STATE OF NEW JERSEY

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| In the Matter of Michael Bell, Plainfield, Fire Department | DECISION OF THE CIVIL SERVICE COMMISSION |
| CSC Docket No. 2024-1091<br>OAL Docket No. CSV 13267-23 | |

**ISSUED: November 7, 2024**

The appeal of Michael Bell, Fire Lieutenant, Plainfield, Fire Department, 45 working day suspension, on charges, was heard by Administrative Law Judge Daniel J. Brown (ALJ), who rendered his initial decision on October 7, 2024. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent, *de novo* evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on November 6, 2024, adopted the Findings of Fact and Conclusions of Law as contained in the initial decision. However, it did not agree with his recommendation to modify the 45 working day suspension to a one working day suspension. Rather, the Commission modified the 45 working day suspension to a seven working day suspension.

In his initial decision, in recommending reducing the 45 working day suspension to a one working day suspension, the ALJ stated:

> [A]ppellant should receive a lesser penalty under progressive discipline. Appellant had no sustained discipline until this case. Additionally, Deputy Chief Reed described appellant as a good firefighter who performed all his assigned tasks once he finished setting up his cell phone to record the fire . . . the time that setting up his cell phone delayed appellant for completing his assigned duties was minimal. Finally, in determining the appropriate discipline, I note that another firefighter with the same rank and disciplinary history as appellant

> received a one-day suspension for failing to evacuate a structure when he was ordered to do so. For those reasons, I **CONCLUDE** that a one-day suspension strikes a balance between appellant's misconduct, respondents need to ensure compliance with its policies, and the public interest.

In its exceptions, the appointing authority argues that the ALJ erred in modifying the 45 working day suspension, as that penalty was more than reasonable. In particular, the appointing authority argues that the appellant's misconduct involved public safety and posed a risk of harm to persons or property, and therefore, it was not bound by the tenets of progressive discipline. The appointing authority also argues that the ALJ's decision to modify to a one working day suspension was so "disproportionate to the offense, in light of the circumstances, as to be shocking to one's sense of fairness." Finally with regard to the differing levels of discipline imposed on other members of the fire department during the same incident, the appointing authority notes that the appellant's misconduct, unlike the other fire fighters, did not occur within the scope of his duties, and thus, it was appropriate that it be afforded the ultimate discretion in instituting discipline in accordance with differing levels of misconduct.

The Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In this matter, although serious, the ALJ found the appellant's actions were not significantly more egregious than the other Fire Lieutenant, who the ALJ noted only received a one-day suspension for failing to evacuate a building during the same fire incident. That, combined with the appellant having no disciplinary history, led the ALJ to find any delay in starting his duties was *de minimus*, and that the appellant performed all of his assigned duties, warranting a lesser penalty then a 45 working day suspension. While the Commission agrees the misconduct is unworthy of the originally imposed suspension, it does not agree that a one-day suspension is sufficient in this matter. Clearly, *any* delay in performing duties that could jeopardize public safety is considered serious. Moreover, the facts

and circumstances behind the discipline imposed on the other employee is not before the Commission. As such, the Commission finds that a seven working day suspension is more appropriate and will impress upon the appellant the inappropriate nature of his actions and that any similar future misconduct may lead to increasingly more severe disciplinary penalties.

Since the suspension has been modified, the appellant is entitled to 38 working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, per 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 are finally resolved.

## ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. However, it modifies the 45 working day suspension to a seven working day suspension. The Commission further orders that the appellant be granted 38 working days of back pay, benefits, and seniority. 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.

Counsel fees are denied.

The parties must inform the Commission, in writing, if there is any dispute as to back pay 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 6TH DAY OF NOVEMBER, 2024

Allison Chris Myers

Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. CSV 13267-23
AGENCY DKT. NO. 2024-1091

**IN THE MATTER OF MICHAEL BELL,
CITY OF PLAINFIELD, FIRE DEPARTMENT.**

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**Craig S. Gumpel**, Esq., for appellant Michael Bell (Law Offices of Craig S. Gumpel, LLC, attorneys)

**Kathryn V. Hatfield** Esq., for respondent City of Plainfield, Fire Department (Hatfield Schwartz Law Group, LLC, attorneys)

Record Closed: August 30, 2024 Decided: October 7, 2024

BEFORE **DANIEL J. BROWN**, ALJ:

## STATEMENT OF THE CASE

On April 12, 2023, Appellant was an on-duty Lieutenant with the Plainfield Fire Department. He responded to an active fire where he was responsible for supervising other firefighters and coordinating with the on-scene commanding officer. Appellant delayed the performance of those essential duties when he placed a cell phone in the window of the fire truck to record the escalating fire for training purposes. Even though Appellant's delay in executing his job duties was minimal, was discipline warranted? Yes. Discipline was warranted because appellant's conduct was outside the scope of his duties

and unnecessarily delayed the performance of his duties at the scene of an active, escalating fire.

## PROCEDURAL HISTORY

On May 5, 2023, Respondent issued a Preliminary Notice of Disciplinary Action (PNDA), charging Appellant with violations of the Civil Service Code, including incompetency, inefficiency or failure to perform duties under N.J.A.C. 4A:2-2.3(a)(1); conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6); neglect of duty under N.J.A.C. 4A:2-2.3(a)(7), and other sufficient cause under N.J.A.C. 4A:2-2.3(a)(12). Respondent alleged that, in using his cell phone to record an escalating fire, appellant compromised the safety of personnel assigned to him and delayed essential assignments. Respondent also alleged that appellant's actions took away valuable time for responding to the fire and potentially jeopardized appellant's situational awareness. Respondent sought a sixty-day suspension and a demotion of appellant from Lieutenant to Fire Fighter as part of the PNDA.

Appellant requested a departmental hearing which was held on August 25, 2023. Thereafter, a Final Notice of Disciplinary Action was issued on October 24, 2023, sustaining the charges in the PNDA and suspending appellant without pay for forty-five days. Appellant appealed that removal action on November 10, 2023. The matter was filed simultaneously with the Civil Service Commission and the Office of Administrative Law (OAL), under the expedited procedures of P.L. 2009, c. 16, N.J.S.A. 40A:14-202(d), where it was stamped received on November 21, 2023, 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. Appellant served the suspension from December 1, 2023, to January 27, 2024.

On December 4, 2023, the case was assigned to me for hearing. On December 21, 2023, and February 27, 2024, I held telephone conferences with the parties. The case was scheduled for an in-person hearing on April 29, 2024. Respondent requested an adjournment of the April 29, 2024, hearing date and I granted that request. The hearing was held on June 4, 2024. The parties requested time to order expedited transcripts and submit written summations. I granted that request. On June 10, 2024, I

conducted a telephone conference with the parties to address a discovery issue that had arisen during the hearing. On June 21, 2024, Respondent's counsel provided the video of the structure fire taken by Appellant. On June 27, 2024, Appellant's counsel submitted additional exhibits to me with the consent of Respondent's counsel. On July 29, 2024, both parties asked for additional time to file written summations, and I agreed. On August 30, 2024, both sides submitted their post-hearing written summations. The record was then closed.

## FINDINGS OF FACT

Given the testimony the parties provided, together with my assessment of its credibility, and the documents and recordings the parties submitted, together with my assessment of their sufficiency, I **FIND** as follows:

Appellant is a Fire Lieutenant employed by the Respondent. Appellant was hired as a firefighter on January 3, 2005. Appellant was promoted to Lieutenant on March 16, 2017. Appellant was on-duty and working on April 12, 2023. He was assigned to line duty on April 12, 2023, the date of an active structure fire located at 621 Brookside Place, Plainfield, New Jersey. Firefighters that are assigned to line duty work a twenty-four-hour shift which starts at 8:00 a.m. and is followed by seventy-two hours off. The fire started around 7:00 a.m. Both appellant and Deputy Chief Reed responded to the fire at 621 Brookside Place. Due to the severity of the fire, several firefighters, including appellant had to remain at the scene of the fire instead of being relieved through a standard shift change.

Deputy Chief Reed described the fire as a heavy fire. I was shown a video of the fire during the hearing, and I agree with that description. Ultimately, the fire escalated to three alarms and spread from the second and third floors of 621 Brookside Place to a second building. Smoke from the fire could be seen from the headquarters of the fire department, which was some distance away. Ultimately, several municipalities provided mutual aid. One of the mutual aid officers was injured when a façade collapsed onto the officer, pinning the officer to the structure. At one point, there were approximately fifty firefighters at the scene of the fire.

Because of the severity of the fire, Deputy Chief Reed took over incident command from Battalion Chief Germinder. Battalion Chief Germinder was then assigned to operations. Both Deputy Chief Reed and appellant agreed that with a fire as severe as the fire at 621 Brookside Place, every second matters. At the time of the fire, appellant was the company officer assigned to Truck 3. Three firefighters and appellant were assigned to Truck 3. As the company officer, appellant was responsible for supervising the other firefighters assigned to Truck 3 while those firefighters were on the truck and at the scene of the fire. He was also responsible for coordinating with incident command. Appellant testified at the hearing that he decided to record the fire for training purposes while on his way to the fire. As Truck 3 approached 621 Brookside Place, there was a downed power line on the sidewalk and a porch on the second floor had collapsed. As appellant was getting ready to exit the truck, he grabbed his flashlight and determined that it did not work. He then went to the rear of the cab to grab an extra flashlight. As he was exiting the truck, he set up his cell phone on the window of the rear of the truck to record the fire, which was still escalating. Appellant then performed his operational duties as a fire lieutenant, which included a search of the house where the fire started. Once he was inside the house, appellant decided that a hose line was needed, called for the hose line and assisted the engine company in feeding the hose line. After he completed his search of the house where the fire started, appellant went to a neighboring house to search for hidden or spreading fires. Deputy Chief Reed testified that appellant did everything that he was supposed to do as a supervisor at the scene only after he set up his phone to record the fire.

When the fire was extinguished, appellant retrieved his cell phone from the truck and advised his on-scene supervisor that he had taken a video of the fire. At this point, the on-scene supervisor was Battalion Chief Germinder and not Deputy Chief Reed. When the fire deescalated, Deputy Chief Reed transferred on-site command back to Battalion Chief Germinder and returned to the headquarters of the Fire Department. Battalion Chief Germinder asked appellant to send him a copy of the video and appellant complied with that request. Truck 3 left the scene of the fire around 2:00 or 3:00 p.m. Later that same day, appellant received a call from the training officer asking if appellant had taken a video of the fire. Appellant told the training officer that he had taken a video.

The training officer asked if appellant could send him a copy of the video and appellant did so.

Deputy Chief Reed was not advised that there was a video of the fire at 621 Brookside Place right away. After he returned to headquarters, Deputy Chief Reed heard there was a video of the fire through talk at the firehouse. Deputy Chief Reed attempted to determine who had a copy of the video and who recoded it. Battalion Chief Germinder told Deputy Chief Reed that he had a copy of the video, but he did not disclose who recorded the video. Deputy Chief Reed told Germinder that he wanted a report from every firefighter at the scene of the fire regarding the source of the video. About a week after the fire, Deputy Chief Reed received a copy of the video. About two weeks after the fire, appellant provided a report where he admitted that he took the video of the fire for training purposes.

Deputy Chief Reed testified at the hearing that he was surprised at appellant's stated purpose for taking the video because recording an active fire for training purposes was not an assigned task for a truck commander of a truck and neither Deputy Chief Reed nor Battalion Chief Germinder asked appellant to record the fire, which was still escalating when appellant arrived at the scene. Deputy Chief Reed testified that photos or video will be taken for a post-fire analysis only of a deescalating or extinguished fire and only at the direction of a battalion chief or incident commander. Additionally, Deputy Chief Reed testified that, because of the severity of this fire, appellant should have immediately been focused on overall safety and operational objectives upon arriving at the scene of the fire. Deputy Chief Reed stated that when appellant arrived at the scene, appellant was supposed to ensure that his truck was properly positioned to support operations. Additionally, appellant was supposed to immediately begin directing and supervising the firefighters on his truck instead of setting up his cell phone to record the fire. Deputy Chief Reed testified that appellant's conduct in setting up his cell phone to record the fire showed a lack of situational awareness and delayed appellant's ability to accomplish his necessary tasks.

Deputy Chief Reed testified that the Fire Department does not enforce its written cell phone policy, which prohibits firefighters beneath the rank of Captain from carrying

their cell phone with them while on-duty. Deputy Chief Reed admitted that firefighters use cell phones to communicate at the scene of a fire and take videos and photos at the direction of a battalion commander or incident commander for post-fire analysis and training. Appellant testified that he has been to forty to fifty structure fires over the course of his career. Appellant further testified that he has used his cell phone to communicate with other firefighters at the scene of a fire and that he used his cell phone to take photos of the origin of a fire, but he never used his cell phone to record an escalating fire until this incident. Appellant also testified that he is aware of firefighters who have taken videos of escalating fires for post-fire analysis, but he stated that all those firefighters have retired, and he could not remember their names.

At the hearing, appellant's disciplinary history was also made part of the record. Before the events on April 12, 2023, appellant received no prior discipline. Deputy Chief Reed stated that he and appellant were hired as firefighters with the City of Plainfield at the same time. Deputy Chief Reed described appellant as a good firefighter that has been a good firefighter over the course of his career with the City of Plainfield. Deputy Chief Reed also testified that some firefighters, in addition to appellant were disciplined because of their conduct at the fire. One of the firefighters who was disciplined had the same rank and disciplinary history as appellant but only received a one-day suspension for failing to evacuate a structure at the scene of the fire when he was ordered to do so by the incident commander. Deputy Chief Reed testified that the other officer received a significantly lesser penalty than appellant because the misconduct occurred in the scope of his duty and was therefore normal or recognized misconduct while appellant's misconduct was outside the scope of his duty.

## DISCUSSION AND CONCLUSIONS OF LAW

### The Charges

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).

However, "there 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, respondent bears the burden of proving the charges against appellant by a preponderance of credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Although administrative hearings follow a relaxed evidentiary standard, there must be substantial or sufficient, credible evidence in the record to support the charges. N.J.S.A. 52:14B-10(a); In re Taylor, 158 N.J. 644, 656-57 (1999). 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 itself as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

As to the charge of incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), incompetence is defined as "lack of the ability or qualifications necessary to perform the duties required of an individual," and "[a] consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't, CSV 9921-98, Initial Decision (December 6, 1999) (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980)), adopted, MSB (January 24, 2000), http://njlaw.rutgers.edu/collections/oal/. "Inefficiency" has been defined as the "quality of being incapable [of doing] or indisposed to do the things required of an officer" in a timely and satisfactory manner. Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), adopted in part, modified in part, MSB (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/. Deputy Chief Reed testified that this charge was issued because appellant chose to unnecessarily delay the performance of tasks that were part of his assigned duties by setting up his cell phone to record the fire despite receiving reports that people may be inside the structure where the fire started and that the fire had spread to a second structure. I find that testimony to be credible and I give great weight to it. I also give great weight to my observation of the video of the fire and the testimony that every second matters when there is an active fire, especially one that is escalating and spreading from one structure to a second structure. I therefore **CONCLUDE** that the preponderance of the credible evidence demonstrates that respondent has met its burden of proof on the charge of incompetency, inefficiency, or failure to perform duties.

As to the charge of conduct unbecoming a public employee, that charge encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998).

The misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation but may be based merely upon the violation of the implicit

standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). The complained-of conduct and its attending circumstances need only "'be such as to offend publicly accepted standards of decency.'" Ibid. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)).

In this case, appellant was the assigned commander of a truck at an active fire. As such, he was in a position of great responsibility. Some of appellant's responsibilities were to supervise the other firefighters on his truck and to properly position that truck to provide operational support. Deputy Chief Reed testified that appellant's actions in setting up his cell phone to record the fire was outside the scope of appellant's job duties. Additionally, Reed testified that appellant's videoing of the fire was improper as it was done while the fire was still escalating, and it was not done at the direction of Deputy Chief Reed or Battalion Chief Germinder. Finally, Deputy Chief Reed testified that the time it took appellant to set up his cell phone to record the fire unnecessarily kept appellant from completing his assigned tasks. Deputy Chief Reed concluded that appellant lacked necessary situational awareness as appellant should have immediately been focused on overall safety of those at the scene and the operational objectives of the fire department instead setting up his cell phone to record the fire. Again, I give great weight to Deputy Chief Reed's testimony and my viewing of the video. I also give great weight to the testimony of Deputy Chief Reed and appellant that every second matters when the fire department is faced with a fire like the one 621 Brookside Place. Appellant's actions in setting up his cell phone to record the fire and not immediately tending to his assigned tasks delayed appellant's completion of his duties and adversely affected the fire department's ability to respond to the fire. Therefore, I **CONCLUDE** that a preponderance of the evidence exists that appellant engaged in conduct unbecoming a public employee.

In this case, appellant was also charged with neglect of duty and other sufficient cause. Generally, "neglect of duty" means that an employee has failed to perform and act as required by the description of their job title. Briggs. v. Dept. of Civil Service, 64 N.J. Super. 351, 356 (1980); In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977).

"Duty" intends conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (internal citation omitted). Also, neglect of duty can arise from an omission or failure to perform a task imposed upon a public employee that indicates a deviation from usual standards of conduct. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job. A failure to perform duties required by one's public position is self-evident as a basis for imposing a penalty without good cause for that failure.

"Other sufficient cause" is not specifically defined by the Civil Service Act's regulations. This charge has been described as other conduct, not delineated within that regulation, which would "violate the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Boyd, Cumberland County Dept of Corrections, CSC Dkt. No. 2019-1198, OAL Dkt. No. CSR 15990-18, Hon. Catherine Tuohy, ALJ; affirmed in final decision, 2019 N.J. CSC Lexis 621. "Other sufficient cause" is essentially the catchall provision for conduct, otherwise not listed within the eleven causes cited in N.J.A.C. 4A:2-2.3, as the reason for which an employee may be subject to discipline. In this case, the charge of other sufficient cause is based upon appellant's use of his cell phone to record the structure fire in violation of several of respondent's rules and regulations.

While I find that appellant failed to promptly undertake his assigned duties at the scene of an active fire so that he could set up his cell phone to record the fire and I find that was not done at the request of a superior officer, these actions are addressed by the charges of "incompetency, inefficiency, or failure to perform duties" and "unbecoming conduct". Thus, I **CONCLUDE** that a preponderance of credible evidence does **NOT** exist to support separate violations for neglect of duty pursuant to N.J.A.C. 4A:2-2.3(a)(7) and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12).

Penalty

The next question is the appropriate level of discipline. A progressive discipline system has evolved in New Jersey to provide job security and protect employees from arbitrary employment decisions. Progressive discipline is an appropriate analysis for determining the reasonableness of the penalty. See West New York v. Bock, 38 N.J. 500, 523–24 (1962). The question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness. In re Carter, 191 N.J. 474, 484 (2007) (quoting In re Polk, 90 N.J. 550, 578, (1982) (internal quotes omitted)). Indeed, bypassing progressive discipline occurs only when the misconduct is severe, rendering the employee unsuitable for continuation in the position or when the application of progressive discipline would be contrary to the public interest. In re Herrmann, 192 N.J. 19, 33 (2007). For example, when the work involves public safety, and the misconduct causes a risk of harm to persons or property. Id.

Respondent suspended Appellant for forty-five days, but I **CONCLUDE** that appellant should receive a lesser penalty under progressive discipline. Appellant had no sustained discipline until this case. Additionally, Deputy Chief Reed described appellant as a good firefighter who performed all his assigned tasks once he finished setting up his cell phone to record the fire. Additionally, appellant's intent in taking the video was laudable as it was for training purposes. Further, the time that setting up his cell phone delayed appellant for completing his assigned duties was minimal. Finally, in determining the appropriate discipline, I note that another firefighter with the same rank and disciplinary history as appellant received a one-day suspension for failing to evacuate a structure when he was ordered to do so. For those reasons, I **CONCLUDE** that a one-day suspension strikes a balance between appellant's misconduct, respondent's need to ensure compliance with its policies, and the public interest.

## ORDER

Given my findings of fact and conclusions of law, I **ORDER** that appellant be **SUSPENDED** for one day.[1]

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.

October 7, 2024
DATE

Daniel J. Brown
**DANIEL J. BROWN**, ALJ

Date Received at Agency: October 7, 2024

Date Mailed to Parties: October 7, 2024
dr

[1] A separate Order addresses Franca's pay status.

# APPENDIX

## Witnesses

For Appellant:

Michael Bell

For Respondent:

John Reed

## Exhibits

Joint Exhibits:

J-1 Preliminary Notice of Disciplinary Action, dated May 5, 2023

J-2 Final Notice of Disciplinary Action, dated October 24, 2023

J-3 Hearing Officer Report dated October 20, 2023

J-4 Notice of Appeal dated November 10, 2023

J-5 Fire Lieutenant Job Specifications

J-6 Rules and Regulations

J-7 Standard Operating Procedure, 2:1-46, Structure Fire Tactics

J-8 Standard Operating Procedure, 2:1-19, Truck Company Rules and Assignments

J-9 General Order 1:1-1

J-10 Directive 2006-1

J-11 Report of Fire Radio Audio Time Lapse for 621 Brookside Place on 4/12/23

J-12 M-13 Michael Bell

J-13 M-13 BC Douglas Germinder

J-14 M-13 Firefighter T. Johnson

J-15 M-13 Firefighter Sorrentino

J-16 Memorandum of agreement between City of Plainfield and Plainfield Fire Officers Association

J-17 Collective Negotiations Agreement between City of Plainfield and Plainfield Fire Officers Association

J-18 Firefighter Job Specification

For Appellant:

A-1 5-24-23 Lt. Joel Valentin Reprimand- Failure to Transmit Urgent

A-2 5-24-23 Lt. Joel Valentin Reprimand- Failure to Supervise

A-3 5-24-23 Lt. Joel Valentin – Failure to Follow Evacuation Orders

A-4 5-5-23 Firefighter Alvin Alson Reprimand- Failure to Wear PPE

A-5 5-17-23 Firefighter Christopher D'Amico Reprimand- Failure to Maintain Housewatch

A-6 5-17-23 BC Douglas Germinder Reprimand- Failure to Supervise

A-7 2-3-23 Firefighter Michael Morgan Reprimand- Violation of Social Media and External Communication Policy

A-8 News Report re: April 12, 2023 Fire at 621 Brookside Place Plainfield, NJ

A-9 7-20-23 Operational Memo re: Department Photographer

A-10 Paystub dated October 19, 2023

A-11 Paystub dated February 8, 2024

A-12 1-31-24 Email re: Medical Contributions for 2023 and 2024

A-13 Performance Evaluations 2016, 2018, 2019- Michael Bell

A-14 Performance Evaluations 2017, 2021, 2022- Michael Bell

A-15 Email from DC Reed to BC Germinder and M-13 for BC Douglas Germinder

For Respondent:

R-1 Video of structure fire