that appellant failed the Academy's physical assessments. I **FIND** that the City has failed to credibly show that appellant did not meet the Academy's physical standards. The City, by way of Vallo's testimony, makes vague references to some overpayment in salary, with no proofs; indeed, I **FIND** that the City offered to recycle appellant until he asked for verification of those allegations of an overpayment in salary, which he had not been aware of, after which the City withdrew its offer to recycle.⁶ I **CONCLUDE** that the City has woefully failed to satisfy its burden of establishing by a preponderance of the credible evidence any of the sustained charges against appellant, and thus **CONCLUDE** that he was wrongfully dismissed from the Academy.

ORDER

I **ORDER** that the sustained charges in the amended PNDA and the FNDA of conduct not becoming a firefighter; incompetence and incapacity, mentally or physically; and not properly performing duty, be and hereby are **DISMISSED**. I **CONCLUDE** that respondent's termination of appellant was inappropriate, and that the termination should be rescinded and appellant enrolled in the next available firefighter class at a different academy, and it is so **ORDERED**.

⁶ Recruit Lucas wrote a check to the City, and was promptly recycled.

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.

July 22, 2022
DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

July 25, 2022

Date Mailed to Parties:
dr

July 25, 2022

APPENDIX

Witnesses

For Appellant:

Mina Ekladius
Dominick Ciccarelli

For Respondent:

Joseph Vallo
Captain David J. Hamilton

Exhibits

For Appellant:

- P-1 Lee Garrett post and photo 4/21/20
- P-2 Unsigned form resignation letter
- P-3 JC Memorandum from James Shea, Director of Public Safety, dated 11/20/19
- P-4 Email, Mina Ekladius to Chief Joseph Menendez, dated 11/26/19

For Respondent:

- R-1 Final Notice of Disciplinary Action (Amended) dated 12/26/19
- R-2 Conditional Offer of Employment dated 9/9/19
- R-3 Fire Fighter Job Specification (NJ Civil Service Commission)
- R-4 Withdrawal Order dated 11/4/19
- R-5 Dismissal Notice dated 11/1/19
- R-6 Undated, unsigned list
- R-7 Discipline
 - 1. Written Warning 10/16/19 (Sleeping in Class)
 - 2. Warning Slip 10/16/19 (Failure to Properly Shave)
 - 3. Warning Slip 10/17/19 (Failure to Shave)
- R-8 O'Donnell email to Vallo re: alleged overpayment

R-9 Ekladious Responses to City's Requests for Admissions

R-10 Untitled document, pages 250 and 251