STATE OF NEW JERSEY

In the Matter of John Tayag-Kosky, Kearny, Fire Department CSC DKT. NO. 2021-1785 OAL DKT. NO. CSR 05320-21	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: JANUARY 18, 2023

The appeal of John Tayag-Kosky, Firefighter, Kearny, Fire Department, removal, effective May 13, 2021, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on November 28, 2022. 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 ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of January 18, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter, most of which are unpersuasive and require no substantial reply. Nevertheless, the Commission notes that the ALJ's findings and conclusions in upholding the charges and the penalty imposed was based on her thorough assessment of the record and were not arbitrary, capricious or unreasonable. In this regard, the ALJ specifically provided many findings based directly on her assessment of the credibility of the witnesses. Upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings 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 appellant 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. In particular, the Commission agrees with the ALJ's conclusions that:

> appellant made a deliberate decision – one built on intentional and material omissions – to keep both military and paramilitary chains of command in the dark about his full-time employment with the other.

Further, the Commission agrees with the ALJ that removal is the appropriate penalty. In that regard, the Commission concurs that:

> In this matter, appellant pursued a self-serving strategy of gaming two para/military organizations for a period of at least six years. He made conscious decisions at very regular intervals to not disclose his active-duty orders or to clarify the ambiguity he himself had helped to perpetuate. Accordingly, I **CONCLUDE** that these career-long, persistent acts of omission or commission by appellant plainly constitute conduct unbecoming a public employee and were detrimental to the chain of command of the para-military organization of the Kearny Fire Department. I **CONCLUDE** that they were serious enough to warrant removal without consideration of progressive discipline principles.

Finally, the Commission notes that this penalty neither shocks the conscious nor is disproportionate to the offense.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of John Tayag-Kosky.

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 18TH DAY OF JANUARY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.CSR 05320-21
AGENCY DKT. NO. ~~NA~~ 2021-1785

IN THE MATTER OF JOHN TAYAG-KOSKY,
TOWN OF KEARNY, FIRE DEPARTMENT.

John D. Feeley, Esq., for appellant John Tayag-Kosky (Law Offices of Feeley & LaRocca, attorneys)

Boris Shapiro, Esq., for respondent Town of Kearny (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: October 28, 2022 Decided: November 28, 2022

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

John Tayag-Kosky (Kosky or appellant) appeals the decision by the respondent Town of Kearny (Kearny or respondent) to remove him from his public employment position as a Firefighter with the Fire Department effective May 13, 2021. Appellant had been immediately suspended without pay on October 27, 2020, the date that he was served with the Preliminary Notice of Disciplinary Action (PNDA). The termination was premised upon allegations that appellant misrepresented his military reservist status as less than full-time active-duty and that he falsified Requests for Military Leave, as well as his employment application, in violation of N.J.A.C. 4A:2-2.3(a)(2) (insubordination);

N.J.A.C. 4A:2-2.3(a)(4) (chronic absenteeism); N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee); 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 latter consisting of the violation of several town code provisions.

On November 20, 2020, Kearny issued and served an Amended PNDA upon appellant (Amended PNDA). The Amended PNDA elaborated on the specifications of the allegations already asserted against appellant, but also added a charge that he had falsely reported to the Deputy Chief the circumstances of a shoulder injury suffered in early September 2020, and that he allegedly had the intention of filing a false workers compensation claim.

After departmental hearings conducted on December 17, 2020, and March 30, 2021, the Final Notice of Disciplinary Action (FNDA) issued on May 13, 2021, upholding appellant's termination as a Firefighter for Kearny on all charges. On May 26, 2021, appellant filed a direct removal appeal to the Office of Administrative Law (OAL) where it was filed and deemed perfected on June 15, 2021, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. As a law enforcement officer, appellant might have been entitled to reinstatement of his salary pending the appeal procedures under certain circumstances and subject to certain tolling provisions. N.J.S.A. 40A:14-200 et seq. (Act).

The plenary hearings on this removal matter were originally scheduled for October 14 and 15, 2021, to allow the case to be heard and decided under the Act's intended expedited process. However, those dates were adjourned with the consent of the parties to allow both for motion practice and to resolve some very complicated discovery issues, including obtaining documents from military and medical third parties over whom neither party had control. New hearing dates were scheduled for December 14 and 17, 2021, but the discovery remained outstanding and both parties advised that the case was not ready to be tried and consented to their adjournment. Because the clock was approaching the Act's 180-day mark for reinstatement to base salary, I reviewed the prior history and determined whether there should be tolling of any of the time since the appeal was filed. Accordingly, I entered a Salary Order on an interlocutory basis on December

10, 2021, tolling the Act's salary provisions for the period from the original hearing dates in October until the rescheduled hearing dates.

The plenary hearings were conducted on April 6, May 25, June 14, 29 and 30, and August 3, 5 and 9, 2022. The record closed after receipt of the post-hearing written submissions.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the testimony of the witnesses and the documentary evidence presented, and with the opportunity to assess the credibility of the witnesses, I **FIND** the following:

Respondent presented the testimony of Steven Dyl, former Fire Chief for Kearny. Dyl's career as a member of the Fire Department began in 1984. He was promoted to Captain in 1992, Deputy Chief in 2005, and was the Chief from July 2007 through his retirement effective June 30, 2020. Chief Dyl testified to the duties and schedules of firefighters. Each works one twenty-four-hour shift and then has seventy-two hours off. The shifts rotate on an eight-week cycle and then repeat. Nevertheless, firefighters are still on call even when off duty and must be available 24/7/365. Chief Dyl then presented appellant's employment history starting with his application from October 2009. That application disclosed his then-present affiliation with the Army National Guard as a Recruiter.

After appellant was hired, he was sent to the Fire Academy for the several firefighter and emergency certification programs requisite to the job. The Academy is a four-month course. There was an immediate issue with appellant at the Academy; specifically, he missed the first day because he had not received a release from the Reserves to attend. As a result, appellant resigned his full-time military position on March 8, 2010, effective April 27, 2010, and so advised Dyl. [R-4.] Therein, Kosky stated to his National Guard Command:

> It is with both regret and anticipation that I submit this letter of resignation. I have accepted a full time position with the Kearny Fire Dept. . . I will continue the recruiting effort in the Guard Recruiting Assistant Program.[1]

Thereafter, Dyl testified that appellant submitted a Request for Military Leave to respondent because he was recalled to full-time active duty from at least October 2010 through February 2011. That military order was then extended through September 2011; and then again from July 5, 2011, through July 4, 2014. [R-5.] Kosky returned to his Kearny firefighter duties in July 2014. He did not inform Dyl at that time that he was still on active-duty orders. Appellant later submitted sporadic leave requests for drill days or weekends, or a three-week course, but did not submit supporting military orders. [R-6, R-7.] Appellant usually checked off the "inactive" duty box. These facts led Dyl to believe that appellant was a part-time reservist for the Guard.

The Chief approved these requests because he tended to err on the side of approving them notwithstanding the corresponding reservist orders were not submitted. However, the Chief explained that when appellant sought leave to attend a three-week course out-of-state in late 2018, he was asked to submit military orders for that activation. Eventually, appellant provided a memorandum from a Senior Non-Commission Officer Sergeant First Class Jose Malave. [R-8.] Dyl recognized that this memorandum was not a valid order for activation and had been issued by someone of the same rank as appellant rather than the superior officer as was the norm. Accordingly, the Chief sought guidance from the New Jersey Department of Military and Veterans Affairs on December 18, 2018, confirming that only a valid military order can authorize being activated and that the Malave memorandum was not a valid order. [R-9.] On that same day, appellant presented an official military order that confirmed he had been on full-time active duty as a Recruiter from July 5, 2017, through July 4, 2020. [R-10.]

A few weeks later, Dyl received that predecessor military order indicating the same status for appellant for the period July 5, 2014, through July 4, 2017. [R-11.] In other words, as Dyl confirmed and so testified at this hearing, appellant had been active duty

[1] As described later in the hearing, the GRAP provided part-time assistance to the Guard Recruitment efforts.

with the Guard and not a reservist from July 2011 through July 2020, even though he returned to full-time employment with the Kearny Fire Department in 2014. For their part, the Army National Guard confirmed to Dyl that appellant was a full-time Recruiter and therefore, not permitted to work a full-time civilian job. [R-12.]

Dyl stated at the hearing that appellant would have been continued on leave from Kearny if they had known of his active full-time status with the military back in 2014. This information led Dyl to consider statements by appellant on the intervening military leave requests to be false because he was not being activated for a weekend of drills or for a short-term course: he was active the entire period of his employment with the town. In hindsight, and as a result of his further review, the Chief confirmed that appellant had never produced supporting military orders for those requests.

Dyl advised appellant that he would be investigating the circumstances of his dual employment once he returned from military leave on which he had again been placed. There is also a policy that Kearny will not authorize more than five years of military leave, an apparent reference to USERRA[2] (see below). Dyl retired as Chief before any disciplinary proceedings were initiated. Between his retirement and Covid, the matter was transitioned over to the new Chief Joseph Mastrandrea.

On cross examination, Dyl denied having an anti-military bias. He was unaware of Kearny not prioritizing veterans off the civil service list for hiring by the Fire Department.

Deputy Chief Bruce Kauffmann also testified on behalf of the respondent. Kauffmann was hired as a firefighter in September 2000. He was promoted to Captain in 2007 and became the Acting Deputy Chief for Training and then Deputy Chief through 2018. Since then, Kauffmann has been the Tour D Commander. He had never been appellant's direct supervisor but knew him in his capacity as training supervisor. Kauffmann became involved, together with Ferraro, in reviewing appellant's simultaneous military service after Dyl retired because the Chief had not completed his own review of that matter. As such, he was present during the September 1, 2020, meeting with

[2] Appellant has made USERRA a central focus of his defense herein. Reference is to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.A § 4301 et seq.

appellant. While Deputy Chief Ferraro prepared the written memorandum to the Chief (R-14), Kauffmann confirmed the same details. It was his observation that Kosky displayed a nonchalant attitude during the meeting and did not appear to be remorseful about any possible misrepresentations concerning his active-duty status with the National Guard.

The Deputy Chief also described his conversations with appellant regarding his shoulder injury, which later became the basis of the Amended PNDA. Appellant had called off sick on September 9, 2020, and reported that he hurt his shoulder two days earlier. Kauffmann asked, as he routinely does, if the injury was work related and appellant said that it was not. During a conversation on October 23, 2020, that was made to check up on appellant's progress, appellant said for the first time that he thought the injury might have been from a work-related fire call on Forest Street sometime before September 7. Kauffmann was able to confirm only that there was a fire on Forest Street that took place on August 24, 2020, and that appellant was on duty there. As a result of this change in causation, Qualcare was contacted about the potential workers compensation claim. In addition, Kauffmann advised Kosky that the Chief wanted him to report in on his next duty day.

On cross examination, Kauffmann acknowledged that it was a well-known fact that appellant served in the National Guard, but he also emphasized that it appeared he was doing so as a part-time reservist. Kauffmann admitted that Kosky said in only very equivocal terms that he thinks he may have been injured while working a fire on Forest Street during the October 23, 2020, medical progress conversation.

Bankim Shah, M.D., appellant's treating physician during the relevant period, testified for respondent. Dr. Shah practices in Internal Medicine and Sleep Medicine. During the fall of 2020, he was employed by Riverside Medical Group and treated appellant. Dr. Shah explained in general terms that Riverside was a high-volume practice. To assist him in recording background medical information from so many patients, Riverside provided him with two scribes. Nevertheless, he always asked the patients all the questions he needed to provide proper medical care and did not rely upon what staff might have completed before the examination. Dr. Shah also reviews all the

case notes with the scribes and will amend or "addend" the notes in the software system if such is needed for accuracy.

Dr. Shah testified that Riverside had different protocols if a patient was presenting with general medical concerns as compared to a work-related injury. From the initial point of obtaining medical information from a patient, a work-related injury goes through distinct "filters" in the office, including a triage by a medical assistant before he would examine the patient. If an injury was work-related, Dr. Shah indicated that it would absolutely be recorded as such in the case notes, which statement became more adamant if the patient advised that it concerned fire suppression efforts.

Dr. Shah next testified to the examination and treatment of appellant on September 3, 2020. Kosky was seen for complaints of pain in his right shoulder and neck. Appellant told Dr. Shah that the pain began after "he was pulling ceiling tiles, carrying drywall, and moving furniture at a friend's house." He described the pain as 10 out of 10, with it radiating down his arm. He denied that there was trauma or a fall. Dr. Shah prescribed ibuprofen-famotidine, a topical anti-inflammatory gel, and a muscle relaxer, if needed. He also directed that x-rays be taken of the shoulder and neck to rule out any fractures. [R-21.]

In response to a request by appellant, Riverside's office manager issued a short summary letter that could be submitted to appellant's health or disability insurance carrier. Dr. Shah explained at the hearing that he reviewed and approved of this letter before it was sent out under the manager's signature. Therein, it is stated, "This is to confirm that the patient was seen relative to injuries sustained on September 2, 2020, while he was doing construction work at a friend's house." [R-22.]

On cross-examination, Dr. Shah reiterated that he asks each patient the information he needs to properly perform his medical responsibilities, even if the scribe has pre-filled some of that data into the chart. He also reviews all notes with the scribes and can addend notes to be more specific or accurate. The chart notes will retain the original time stamp; the addended note will not indicate a different time stamp although there are technical system inquiries that might reveal that.

The current Kearny Fire Department Chief also testified on behalf of the respondent. Chief Joseph P. Mastandrea has been with the Department since February 1999. He was elevated to the rank of Captain in June 2009, and then Deputy Fire Chief in April 2018. Mastandrea assumed his current position on July 1, 2020, upon the retirement of Dyl. Prior to that retirement, they spoke about appellant whose career as a firefighter Dyl had been reviewing because of information about overlapping active-duty orders and full-time town duties. Dyl advised Mastandrea to pick up the investigation by examining appellant's military leave requests and military orders.

As a result, Mastandrea had Deputy Chiefs Ferrara and Kauffmann convene a meeting with appellant on September 1, 2020. [R-14.] The conversation and notes from that meeting led to issuance of the PNDA on October 27, 2020. Chief Mastandrea found that there were misleading requests for reservist drill weekends, that appellant hid his active-duty orders, and that he had had someone generate and submit a false memorandum to support his request for a three-week military training leave in late 2018. [R-8.]

Chief Mastandrea further testified that soon after, appellant reported his shoulder injury to the Department. On September 7, 2020, appellant reported off-duty starting September 9, 2020. Over the course of the next two months, departmental supervisors maintained updated log of appellant's course of medical treatment and return to work information. On October 23, 2020, when Deputy Chief Kauffmann followed up with appellant, he stated for the first time that "he thinks he sustained the injury at a 'fire in August on Forest Street.'" [R-15 at 7.] Appellant was then required to report to the Chief's office on October 27, 2020. While appellant stated that he believed his injury derived from either an active fire in late August or perhaps working out in the firehouse, the Chief found his claim contradicted the initial claim that his shoulder injury was the result of a non-duty activity and that he was quite delayed in changing his story. He also did not really explain the delay in the new explanation. The Chief stated that the non-work-related medical treatment was handled by AFLAC, as was usual for such, and that his initial report of the injury was buttressed by the physician's statement sent to that company. [R-

16.] It was that statement, which the Chief first saw in November, that highlighted appellant's contradictions.

Chief Mastandrea acknowledged that appellant never obtained workers compensation medical care or benefits. As far as he knew, the claim was denied because Kosky refused to sign a medical release. The Chief concluded his direct testimony by expressing his concern that appellant had breached the public trust placed on a firefighter, who is required to enter private residences and businesses under emergency conditions. Kearny also depends on the truthfulness of firefighters when completing reports. Moreover, a full-time firefighter is answerable to the Department 24/7/365, and that is also true of full-time active-duty National Guard. Having been untruthful in trying to maintain both of those positions to himself and Chief Dyl, Chief Mastandrea believed that removal was the only appropriate remedy.

On cross-examination, Chief Mastandrea was queried on the allegations of untruths by appellant. He restated that it was at least misleading for Kosky to not have submitted his active-duty orders that covered the period up through 2020. Under those orders, appellant would have been placed on military leave because he would have "belonged" to the National Guard 24/7/365. The Chief could not cite a reference in the municipal code that supported that statement but maintained that leave would have been required just as appellant had been on leave from 2011 to 2014.

Chief Mastandrea admitted that appellant had no prior disciplinary actions, no allegations of being away from fire duty without leave, or any allegations of theft. The Chief acknowledged that appellant had been an Academy leader but only during the second time he was required to go through the Academy because of the prior extended military leave. The Chief noted that appellant had missed his first day of his first Academy training because he had not received leave permission from the National Guard. He apparently resigned from active duty with the Guard on March 8, 2010, to complete his fire training. The Chief also acknowledged that some Kearny firefighters held other employment, but he believed that was mostly part-time work with the ability to drop and run if called onto duty. In his prior Deputy Chief position, Mastandrea was not in a position

to know the activities of the rank-and-file members because of his scope of responsibility elsewhere.

On further examination, Chief Mastandrea stated that appellant deprived Chief Dyl of the ability to determine if military leave was in the best interests of the Department, for which he did reference a written policy provision (R-2, Kearny Code § 3-63.1(b)(1), (11)), by not submitting his ongoing active-duty orders. He then denied that Kearny had a bias against veterans or that it had skipped over 50-70 veterans on the 2015 eligibility list. The Chief explained that he could not answer that question without the lists and the disposition codes because there are many reasons an individual does not make the cut and the use of the word "skip" is misleading and inaccurate.

Respondent also presented the testimony of TeKesha Thornhill in support of its disciplinary allegations. Thornhill is a Senior Claims Adjuster for Qual-Lynx, the entity that handles Kearny's workers compensation claims. As an Adjuster, Thornhill handles claims assigned to her from inception through to resolution and/or closure. With respect to Kosky's claim, Thornhill was assigned on October 27, 2020, a few days after the claim was filed.

In order to process appellant's claim, Thornhill was advised to investigate the gap in time between the alleged date of the injury and the date it was reported as work-related. After some difficulty contacting him, Thornhill obtained and recorded his statement on or about November 16, 2020. [R-17.] Kosky told her that he was part-time in the Army National Guard and also advised that he had had a prior motor vehicle accident.. Thornhill did not hear about the friend's construction from Kosky but did read it on the Physician's Statement. She then sent him a HIPAA form to complete and return, but he never did.

In response to questions about the general worker compensation process, Thornhill testified that an approved claim results in all medical bills being covered without any copayments, and payment of seventy (70%) percent of lost wages being paid by Qual-Lynx but subject to reimbursement from the employer. Eventually, a permanency award will issue based upon the injuries and whether it is determined to have resulted in partial or total disability.

On cross-examination, Thornhill confirmed that appellant answered all the questions that she asked. However, she never received any documents from him, and he was never examined by a worker compensation doctor as the claim remained incomplete. For the same reason, no salary was paid to appellant by her company or Kearny. She also explained that Qual-Lynx is a third-party administrator for employers, including Kearny.

I permitted the recall of Chief Mastandrea for the limited purpose of explaining how a fire-related injury by a firefighter would ordinarily be reported. The Chief described the National Fire Incident Reporting System (NFIRS) as the repository of reports of every fire incident to which a department responds, as well as a section to be completed if any firefighter in injured on that call. The alleged injury suffered by appellant in August 2020 was never placed in that data base because he did not advise his superior officers until two months later.

On his case, appellant called six colleagues whom he knew from the Army National Guard and/or the Kearny Fire Department: Captain Damian Caceres, Captain Lorenzo A. Tirado, Captain Thomas F. McDermott, Captain Andrew O'Donnell, John Albizu, and Sergeant Jared Costanzo.

Caceres has been with the Kearny Fire Department for almost fourteen years. He also served in the Army National Guard for six years from 2001 to 2007, overlapping with appellant's time. He was promoted to Fire Captain in July 2020. Both he and appellant served on active duty for one year at Guantanamo Bay. The rest of Caceres' service was as a reservist. In Kearny, Caceres was aware that appellant was employed with the National Guard and had seen him sometimes in his military uniform before or after his firefighter shifts, and occasionally driving a government vehicle.

Caceres also testified that appellant did not hide his military affiliation. He found appellant to be reliable, punctual, a hard worker, and a person of good character. Caceres was unsure, however, whether they ever served on a fire together. He stated

that he has a part-time job as the Montclair Fire Inspector, and that about ten firefighters he knows also have some secondary employment.

On cross-examination, Caseres confirmed that he and Kosky were not friends outside of work. He seemed unaware that appellant was on military leave from the department for several years. He described the limited obligations of a part-time reservist. Caseres thought that appellant was active duty with the Recruiting group, but he was unsure of what period of time. He understood that Kosky "had to resign" from the military at some point. He agreed that being truthful was an important quality for a firefighter.

Captain Tirado has been a member of the Kearny Fire Department for thirteen years and was promoted to Captain in January 2017 to serve at one of the station houses. He was the company commander in charge of the fire apparatus. Tirado worked with Kosky after his return to the Fire Department, although he did not know from where he was returning. He found appellant to be inquisitive about learning and a hard worker and demonstrated integrity. Tirado testified that he was aware that appellant was in the National Guard as a full-time recruiter mostly because of his own former Guard service. He occasionally saw appellant in military uniform during off-duty hours and in a government vehicle.

On cross-examination, Tirado stated that his own service in the National Guard was from 2004 to 2010, overlapping with Kosky for about one and one-half years. Appellant was assigned to Tirado's station at the time his separation from Kearny took place.

Captain McDermott has been the Kearny Fire Department for thirty-five years, and a Captain since 1995. Appellant served under his command for quite a while. McDermott understood that Kosky was a recruiter with the National Guard. There was also a period of military leave, but McDermott could not provide details. The Captain found Kosky to show integrity and was at the fire house when he needed to be. McDermott confirmed that he has a part-time secondary job, as do many others.

On cross-examination, McDermott admitted that he had no knowledge of whether appellant worked full-time or part-time for the National Guard. He has no familiarity with the difference between active duty and a reservist, acknowledging that he does not know anything about military service. As did others, he occasionally saw Kosky in military uniform after his fire shift was completed.

Captain Andrew O'Donnell also testified on appellant's behalf. He has been employed by the Kearny Fire Department for twenty-three years, with eight of those being a Captain. He only knew Kosky slightly as they were not assigned to the same station house, but he worked with him occasionally on some fires, perhaps when appellant was on overtime. O'Donnell knew appellant was in the military and observed that appellant did not "hide" it from him. Nevertheless, he did not know whether his work as a National Guard recruiter was full or part time. He did not recall seeing him in uniform in Kearny.

On cross-examination, O'Donnell recalled that appellant left the fire department for an extended period of time. He thought it was around 2011, about the same time that Kearny was laying off employees. O'Donnell was not aware of appellant's active-duty orders from that period.

John Albizu has been a firefighter with Kearny for approximately six years. He testified on behalf of appellant as a co-worker who had been on the same tour of duty for one year. Albizu considers appellant to be a helpful co-worker, and a "great guy" with integrity. He never had an issue with him. Albizu knew appellant was in the military as a recruiter but never saw him in uniform. Both men worked the Forest Avenue fire, but Albizu noted that it was a few tours of duty afterwards that he heard appellant complain about his shoulder. Albizu suggested some stretches but those might have aggravated the injury because appellant was out after that.

Albizu was asked to explain the action of a firefighter "overhauling." He described it as the point after a fire is out when they rip down ceilings and drag furniture and other items out of the structure to prevent rekindling of the fire.

On cross-examination, Albizu modified his testimony to confirm that he and appellant had worked together for less than a year. He explained that they stayed in touch because of their common interest in cars. Albizu admitted that he recalled the Forest Avenue fire only because, after he received the subpoena for this hearing, he went into the system to look it up and then reconstructed his timeline of events. Appellant had not mentioned the fire, but people were speculating as to why he was out. Albizu recalled appellant just saying that he thought he hurt his shoulder while holding it and demonstrating shoulder gestures. Albuzi also admitted that he and appellant were not on the same task at that fire, were not in same location, and did not work side-by-side. He stated, however, that he knew that appellant's crew had been detailed to overhaul and that he saw appellant with a tool in hand.

Appellant also presented the testimony of Sergeant Jared Costanzo. Costanza is a non-commissioned officer in the New Jersey Army National Guard. He has been a full-time recruiter since 2013. Costanza likes that assignment because it is flexible, although the hours can also be irregular because you must meet kids and parents when they are available, often in their homes in the evenings. He met appellant in 1993 when the latter was a part-time reservist. They were deployed together to Guantanamo Bay, Cuba, in 2004-2005. Costanzo explained that a Guard member gets three-year orders as a full-time recruiter with no new military orders in the interim. Authorization to go to trainings are handled just with travel vouchers. He acknowledged that appellant would have gone to the Little Rock training on just a memorandum and a travel voucher. [A-12.]

Costanzo was asked general questions about reductions in rank in the National Guard. He stated that they can occur for reasons other than discipline; for example, he took one in order to accept a new position. The nature of the reduction, i.e., voluntary or involuntary, would be noted on the orders. Costanzo also stated that he works a part-time job as a loan officer on the weekends but acknowledged that Lieutenant Gagnon instituted a policy on outside employment for the first time approximately two years ago. He identified some of the types of jobs he knew other Guardsmen held as including Lyft drivers, loan officer, referee, and firefighter.

Costanzo was aware that appellant resigned as a full-time recruiter in 2010 to attend the Fire Academy. When he returned, Kosky was a top recruiter and achieved the highest enlisted rank of Sergeant First Class. To be a good recruiter, one must have high character and discipline. As the face of the National Guard speaking with schools, mayors, parents and potential recruits, a recruiter must demonstrate a lot of integrity. He found that appellant had such qualities and that he was "truthful to a fault."

On cross-examination, Costanzo noted that he and appellant used to socialize some but have not in a while. He thought that appellant was now a part-time recruiter. Costanzo also elaborated on the obligations of a recruiter. He used the phrase "mission" which was the term used instead of "quota." A recruiter is never really done even after they have achieved the mission, but the days can vary and be very flexible. Costanzo did know Sergeant Malavo, as they all knew each other to some extent. He also acknowledged that appellant would have needed the SLC training to maintain his E7 rank.

Michael F. McCurrie was also a witness for appellant. He is the President of the FMBA Local #18. He has also been a firefighter since May 1988. McCurrie stated that he was contacted by the Chief in late November 2019 after appellant went to Little Rock for "maneuvers." He was instructed to contact appellant because he had failed to submit the military paperwork necessary for that leave. McCurrie contacted appellant a few times who told him that the paperwork is sometimes delayed until after the duty actually starts. McCurrie then advised the Chief that appellant would be taking care of that paperwork but it might need to wait. He believed that USERRA might have come up in his conversation with Chief Dyl. Lastly, McCurrie testified that most firefighters moonlight or have a secondary job. He did some carpentry. To his knowledge, appellant was the only one ever charged for having a second job.

On cross-examination, McCurrie believed that the military had a rule against moonlighting unless you had the approval of a superior officer. He also acknowledged that he only knew that appellant was full-time active duty because he asked him during their conversations from Little Rock. He was unaware of that status previously. McCurrie personally had a good working relationship with Chief Dyl, and it was when he sensed his frustration with appellant that McCurrie offered to contact him.

McCurrie learned by asking other people that a National Guard Recruiter had flexibility in that position. It was also suggested that he speak with Battalion Chief Jack Dunne who was also in the National Guard, and Kenny Bolger who was based in Sandy Hook with the Coast Guard. He believed, however, that Bolger was just finishing his tour there when he was hired by Kearny, all of which pre-dated Chief Dyl's tenure.

Upon appellant's return from Little Rock, McCurrie met with him and the Chief, at which time appellant produced his active-duty orders. With respect to the union contract with Kearny, McCurrie believed that it might reference calculations for military leave and perhaps a reference to state or federal regulations. Any such leave must be signed off by the Chief. In response to my own questioning, McCurrie agreed that a firefighter is on call 24/7/365 and can be ordered in at any point. At the conclusion of his testimony, McCurrie noted that appellant was well-regarded amongst his peers in the firehouse.

Staff Sergeant Jose Malave next appeared as a witness for appellant. Malave has been in the military for twenty-four years, the last nine to ten of which were as an active-duty Recruiter with the Army National Guard. He acknowledged that appellant asked him for the memorandum (R-8) which he did as a favor. He also admitted that someone higher than him should have produced it, but appellant took the blame and accepted a demotion. Malave did not believe he had done anything wrong.

On cross-examination, Malave filled in some details on his military background and that he had known appellant for approximately twelve years. They did not socialize outside of work. He had seniority over appellant but only to the extent that he had been longer in the same rank. Malave had never been appellant's commanding officer.

Kosky testified on his own behalf. He outlined the steps required to obtain the position as a firefighter with respondent, including the written exam, a physical, the application, and an interview. Appellant also set forth the history of his enlistment with the National Guard. From 1992 until 2001, Kosky was a part-time reservist. After 9-11, he was called up by the Department of Homeland Security for full-time active duty for eight months. From May 2002 until December 2005, appellant returned to his position as

a reservist, except for ten months when he was deployed to Guantanamo, Cuba, and then to Fort Dix.

In January 2006, appellant became a full-time recruiter with the Guard. He explained that this position is unavailable to new reservists. One must be recommended, go through several interviews, and achieve high scores. It requires one to be a Sergeant E-5, a non-commissioned officer rank. As a Recruiter, one has access to more secure information, and the position demands a strong and honorable character as a representative of the Guard to parents and potential recruits. Kosky described how he meets with guidance counselors and military liaisons at the high schools within his territory, sometimes with slide presentations. He meets with vice principals and principals and tries to get speaking opportunities before the students.

Appellant further explained that recruiters would be given an annual goal or "mission," which would be approximately sixteen (16). He also stated that one needs to get to know the character of the area to which you are assigned. For example, he differentiated between Jersey City where there are lots of drugs and criminals and Hackensack where there are fewer such juvenile problems. Once he gets access to some interested students, Kosky would try to get introduced to their friends. He also meets with parents of potential recruits, at their convenience and in their homes.

Kosky testified that he told Chief Dyl in his interview that he would put his firefighter responsibilities first and would make himself available for his own hours and any shifts they wanted him to cover. He felt that he and Dyl had extensive discussions about the Guard position.

Appellant also believed that he had a good working knowledge of USERRA and its impacts on both him and possible recruits, who often worried about how joining the National Guard would affect their regular jobs, many of which were in civilian law enforcement or "badge" occupations. Appellant stated that every time you leave your civilian job for military service, it counts toward the five (5) year period when you are protected from being fired. Nevertheless, in other portions of his testimony, he asserted that it was his choice whether to count military leave time toward USERRA, which he also

stated was the reason why he did not have to submit his three-year active-duty orders to the respondent.

Appellant stated that he made the choice in the spring of 2010 to focus on the Fire Academy and so he resigned his full-time position as a Recruiter with the Guard, effective April 30, 2010. [A-3.] Kosky missed the first day of the Academy due to lag in the Guard paperwork, but he insisted that Chief Dyl knew and gave him permission. For the April overlap, he used Guard leave time. Later, he did use USERRA time in the fall of 2010. Appellant apologized to the Chief for not working around his Guard obligations while still prioritizing firefighting. His son was battling leukemia at the same time, so he felt he had no choice.

At the hearing, appellant acknowledged that he was on active-duty orders and on military leave from Kearny from September 28, 2009, through May 31, 2011, and then also July 5, 2011, through July 4, 2014. [R-5.] While he continued without break on active-duty (full-time) orders from July 5, 2014, through July 4, 2020, appellant insisted that it was his choice not to take civilian leave using USERRA time. He sought military leaves of just a few days at a time when he was required to support the drill weekends of new recruits. Appellant also stated that the Kearny Fire Department had no policy on seeking permission to serve in the National Guard.

In November 2018, Kosky requested leave to attend the SLC in Leavenworth, Kansas, a course he was required to complete as an active-duty recruiter. Because he was already on full-time active duty, he explained at this hearing that there would be no further "orders" but only a travel authorization for expenses. After he departed for the SLC, however, Chief Dyl was apparently still expecting military orders supporting it. Accordingly, Kosky was contacted several times while still in Kansas, with McCurrie insisting that he get the orders even though appellant kept trying to explain that difference between orders and vouchers. Eventually, appellant asked his friend Jose Malave to draft a memorandum to help explain his active-duty SLC requirement to the respondent. Malave was also a Sergeant First Class but with some seniority over appellant because of time in rank. Malave was not in his chain of command.

After each employer became aware of appellant's commitments to the other, the Guard sought to impose discipline for the "bad" memo Malave had issued. Insofar as Malave had done it as a favor for appellant, appellant accepted the blame and a demotion in rank. A recommendation of his superior officer that he be discharged from the Guard was vetoed by the Command General. At the hearing, appellant asserted that there was no policy in either entity prohibiting him from holding two full-time positions so long as he was never AWOL from either. As a result of these events, Kosky submitted his previously undisclosed two three-year active-duty orders to respondent. He commented that his relationship with Chief Dyl had been tense after he first used USERRA from 2011 to 2014, and he implied that such was a contributing factor to why he chose not to use USERRA time again.

Subsequent to these disclosures and meetings, appellant was on military leave from Kearny from January 16, 2019, through March 2, 2020. During that time, he was advised by letter dated December 11, 2019, that he would be considered to have resigned in good standing because of expiration of five years of USERRA time prior to the end date of that leave period. Accordingly, he received an Honorable Discharge from the National Guard on February 29, 2020. Lastly, appellant emphasized that he had never been AWOL from the National Guard.

On cross-examination, appellant acknowledged that he was beholden "24/7" to his active-duty orders, but he also reemphasized that his work as a Guard Recruiter had irregular or flexible hours due to parental and school meetings. He had assured Chief Dyl that his guard duties would always take a backseat to his duties to the Kearny Fire Department. When asked hypothetically what he would have done if he was called to an active fire while in the home of a prospective recruit, appellant responded that he would leave the parental appointment. Appellant insisted that his active-duty responsibilities to the Guard were not primary, but rather it was the "mission" of the number of recruits that was paramount. As a Recruiter, appellant cannot be deployed so there is no conflict in the event of a military emergency.

With respect to the first day of the Fire Academy that appellant missed, he explained that the National Guard Sergeant Major was requiring him to make his mission

even while commencing his employment with respondent at the Academy. Appellant chose, therefore, to discharge because he knew he could not make his mission at the same time. He seemed to say that the Sergeant Major gave him a specious choice of making mission while going to the Academy because it was logistically an either/or proposition. On further questioning, appellant admitted that the Sergeant Major had sent military personnel to "check on him" and return him to base so he could be discharged from his full-time Recruiter position. He decided to continue as a part-time reservist in the Guard Recruiting Assistant Program (GRAP), a unit that assists the full-time recruiters.

In October 2010, appellant explained that he was requested by the Recruiting Command to return to the full-time Guard position, which unit is reevaluated before the start of every federal fiscal year to remove unproductive recruiters and hire new ones. At that same time, he knew that Kearny was possibly going to lay off some firefighters but that did not impact his decision with respect to the Guard because he was already high enough on the civil service list to be protected. Appellant further stated that his son had been diagnosed with leukemia that summer and the family needed his two incomes as his wife was at the hospital much of the time. I inquired as to the amounts of those incomes, which he said were approximately eighty ($80) thousand for the Guard and thirty ($30) thousand as a firefighter. In response to my questioning, appellant acknowledged that if he had presented to the Chief his active-duty orders from 2014 and 2017, his USERRA time would have expired, and he would have lost employment protection. In other words, he would likely have had to quit one of his full-time positions.

On continued cross-examination, appellant testified that he was requested to bring in discharge paperwork when his military leave ended in July 2014. He admitted at the hearing that he could not do that because he had no discharge orders -- he was still in the Active Guard Recruiting. When Kosky returned to Kearny that month, he was initially assigned to administrative work and then re-enrolled in the Fire Academy for August and September. This time, he did not inform his Guard command that he had to attend the Academy because those personnel had changed, and he felt he could keep it to himself. By mid-October, appellant was back in fire tour rotation.

Appellant was questioned on the several short-term military leave requests he submitted to respondent before 2015 and the years thereafter. [R-5, R-6.] He was unsure whether to check-off "active" or "inactive" and his direct chain of command at the Fire Department could not advise him. He did check off "drill" and testified that it was a type of "inactive duty training" (IDT) but only in the sense that the full-time active-duty recruiters supported the training for the part-time reservists. He never had inactive-duty (reservist) training orders. Yet, appellant submitted the IDT schedules for each year. [See, e.g., R-23, R-24.] For the several weeks that he needed to attend the SLC in Kansas, appellant's leave request checked-off "active." At the hearing, he repeated that he had tried to explain to McCurrie, who contacted him at the behest of the Chief, that he had been "activated" and only had travel vouchers. As appellant was being pressed for orders, he reached out to his friend Malave in the Guard for the memorandum he eventually submitted. Appellant was aware that the memorandum contained errors; in fact, he said the first draft was even worse. Nevertheless, he submitted it because otherwise he might not have had a firefighter job to return to.

Once again, appellant confirmed that it was his choice as to whether to submit his three-year active-duty orders to respondent and use USERRA time. It was only in January 2019, after National Guard Lieutenant Colonel Gagnon and Kearny Chief Dyl each learned of appellant's full-time position with the other, that the former issued his policy memorandum prohibiting dual full-time positions while in the Guard. [R-12.] Appellant asserted that the recruiters often had secondary jobs. While Kosky believed that his fire duties would come first, he understood that the Lieutenant Colonel disagreed with that and that making "mission" was all that mattered.

Appellant was further cross-examined on the shoulder injury he sustained in or about August 2020. He had not known about worker compensation until DeGiovanni suggested that he at least file a claim to create a record of the injury should appellant ever need sick leave, desk assignment, or disability pension in the future. In late October, he was ordered by Chief Mastandrea to speak with their Qual-Lynx contact person. Again, appellant did not understand that reporting to Qual-Lynx meant filing a worker compensation insurance claim. Kosky stated that he could not recall if there was any

follow-up from Qual-Lynx about signing HIPAA release forms, which turned out to be one of the reasons that the worker compensation claim was closed.

Appellant testified that he went out on military leave from the Fire Department after his return from the SLC because of all the questions that got raised at that time. As his USERRA time was approaching the five-year maximum, the Chief so advised him. Accordingly, Kosky resigned from active duty with the Guard and returned to Kearny. He commented at the hearing that he recalled that Chief Dyl had not been happy about his 2011 activation. Appellant wrote a letter of thanks to respondent as the "right approach" to take to "clear the air" and demonstrate respect for the Kearny chain of command. [R-27.]

On redirect examination, appellant reiterated that there had been no Guard policy prior to January 2020 against holding simultaneous full-time civilian employment. In response to my own questioning, he also described that recruiter duty included meetings in the office at the Armory two to three times per week, with some appointments for recruits there as well. Appellant admitted that during his second round at the Academy in 2014, he could not have attended any Armory meetings or work on the mission because he was an Academy class leader with daily hours that stretched from 7:00 a.m. to 5:00 p.m.

The last hearing date in this matter was scheduled for rebuttal witnesses by both parties. Chief Dyl resumed the stand to set forth that appellant submitted his SLC military leave request on October 22, 2018 (R-7), but did not submit his 2017-2020 miliary active-duty order until forced to in December 2018. [R-10.] Chief Dyl stated that he spoke to appellant several times about the required military order to support the SLC leave request. Appellant never mentioned to him that he was full-time active duty at that time. The Chief remained under the impression that appellant was a reservist, that is, part-time with the Guard. He denied that he held ill will toward those in the military or that he ever disparaged military service. Chief Dyl testified that it was not the fact that Kosky was in the military but the untruthful manner in which he handled his service that demonstrated his unfitness for employment with Kearny. Appellant was not truthful or forthcoming with the fact that he had never been discharged in 2014 when he returned to Kearny but had

had his active-duty orders extended by three years, and then another three years after that. This showed a lack of integrity in his opinion.

On cross-examination on this rebuttal testimony, Chief Dyl clarified that he only learned of the 2017-2020 order in December 2018. The 2014-2017 order had not been produced until January 2019.

Appellant also presented himself for additional rebuttal testimony. He contradicted Chief Dyl's statement that the two had had many conversations because that belied the Kearny chain of command. Appellant only recalled talking about his orders directly with the Chief at the December 2018 meeting. Kosky felt that the Chief's impugning of his integrity was a "slap in the face" after all he had done in the military. Finally, he testified that his "thank you" letter in 2020 was his way of clearing the air. He would not and did not file any grievance against the Chief.

Finally, Mike McCurrie was presented on behalf of appellant as the final rebuttal witness. He confirmed the details of his conversations with Chief Dyl during the period when appellant was at the SLC, as well as afterwards. He was in attendance for the December meeting.

I **FIND** that appellant knowingly and intentionally had Malave do him the "favor" of producing a memorandum that was neither official nor authorized by his National Guard chain of command in order to have some, any, piece of paper he could show to his Kearny chain of command, without the burden of telling the full truth. Chief Dyl would not have known the "wrong" aspects of the Malave memorandum that were obvious to Lieutenant Colonel Gagnon. Appellant's repeated testimony that a person on active duty does not get travel orders but only a travel voucher was so nuanced as to be lost on non-military personnel and was not adequately disclosed at the time to Kearny and I so **FIND**. It was difficult to follow even during the hearing. I **FIND** that emails and a travel authorization, similar to a box checked off on a form, was simply not the equivalent of actually presenting Kearny with his three-year active-duty orders in both 2014 and 2017. And I **FIND** that appellant knew as much and purposely failed to share them with respondent to play on the ambiguity to his pecuniary advantage. Appellant knew from his experience that both

Kearny and the Guard had had issues with his accepting dual full-time positions in 2010-2011. Further, I **FIND** that appellant had to neglect his recruiter responsibilities during his second Academy training.

Irrespective of his job performances in these dual positions, I **FIND** that appellant made a conscious decision to finagle the issue – slip between the cracks -- and keep both military and paramilitary commands in the dark. His testimony to the contrary notwithstanding, appellant came across as someone who knew exactly what he was doing and what impression he was leaving with others. I also did not **FIND** appellant to be credible in his USERRA legal interpretation assertions, which will be rectified below. While not a lawyer, appellant touted his familiarity with its protections and obligations because of his recruitment duties. It was frankly disingenuous of him to try that angle in his defense of this removal action. He was too clever by half, and I was not fooled.

With respect to the Amended PNDA, I **FIND** that appellant never really considered the shoulder injury to have been caused by fire duty in August. It was never reported by him as fire-related at the time or to the medical staff he saw; and he filed for just short-term disability. Only later, when friends in the firehouse suggested that he consider characterizing it as such in case a later injury or aggravation necessitated disability leave or pension did he start phrasing it as "maybe" work-related. I **FIND** that appellant did not *per se* falsify this incomplete claim. And I **FIND** that he did not follow through with the workers compensation claim because he was always equivocal about the cause of the injury, the claim process, and the correctness of pursuing it, which he seemed to do at the insistence of the Chief.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. 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 DOC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental

employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

Nevertheless, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, 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).

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, I 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. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

"Conduct unbecoming a public employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a

tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140-42 (App. Div. 1960); cf. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). In this matter, appellant is charged with conduct unbecoming[3] a firefighter because he withheld material information about his military service from the Kearny Fire Department, falsified information on his employment application, and lied about a work-related accident.

For the reasons set forth below, and contrary to the legal arguments presented,[4] I **CONCLUDE** that appellant was never protected against termination of his Kearny employment under Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.A § 4301 *et seq.*, because he was never discharged; yet appellant was nevertheless obligated to have advised both of his employers of the other.[5] Accordingly, I **CONCLUDE** that respondent has proven conduct unbecoming a public servant and that removal is the appropriate discipline.

The core provision of USERRA is that the need for leave a civilian job because of a call to service in the military branches, *e.g.*, National Guard, should not result in losing

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[3] Other charges were set forth in the FNDA, as laid out at the top of this Decision. I would conclude that respondent had not supported the charges of chronic absenteeism or neglect of duty on this record, supported only by R-26, and I need not discuss those further. **I CONCLUDE** that insubordination and other sufficient cause charges overlap and merge with conduct unbecoming, based upon my decision herein.

[4] Appellant submitted with his post-hearing brief, a Letter Memorandum prepared by Thomas Roughneen, Esq., and dated October 27, 2022. I ruled sua sponte that this opinion would be disregarded to the extent it presented anything other than legal analysis of USERRA. Respondent thereafter sought to have the entire letter excluded as an ex post facto expert report. In light of my own legal analysis and for purposes of any appeal, it will be included the file but I have not relied upon it.

[5] As set forth in an article published by the private organization Veteran.com on July 18, 2022, entitled "Off-Duty Employment for Military Members:"

> If a reservist misses civilian work due to military obligations and then gets fired, the reservist has legal recourse. However, if the reservist wasn't keeping their duty separate from their employment (i.e., remaining on the clock instead of taking military leave), legal protections are less clear. National Guard and reserve service members can keep things simple by refraining from trying to perform their military and civilian work in the same time frame.
>
> [https://veteran.com/off-duty-employment-military/ (emphasis added).]

that job for the temporary duration[6] of that service.

> (a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—
>
> (1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;
>
> (2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and
>
> (3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).
>
> [38 U.S.C.A. § 4312.]

USERRA goes on to provide limited exception to the five-year maximum reemployment benefit period, in relevant part, thusly:

> (c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—
>
> ***
>
> (2) during which such person was unable to obtain orders releasing[7] such person from a period of service in the uniformed services before the expiration of such five-year

[6] As stated in the official employment poster on USERRA rights: "you return to work or apply for reemployment in a timely manner after conclusion of service[.]" [https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf (emphasis added).]

[7] See also USERRA, Final Rules, 70 Fed. Reg. 75,246, 75,303 (December 19, 2005) (Response to Comments addressing §1002.123) (documents that can establish release or discharge) available at <https://www.govinfo.gov/content/pkg/FR-2005-12-19/pdf/05-23961.pdf>.

> period and such inability was through no fault of such person;
> . . .
>
> [Id. (emphasis added).]

These provisions must be construed to mean that a person seeking USERRA reemployment rights after having left civilian employment to serve in the military must present orders releasing him or her from that service before (or soon thereafter) the end of the five-year period. In other words, one leaves the civilian job for military service; then one receives orders to be released or discharged from the military service to return to the civilian job to be reemployed. It is not intended for career military service.[8]

While unpublished, a federal case, Drake v. Tucsan, Inc., 2010 U.S. Dist. LEXIS 2288, at *5 (D. Ariz. Jan. 11, 2010), is directly on point with my own interpretation and will be quoted at some length. USERRA generally comes with protections for seniority, pay and grade raises, and other benefits.

> The purpose of USERRA is "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). USERRA's definition for "noncareer service" is as follows: "The period of active uniformed service required to complete the initial uniformed service obligation; a period of active duty or full-time National Guard duty that is for a specified purpose and duration with no expressed or implied commitment for continued active duty; or participation in the Reserve component as a member of the Ready Reserve performing annual training, active duty for training or inactive duty training. Continuous or repeated active uniformed service or full-time National Guard duty that results in eligibility for regular retirement for the Armed Forces is not considered non-career service." Barker v. Office of Adjutant General, 907 N.R. 2d 574, 580 (Ind. App. 2009).
>
> [Id., 2010 U.S. Dist. LEXIS 2288, at *7-8 (emphasis in original).]

[8] "Employment rights under Uniformed Services Employment and Reemployment Rights Act (38 USCS §§ 4301 *et seq.*) do not extend to employees who leave their civilian employment to pursue military careers." OPM Case No. S000958 (7/30/99), found at <https://www.opm.gov/policy-data-oversight/pay-leave/claim-decisions/decisions/1999/s000958/>

In Drake, the court went on to describe why the plaintiff was not protected by USERRA; that is, had not triggered its provisions.

> It is undisputed that the Plaintiff gave Defendant notice that he was being deployed to Qatar, he applied for reemployment with Tens within 14 days, his absence did not exceed 5-years, and his service has not been terminated with a dishonorable or bad conduct discharge. Plaintiff's service has not been terminated at all.
>
> The Court finds that the Plaintiff is unequivocally entitled to USERRA benefits. 38 U.S.C. § 4304, but USERRA benefits do not include reemployment rights prior to the completion of the period of service being served by a full-time active member of the armed services. Completion of active duty is expressly required by the statute. Additionally, the right to reemployment is limited to a total time in absentia of 5 years, therefore, it is critical to count the beginning and ending of each period of service with uniform specificity.
>
> [Drake v. Tucsan, Inc., 2010 U.S. Dist. LEXIS 2288, at *5 (D. Ariz. Jan. 11, 2010) (emphasis in original and added).]

Similar and even more thorough analyses have also been undertaken by Captain Samuel F. Wright, JAGC, USN (Ret.), who has published numerous articles with the Reserve Officers Association's Law Center. In one, he reviews a scenario posed as a "hypothetical" that is nearly identical to appellant's situation.

> Q: I am the fire chief of an intermediate-sized city in New Jersey. Several of the firefighters in my department are National Guard or Reserve members . . .
>
> We have a firefighter in our department -- let's call him Joe Smith Army — who is a member of the National Guard. Very often, Joe requests time off from his firefighting job (often on short notice) to do "urgent" military duties. Instead of bringing me military orders, Joe brings me a memorandum signed by a more senior noncommissioned officer, stating that urgent military responsibilities require that Joe be present another place during one of his scheduled firefighter workdays, and I have always accommodated his requests for days off.
>
> Among the firefighters who work for me, three others are members of the New Jersey Army National Guard. When they need time off from work for military duty, they bring me military

orders. Several times, I have asked Joe why the memos that he brings me are so different in appearance from the orders that these other firefighters bring me, but he has never given me a satisfactory answer. He always insists that the memos are "equivalent to" military orders and that USERRA gives him the right to a day off from his firefighter job for these military responsibilities.

Just recently, it came to my attention that Joe has been on full-time active duty for at least the last three years. He works as a recruiter in a small National Guard recruiting office just ten miles away from his home and civilian job. I called Joe into my office and gave him a copy of your Law Review 106 and your Law Review 18029. He quickly read those articles and then insisted that his situation is different and that those articles do not apply to him. What do you say?

A: I stand by what I wrote in 2003 and 2018. USERRA simply does not apply to a person in Joe's situation, on full-time active duty. You (the fire department) are not obligated to allow Joe to continue working while he is on active duty, nor are you required to accommodate the obligations of his full-time active-duty status while he continues working at the civilian job while on active duty. As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran must meet five conditions to have the right to reemployment under USERRA:

a. Must have *left a civilian job* to perform service in the uniformed services, as defined by USERRA.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that pertain to the employer relationship for which the person seeks reemployment.
d. Must have been released *from the period of service* without having received a disqualifying bad discharge from the military.
e. After *release from the period of service*, must have made a timely application for reemployment.

Joe must meet all five of these conditions to have the right to reemployment, and he clearly does not meet the first condition — he never left his civilian job to perform service, but he remained in the civilian job while performing service.

[https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2019/19016-LR.pdf (emphasis in original).]

I **CONCLUDE** that USERRA cannot protect appellant from termination now or help him against the specific charges asserted by Kearny. As discussed above, one of the central precepts of USERRA is that a person is protected from losing their civilian employment because of military service upon his return from that military service of less than five years. Thus, a central element of USERRA protection is discharge from that active-duty military service. Appellant was never discharged from active duty between 2011 and 2020. When he returned to the Kearny Fire Department in 2014, he had not been discharged from the National Guard, but rather remained a full-time Recruiter. He just chose not to tell anyone those finer details. In fact, he admitted that he would not have been able to produce discharge papers in 2014. Thus, he cannot get any protection from USERRA. I **CONCLUDE** that appellant did not have the right to pick and choose when to trigger USERRA with Kearny. Accordingly, there can be no question that he would have exceeded five years of military leave had he been honest with Kearny, as any honorable discharge papers could not have been presented until February 29, 2020.

There being no genuine applicability of USERRA to appellant's employment, reemployment, or termination, I next turn to the question of whether appellant had to inform his Kearny command and produced supporting military orders of his active-duty status with the Guard after 2014; and, whether his failure to do so is a material omission or misrepresentation that might constitute conduct unbecoming a firefighter and insubordination. I **CONCLUDE** that respondent has proven by the preponderance of the credible evidence that appellant violated tenets of the Kearny Code applicable to firefighters.

Specifically, Kearny Code § 3-63.1(b)(1) requires that members "devote their entire time to the service of the Fire Department." Appellant did not, instead serving two government employers on a full-time, in fact 24/7/365, basis, as he admitted in his testimony. I **CONCLUDE** that Kearny Code § 3-63.1(b)(11) also was violated:

> Members of the Fire Department shall at all times serve the best interests of the Fire Department by observing and reporting all matters pertaining to and concerning its welfare. [(emphasis added).]

As set forth in the testimonies of the two Chiefs and the Code, appellant had an obligation to put the question of his full-time active-duty orders before his commanders. Maybe they would have agreed that he did not have to take a military leave of absence. By not doing so, however, appellant took the determination and discretion as to the impact of his full-time military service on the welfare of the Department out of their hands. Furthermore, I am not persuaded that the absence of a specific military leave policy in the Kearny Code is critical or material here. Appellant knew to ask both his military and paramilitary chains of command without any express rule in 2010-2011; he just knew he was not going to like the answer he would get in 2014 through 2020.

I CONCLUDE that appellant made a deliberate decision – one built on intentional and material omissions – to keep both military and paramilitary chains of command in the dark about his full-time employment with the other. He already knew what each would say, and he wanted to stay on both salaries and benefits. In 2010, the National Guard and Kearny required appellant to quit his employment as an active-duty, full-time Recruiter to attend the Academy. In 2011, respondent required and approved appellant's requests for leave from Kearny for three years of National Guard activation. Appellant was obviously aware that if he submitted his next and continuing three-year order that the Chief would probably place him on military leave, and he would also be deemed to have exceeded USERRA's five-year limitation. Kearny would have no obligation or motivation to keep his position available to him for nine, ten and probably even more years, i.e., the duration of a military career. In 2014, it is also not difficult to surmise what appellant's National Guard commander would have said about his need to attend another ten-week Academy from seven to five every day, with no time for AGR office meetings, making mission, etc., since his commander gave him a "specious choice" about that before. While his exposure to military discipline is not before me, these facts illustrate his intentions.

As detailed in the testimony itself, appellant used a lot of military jargon and acronyms to confuse his colleagues and supervisors as to whether he was a part-time reservist or a full-time active-duty recruiter. No one doubted, nor do I, that he was "in the National Guard." Nevertheless, his civilian employer was not advised and had no reason to be aware that he was still on active-duty orders for an additional six years past his

"return" (but not "discharge") to Kearny in 2014. Appellant's more than nine years of active duty might have been left unsaid, as opposed to an outright lie, but it was a deliberate shell game by him. I refuse to give him credit for his assertion that he never missed a call to a fire, an overtime request, or other unscheduled duty with Kearny. I **CONCLUDE** that appellant had an obligation to inform Kearny of his active-duty status and the Guard of his full-time fire department employment.

It will be noted that I have not discussed the allegations that appellant lied on his employment application. It was true that he was a full-time Recruiter when it was completed in the fall of 2009. Like many people, appellant was currently employed even as he was applying for a new job. Similarly, his "check mark" assent that he would make himself available to work overtime, any day of the week, or holidays has not been proven to have been false at the time he made it. [R-3.] He might have thought he would continue with the Recruiter position even if he got the job with Kearny, but irrespective of any such discussions during his interview, he did resign on the first day of the Academy. Accordingly, I have not given much weight to that aspect of the charge of conduct unbecoming a public employee, nor to any allegation that he falsified the application.

Nevertheless, I do give some weight in considering these charges to his words and deeds in September 2020 concerning his shoulder injury. As the preponderance of the testimony showed above, appellant never truly considered the injury to have been caused by the fire assignment in August until friends in the firehouse suggested that he consider characterizing it as such in case a later injury or aggravation warranted a disability leave or disability pension. It was never reported by him as fire-related at the time or to the medical staff he saw; and he filed for just medical temporary disability with Aflac. The evidence also showed that he did not follow through with the workers compensation claim because he was always equivocal about the cause of the injury, the claim process, and the correctness of pursuing it, which he seemed to do at the insistence of the Chief. I **CONCLUDE** that appellant showed a weakness of character during this period, perhaps exacerbated by the military leave circumstances that pre-dated it in 2020 and might have caused some residual bitterness, but I do not believe he was outright lying about the source of the injury.

Having concluded that respondent has carried its burden of proof on the major allegations in the FNDA, I must next address the issue of the appropriate disciplinary action to be imposed. Progressive discipline is the touchstone of our civil services laws, even with respect to para-military organizations. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Nevertheless, "[t]he welfare of the people, and not exclusively the welfare of the civil servant, is the basic policy underlining [the] statutory scheme." State-Operated School Dist. of City of Newark 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." George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463, 465. Further, while progressive levels of discipline are usually the preferred and measured response, when an employee's conduct is so egregious as to render the employee unfit for continued service, the principle of progressive discipline must give way to the public need. Robinson v. East Jersey State Prison, Department of Corrections, 96 N.J.A.R. 2d 134 (CSV) 1996). Thus, 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 matter, appellant pursued a self-serving strategy of gaming two para/military organizations for a period of at least six years. He made conscious decisions at very regular intervals to not disclose his active-duty orders or to clarify the ambiguity he himself had helped to perpetuate. Accordingly, I **CONCLUDE** that these career-long, persistent acts of omission or commission by appellant plainly constitute conduct unbecoming a public employee and were detrimental to the chain of command of the para-military organization of the Kearny Fire Department. I **CONCLUDE** that they were serious enough to warrant removal without consideration of progressive discipline principles.

ORDER

Accordingly, and for the reasons set forth herein, it is hereby **ORDERED** that the appeal of John Tayag-Kosky is **DENIED**. It is further **ORDERED** that the termination of his employment as a Firefighter with the Town of Kearny is **UPHELD**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, 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 28, 2022
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 11/28/22

Mailed to Parties: 11/28/22
id

APPENDIX

LIST OF WITNESSES

For Appellant:

Damian Caceres

Lorenzo Tirado

Thomas F. McDermott

Andrew O'Donnell

John Albizu

Jared Costanzo

Michael F. McCurrie

Jose Malave

John Tayag-Kosky

Mike McGurry

For Respondent:

Steven Dyl

Christopher Lazas

Joseph Ferraro

Bruce Kauffmann

Bankim Shah, M.D.

Joseph R. Mastrandrea

Tekesha Thornhill

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Kosky's Employment Application, dated October 14, 2009

A-2 Email from Kosky to Dyl, dated March 9, 2010, with attached Kosky Resignation from Active Guard/Reserve Status, dated March 8, 2010 [duplicate of R-4]

A-3 Resignation and Demotion Military Orders, dated March 25, 2010

A-4 Request for Military Leave, August 30 – September 2, 2010

A-5 Request for Military Leave, October 1, 2010 – July 4, 2014 [duplicate of R-5]

A-6 Request for Military Leave, Recruit Sustainment Program/Inactive Duty Training, various dates 2017 -- 2018

A-7 Memorandum from Sergeant Jose Malave to Employer, dated November 16, 2018 [duplicate of R-8]

A-8 Letter re Resignation from Active Guard Reserve from Kosky to Dyl, dated February 24, 2020 [duplicate of R-27], with attachment Certificate of Release or Discharge from Active Duty, dated February 27, 2020

A-9 Active-Duty Order for July 5, 2014 – July 4, 2017, dated May 15, 2014, received January 8, 2019 [duplicate of R-11]

A-10 Off-Duty Progress Notes for Injury, dated September – October 2020 [duplicate of R-15]

A-11 Riverside Medical Group Medical Notes and Physical Therapy Evaluation

A-12 Verizon Cell Phone Records of Kosky, October 7 – November 6, 2020

A-13 USERRA Statute [not admitted as evidence]

For Respondent:

R-1 Final Notice of Disciplinary Action, dated May 13, 2021

R-2 Excerpts from Chapter 3 of Town Code, Police and Fire Department

R-3 Excerpts from Kosky's Employment Application, dated October 14, 2009

R-4 Email from Kosky to Dyl, dated March 9, 2010, with attached Kosky Resignation from Active Guard/Reserve Status, dated March 8, 2010 [duplicate of A-2]

R-5 Request for Military Leave, October 1, 2010 – July 4, 2014 [duplicate of A-5]

R-6 Requests for Leave to Attend "Drills," 2015 -- 2018

R-7 Request for Military Leave to Attend SLC School, dated October 22, 2018

R-8 Memorandum from Sergeant Jose Malave to Employer, dated November 16, 2018 [duplicate of A-7]

R-9 Correspondence from NJDVA, Human Resources Director Langston re Malave Memorandum, dated December 18, 2018

R-10 Active-Duty Order for July 5, 2017 – July 4, 2020, dated May 6, 2017, received December 18, 2018

R-11 Active-Duty Order for July 5, 2014 – July 4, 2017, dated May 15, 2014, received January 8, 2019 [duplicate of A-9]

R-12 Memorandum from LTC Gagnon re: Kosky Employment Status, dated January 14, 2019

R-13 Certificate of Release or Discharge from Active Duty, dated February 20, 2020

R-14 Report of Ferraro to Dyl, dated September 9, 2020

R-15 Off-Duty Progress Notes for Injury, dated September – October 2020 [duplicate of A-10]

R-16 AFLAC Physician's Statement Received by Mastandrea, dated October 12, 2020

R-17 Audio Recording and Transcript of Conversation Between Kosky and Qual-Lynx Thornhill, dated October 30, 2020

R-18 Notice of Denial of Workers' Compensation Claim, dated January 14, 2021

R-19 Notification of Recommendation for Involuntary Release from Full-Time Active Duty, dated March 19, 2019

R-20 Personnel Action Form, Voluntary Reduction in Rank, dated April 19, 2019

R-21 Progress Note Prepared by Dr. Bankim Shah, dated September 30, 2020

R-22 Select Documents Received by AFLAC from Riverview Medical Group

R-23 Inactive Duty Training Schedule, dated August 8, 2016

R-24 Inactive Duty Training Schedule, dated April 4, 2018

R-25 Qual-Lynx Letter re Medical Releases Forms, dated October 29, 2020

R-26 Sick Leave Record for Kosky, with news article dated January 26, 2017

R-27 Letter re Resignation from Active Guard Reserve from Kosky to Dyl, dated February 24, 2020