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STATE OF NEW JERSEY

In the Matter of Paul Andrade  
City of Newark  
Fire Department

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2014-575  
OAL DKT. NO. CSR 13260-13

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ISSUED: February 5, 2015 PM

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The appeal of Paul Andrade, a Fire Fighter with the City of Newark, Fire Department, removal effective December 10, 2012, on charges, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on November 10, 2014. Exceptions and cross exceptions were filed on behalf of the parties.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 4, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

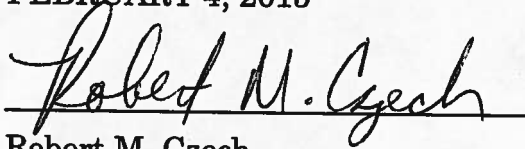
ORDER

The Civil Service Commission 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 Paul Andrade.

Re: Paul Andrade

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  
FEBRUARY 4, 2015

A handwritten signature in black ink, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
Division of Appeals  
and Regulatory Affairs  
Civil Service Commission  
Unit H  
P. O. Box 312  
Trenton, New Jersey 08625-0312

attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSR 13260-13

2014-575

**IN THE MATTER OF PAUL ANDRADE,  
CITY OF NEWARK FIRE DEPARTMENT.**

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**Bette Grayson, Esq.**, for appellant Paul Andrade (Grayson and Associates)

**Brenden Egan, Esq.**, Corporation Counsel, and **Michael Oppici, Esq.**, Assistant  
Corporation Counsel, for respondent (City of Newark)

Record Closed: October 3, 2014

Decided: November 10, 2014

**BEFORE JOANN LASALA CANDIDO, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant, Paul Andrade, a Newark City fire fighter since October 26, 2006, appeals his removal by the City of Newark Fire Department (Department or respondent) on allegations that he engaged in violation of the Civil Service Regulations N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, inability to perform duties N.J.A.C. 4A:2-2.3(a)(3), neglect of duty N.J.A.C. 4A:2-2.3(a)(7) and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause, and he also violated provisions of its internal rules and regulations. The Department's decision to remove appellant was based upon his arrest on December 10, 2012, on charges of possession of ninety-four grams of marijuana, in violation of N.J.S.A. 2C:35-10A; possession of ninety-four grams of marijuana with

intent to distribute, in violation of N.J.S.A. 2C:35-5B(12); and possession of 94.4 grams of marijuana within five hundred feet of a public park, in violation of N.J.S.A. 2C-35-7.1A.

On December 13, 2012, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) by respondent seeking a suspension. Appellant was charged with violating the following Newark Fire Department Rules and Regulations; in addition to the New Jersey Administrative Codes:

**Article 6:** Members of the Department shall not violate the Oath of Office, nor be guilty of neglect or cowardice or shirk any duty.

**Article 13:** Members are considered to be on duty at all times, and are subject to call at any time their services may be required.

**Article 11:** Members shall at all times appear neatly attired and clean in person, and shall set examples to subordinates and peers in dignity, sobriety, courtesy, skill and the observance of discipline.

**Article 23:** Members shall be held liable for any disorderly conduct or violation of any Law, whether on duty or off duty.

Paragraph 2:

Members shall not engage in altercations, nor be guilty of improper, indecent or immoral conduct. Members shall at all times be civil and orderly in their conduct and refrain from doing anything which may bring discredit to themselves or the Department.

**Article 28**

Paragraph 2:

The use of intoxicating beverages, narcotics or other controlled dangerous substances, or any other behavior to such an extent as to render a Member unfit for the proper performance of duty, while on duty or off duty, when in uniform or otherwise, will be cause for immediate suspension from duty.

Paragraph 3:

The addiction of any Member to the use of intoxicating beverages, narcotics or other controlled dangerous

substances shall be considered an act against the best interest of the Department, justifying the dismissal of the Member from the Department.

**Article 58:** Members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

<u>N.J.A.C. 4A:2-2.3(a)(3)</u>	Inability to perform duties;
<u>N.J.A.C. 4A:2-2.3(a)(6)</u>	Conduct unbecoming a Public Employee;
<u>N.J.A.C. 4A:2-2.3(a)(7)</u>	Neglect of Duty;
<u>N.J.A.C. 4A:2-2.3(a)(10)</u>	Violation of Federal regulations concerning drug and alcohol use by testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder; and
<u>N.J.A.C. 4A:2-2.3(a)(11)</u>	Other sufficient cause.

### **SPECIFICATIONS OF CHARGES**

1. On December 10, 2012 at approximately 1530 hours, you, Firefighter Paul Andrade were arrested by the Essex County Prosecutor's Office V.I.P.E.R. Bureau and charged with the following:

- |                 |   |
|-----------------|---|
| a. 2C:35-10A    | Possession of CDS Marijuana   |
| b. 2C:35-5B(12) | Possession of CDS Marijuana with intent to distribute; and  |
| c. 2C:35-7.1A   | Possession of CDS with intent to distribute within five hundred feet of a park (Ironbound Recreation Center). |

2. As a result of your arrest by Essex County Prosecutor's Office and charged with possession of a CDS, you were ordered to submit to a Urinalysis at Concentra Medical Center, located at 375 McCarter Highway. You, Firefighter Paul Andrade were transported to Concentra by the Division of Investigations on December 12, 2012 at approximately 1300 hours. The results of your Urinalysis were non-negative.

Please take notice of the following Article of the Newark Fire Department's Rules and Regulations

**Article 1:** All Executive orders, General Orders, and Directives, hereinafter issued, affecting the operations of the Fire Department shall have equal force and effect.

It shall be every Member's duty to study and understand the Rules and Regulations herein set forth and to be guided accordingly.

It shall be the duty of every Member to promptly and implicitly conform to all Rules and Regulations, Orders, Executive Orders, General Orders, Notice and Directives governing the Fire Department.

Ignorance of, or misunderstanding of, any of the included Articles will not be accepted as an excuse for failure to comply therewith.

On December 20, 2012, respondent served a Final Notice of Disciplinary Action implementing an indefinite suspension pending criminal charges, with the exception of N.J.A.C. 4A:2-2.3(a)(10), which was withdrawn.

On June 11, 2013, appellant was served with an amended PNDA for his removal with a date to be determined.

The Department served a Final Notice of Disciplinary Action via certified mail on August 16, 2013, removing Appellant effective December 10, 2012. On September 13, 2013, appellant filed a request for a hearing and the matter was then forwarded to the Office of Administrative Law (OAL) where it was filed on September 13, 2013, as a contested case. Since counsel for respondent required a surgery and, consequently, was not available for hearing, this matter had a lengthy adjournment and appellant was put back on the payroll during or about February 2014 with respondent recognizing that it was due to delays with their department and inability to obtain coverage for this matter until a later date. A hearing took place on November 21, 2013, and April 3, 4, 7, and 10, 2014. After an extended process of several months for respondent to obtain transcripts, post-submissions were finally received on October 3, 2014, on which date the record closed.

**TESTIMONY**

**Faten A. Ziyad**

Newark Fire Department Director Faten Ziyad testified on behalf of the Department. He stated that there are over 600 members. He has been employed by the fire department for approximately twenty-eight years. Ziyad's duties include overseeing the reviewing and finalizing of disciplinary charges, negotiating contracts, and interpreting regulations.

Ziyad was contacted by his arson investigation team and then by the Essex County Prosecutor's Office (ECPO) by letter dated December 12, 2012, received or read by him on December 19, 2012, advising that appellant was arrested by their office on December 10, 2012, for possession of a controlled dangerous substance (CDS), namely, 94.4 grams of marijuana; possession of CDS with intent to distribute; possession of CDS within five hundred feet of a public park; and possession of CDS with intent to distribute within five hundred feet of a public park. (R-13.) Ziyad suspended appellant immediately based upon these charges, as well as conduct unbecoming a public employee and neglect of duty, among others.

A PNDA dated June 11, 2013, and an amended PNDA dated June 13, 2013, reflecting Ziyad's signature, rather than someone else's, was provided to appellant to advise of a limited-purpose hearing of an immediate suspension to be held on December 17, 2012. The Final Notice of Disciplinary Action (FNDA), dated August 16, 2013, suspended appellant pending the outcome of his hearings. He did not sign the FNDA, but rather had someone else in the department sign it for him. Appellant did not appeal the FNDA. Appellant had a limited-purpose hearing that Ziyad, as is his usual practice, did not attend. He receives information from the hearing officer after the hearing is complete.

At the time of the arrest, appellant was found in possession of marijuana in the glove compartment of his car and in his pockets and drug paraphernalia in his

apartment, such as weights, scales, and bags. Ziyad determined that this entailed distribution and found this to be conduct unbecoming.<sup>1</sup>

Ziyad testified that appellant elected to take Pre-trial Intervention (PTI) rather than go through the criminal process. PTI did not change Ziyad's position since appellant did not go through the criminal process for a final determination of guilt or not guilty, but rather chose to enter PTI. He also charged appellant with neglect of duty since appellant did something that put him in a position to be unable to perform up to the standards and ethics of a firefighter. Ziyad stated that PTI did not give appellant the ability to get his job back.

Joseph A. DiLauri

Detective Joseph A. DiLauri has been employed with the Essex County Prosecutor's Office since 2003. He is assigned to the Violent Crime Task force. During 2012, he was assigned to the Violence Interdiction/Intelligence Prosecution Eradication Recidivism Unit (V.I.P.E.R. Unit), targeting narcotic trafficking.

DiLauri, who was assigned to investigate appellant and testified that he worked with a confidential informant (CI) starting in September 2012. The CI provided him with information that appellant was distributing marijuana and that the CI personally conducted business with appellant on the purchase of illicit drugs. This was the only case that DiLauri worked with this CI.

DiLauri had the CI contact the appellant and, while he was conducting a transaction, could "overhear" the conversation between the CI and appellant through a cellular phone. DiLauri would not testify as to specifics of the conversation in order to protect the identity of the informant. The purpose of the "overhear" was to verify the truthfulness of the informant's information. DiLauri submitted a report to his supervisor

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<sup>1</sup> Ziyad stated that the Department gives an individual who uses drugs the opportunity to go through a rehabilitation program and given the opportunity to sign a letter of conditional employment and then monitored with random drug screening. If an individual is selling a controlled substance, that is not becoming of a fire fighter, does not exemplify what is deemed as a public servant to the fire department, and that individual should not be a fireman.

based upon the verification of information from the CI and he recommended that the case continue to go forward.

DiLauri was given four detectives to work on the investigation of appellant's alleged drug distribution. In October 2012, CI arranged a telephone call to appellant to purchase marijuana. The location was established during the overhear telephone call and the CI was provided with funds by the Prosecutor's Office that were photocopied before given to the CI. A pat-search was provided of the CI to make sure that person is clean of any contraband so as to make sure the person is not set up. Surveillance units were established at the location for safety of the CI. The CI met with appellant and provided him with the funds and, in return, the CI was provided with marijuana. When the CI completed the buy and returned to the officers, the money was no longer in the CI's possession.

DiLauri further testified that after the above information was brought to appellant's supervisors, a surveillance was set up appellant's home, place of employment, and a third location where appellant had been seen on multiple occasions conducting what he believed to be narcotic use and transaction. His activity was monitored throughout the day.

On or about December 10, 2012, DiLauri was in an unmarked police vehicle along with two other detectives. Appellant was observed exiting his residence and walking down the street with a dog and then returning to his home. He then exited the parking garage in his red four-door Jaguar whereupon DiLauri followed appellant first to a bank, and then to a residence on Carmen Street. On a prior occasion, DiLauri had once observed a blonde-haired female coming out of that address holding a pocket book and approach appellant's car, giving him currency. In exchange, DiLauri saw an unknown object given to her before she went back into the residence. On December 10, 2012, Appellant was again at this location and DiLauri observed the same woman approach Appellant's car and again hand him paper currency and, in return, he handing her an unknown object. Appellant then left the area. DiLauri followed him out of the area and pulled appellant over when he observed the rear-window shade being put up

that covers the window because DiLauri felt appellant had made a narcotics transaction and was hiding something.

DiLauri stated that he approached appellant's car on the driver side of the vehicle and asked him to get out of the vehicle. DiLauri smelled marijuana in the vehicle. No weapons were found and a pat-down of appellant was conducted by Detective Arias, one of the other detectives accompanying DiLauri. A small baggie of marijuana was found on appellant. No one else was in the vehicle. Appellant advised DiLauri that he was a Newark fireman. He was placed under arrest and provided his Miranda warnings. Appellant advised DiLauri that there was marijuana in the car before the car was impounded. Four clear sandwich baggies of suspected marijuana were found in the glove compartment. Appellant had \$120 on his person. He was very "cooperative" at the time of the arrest.

A search warrant was executed and detectives went to appellant's apartment on December 10, 2012. Items secured from the apartment on the kitchen counter were one clear Ziploc bag containing suspected CDS marijuana of approximately 26.6 grams; one clear sandwich bag containing suspected CDS marijuana of approximately 3.1 grams; one clear sandwich bag containing suspected CDS marijuana of approximately 3.7 grams; one Tanita model 1476 n digital scale marked "cash up" on it; one box GoodSense sandwich bags; one Triton T-2 model digital scale; a set of keys; one plastic bag marked "A & P"; one clear bag marked "food saver" containing two Ziploc bags, which in turn contained suspected CDS marijuana of approximately sixty grams; one packed EZ Wider cigarette papers; appellant's passport; a pension benefit page; a photograph of appellant; a fireman's uniform; one Newark Fireman Federal Credit Union local information and miscellaneous paperwork. Photographs of these items were taken by a detective on December 10, 2012.

DiLauri concluded that the items confiscated from appellant's home were used for the distribution of marijuana. He described "cash up" as slang used by drug traffickers. He further testified that it was common for drug traffickers to be missing a license plate on their vehicle such as appellant's front license plate missing and in his trunk so that it cannot be traced.

John DeGroot

Detective John DeGroot, who is a detective with the Essex County Prosecutor's Office in the gangs and narcotics division, testified on behalf of respondent. He was involved in the appellant investigation during October and November 2013. DeGroot and Detective Fontouro of his office met with the confidential informant (CI) to prepare the individual for the controlled buy of narcotics from appellant. The CI and the vehicle were searched for contraband, cash, and drugs, after which the CI was provided with prerecorded "buy money." DeGroot maintained constant eye contact with the CI while making a drug transaction with appellant and then followed the CI back to his office so that the CI could turn over the narcotics evidence.

Ramon Irizarry

Newark Fire Department Detective Irizarry testified on behalf of respondent. He had been employed by respondent for twenty-eight years, twenty-two of which has been in the Division of Investigations. Irizarry was notified by the Essex County Prosecutor's Office that appellant had been arrested for various drug offenses. He instructed appellant to write a report of what had happened, which appellant did. Irizarry stated that when a firefighter is arrested on any charge related to drug activity, the firefighter is sent to Concentra for a drug test.

No further witnesses testified on behalf of respondent.

David Giordano

David Giordano, who has been an aide to the Newark city mayor since 2010, testified on behalf of appellant. He was previously employed as the respondent's Fire Director from July 1, 2006, to December 1, 2010. Prior to that, he was employed as a firefighter for seven years. Giordano testified that depending on what a fireman has been arrested for and convicted of, can result in the fireman's termination from employment. He stated that if a fireman accepted PTI without forfeiture of his position,

he would be given a Last Chance Agreement provided he completes a drug rehabilitation program. Appellant tested positive for marijuana on December 12, 2012.

John Centenni

Newark Fire Chief John Centenni testified on behalf of appellant. Centenni was not aware of any prior disciplines for appellant, other than a reminder in 2012 of the sick leave policy regarding a call back while out sick. He was not involved with the decision to discipline appellant in this matter.

Alessandra Sfirri

Alessandra Sfirri testified on behalf of appellant. She has been his girlfriend since September 2012. At the time of appellant's arrest on December 10, 2012, Sfirri resided on Carmen Court in Newark, New Jersey, about four blocks from appellant's apartment, which was located on St. Charles Street. Sfirri testified that appellant used marijuana in his own home, but never in her home.

Sfirri stated that on December 9, 2012, she forgot her wallet at appellant's house and telephoned him on the December 10 to inquire if it was there. It was, and appellant drove to her residence to deliver it. She met him outdoors.

Sfirri described appellant's apartment building as family oriented, with eight apartments and a parking garage underneath the building. She stated that she stayed in his apartment when she did not have her daughter every other weekend, and he would stay at her apartment. She had witnessed appellant weighing marijuana on a scale, and then rolled paper around it. She stated that appellant never smoked marijuana at her home.

Jose Rodriguez

Newark Fire Department Captain Jose Rodriguez testified on behalf of appellant. He has been with the Department since 1996. He and appellant worked together at the

Ferry Street firehouse and have been good friends. Rodriguez never observed appellant to be under the influence of narcotics nor did he ever suspect appellant to be selling narcotics. However, he had no knowledge of the events on December 10, 2012.

Daniel Kramer

Fire Captain Daniel Kramer testified on behalf of appellant. Appellant was under his command with two other firefighters at LADDER 8 on Ferry Street. He never suspected appellant of drug or alcohol use and had never disciplined him.

Paul Andrade

Paul Andrade testified on his own behalf. He has resided at 37 St. Charles Street address since purchasing the apartment in March 2011. Prior to that, he lived nearby with his parents. He maintained his parents' address for most of his financial matters. He was appointed a firefighter on October 26, 2006, and was last assigned to a fire company on Ferry Street.

Appellant stated that he began using marijuana in his late twenties. He would measure the exact amount every time on a scale he owned. He would roll the marijuana into a "joint" using EZ Wider paper. Appellant further testified that he only used marijuana in the comfort of his own home. Just prior to dating Sfirri, he lived with someone else from January to August 2012 named Sumari (sic). She too was a marijuana user. According to appellant, it was not an amicable breakup with her and she tried to harass him whenever she could, such as by calling him or coming to his apartment building. Although he blocked her telephone number and wanted nothing further to do with her, he nevertheless met with her on his birthday on November 20, 2012, because she had gifts for him and he thought it would be nice gesture on his part. She gave him marijuana, tee shirts, and a birthday card. He stated that, after he returned home, he put the marijuana in his kitchen cabinet. He stated that when the former girlfriend moved out, she left behind some clothing, personal belongings, and a scale marked "cash up."

Appellant testified that he never smoked marijuana immediately prior to reporting to work nor did he ever smoke it in his car or on the job. He stated that the reason he had marijuana in his car the day of his arrest was because he had gone to a friend's house the night before to watch a football game and had brought some "pot" for himself. He forgot he had it in the car. He stated that he never sold marijuana, only using it for himself.

On December 10, 2012, he stated that he left his apartment in the morning to bring Sfirri her wallet and then proceeded to the Wells Fargo bank. Upon exiting the bank, he was stopped by officers of the Essex County Prosecutor's Office. Three officers exited their vehicle and asked him to exit his car. He stated that his front license plate was missing as the result of his car being hijacked with damage sustained to the front bumper.

He said that marijuana was found in his pocket and then informed the officers that he had marijuana in the glove compartment of the vehicle. He gave the officers the key to his apartment. He was then placed under arrest and brought to a holding cell. His car was impounded. He said that marijuana found in his home by detectives on December 10, 2012, in plastic bags was a birthday gift from his former girlfriend. The scale marked "cash up" found on his kitchen counter also belonged to his former girlfriend.

Appellant stated that the white Honda observed by detectives belonged to a tenant in his building who parks next to him. The black Dodge pickup belongs to the owner of the building and café deli. He does not reside in the building. He described the St. Charles Street garage entrance as having a wall on the right and left, a pick-up truck length before opening up to car spaces.

As a result of the arrest of December 10, 2012, Appellant applied for and was accepted into the PTI program without a plea of guilt and was also entered into an outpatient drug rehabilitation program. The duration of PTI was for a period of twenty-four months, commencing on May 3, 2013.

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Based upon these principles, the testimony of DiLauri, the primary witness for the respondent, was specific, compelling and credible. He was forthright and detailed in his testimony concerning the events which occurred. In other words, his testimony was entirely candid, believable, and convincing.

Appellant, on the other hand, was not deemed credible. His testimony was not believable, compelling, nor consistent. For example, and not by way of limitation, he mentioned that his break-up with his former girlfriend was extremely difficult, how she had harassed him at every chance, and how he went to great measures to avoid her, including blocking his telephone line from her calls. Yet he went on to state how he met with her on his birthday on November 20, 2012, because she had gifts for him, which included marijuana that was later found in his car when stopped by the police. Also he was inconsistent about the scale found in his apartment claiming at first that he had always used a scale to measure the amount of marijuana he used to roll a joint, implying that it was his own, yet changed that to state that the scale marked "cash-up" belonged to his former girlfriend when his premises was searched and he happened to keep it in the kitchen. He also claimed that he only smoked marijuana in his own home, yet later testified that he brought marijuana to a friend's home to watch a Sunday football game.

### **FINDINGS OF FACT**

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following critical **FACTS**:

1. Appellant became a Newark fireman on October 26, 2006, assigned to the Firehouse on Ferry Street for approximately six (6) years.

2. The Essex County Prosecutor's Office (ECPO) received a tip from a Confidential Informant (CI) that appellant was selling drugs on the streets of Newark and from the firehouse.
3. ECPO's Investigators Joseph DiLauri, Ricardo Arias, John DeGroot, and Detective Fontouro (sic) were assigned to investigate an allegation that appellant was selling drugs.
4. In October 2012, ECPO arranged for a telephone call from the CI to appellant to purchase marijuana. The ECPO provided the CI with funds to make the purchase, which currency was photocopied before given to the CI. The CI was then pat-searched to confirm that he had no contraband. Surveillance units were established at the location for the safety of the CI. The CI met with appellant and a purchase of marijuana was made.
5. On December 10, 2012, DiLauri, Arias, and DeGroot followed appellant, who was driving a red 2010 Jaguar to 27 Carmine Court. A woman approached appellant's passenger side of the vehicle exchanged something and then walked away.
6. DiLauri followed appellant and stopped him on Harrison Street, Newark after observing the rear-window shade being put up.
7. No weapons were found and after a pat frisk of appellant, a small baggie of marijuana was found on his person. No one else was in the vehicle. Four clear sandwich baggies of suspected marijuana were found in the glove compartment. Appellant possessed \$120 in cash.
8. Appellant agreed to authorize a search of his home, his automobile, and his person.
9. Appellant was placed under arrest and provided with the Miranda warnings.

10. A search warrant was executed and detectives went to Appellant's apartment on December 10, 2012.
11. Items secured from the apartment on the kitchen counter were one clear Ziploc bag containing suspected CDS, namely marijuana of approximately 26.6 grams; one clear sandwich bag containing suspected CDS, also marijuana of approximately 3.1 grams; one clear sandwich bag containing suspected CDS, again marijuana of approximately 3.7 grams; one Tanita model 1476 n digital scale with "cash up" noted on it; one box GoodSense sandwich bags; one Triton T-2 model digital scale; a set of keys; one plastic bag marked A & P; one clear bag marked food saver containing two Ziploc bags containing suspected marijuana of approximately sixty grams; one packed EZ Wider cigarette papers; his passport; a pension benefit page; a photograph of appellant; a fireman's uniform; one Newark Fireman Federal Credit Union local information and miscellaneous paperwork.
12. Appellant was released upon his own recognizance after being issued criminal complaints for possession CDS marijuana under 50 grams, possession of marijuana with intent to distribute, possession of CDS within 500 feet of Ironbound Recreational Center, possession of CDS with intent to distribute within 500 feet of a public park, and motor vehicle summonses not in evidence.
13. Appellant entered into PTI without making any admission of guilt or culpability and without a provision of forfeiture of public employment.
14. There is no dispute that the CDS found in appellant's vehicle, on his person, and in his apartment was marijuana.

### **LEGAL DISCUSSION AND CONCLUSION**

In a disciplinary action, the burden of proof is on the appointing authority, which must prove its case by a preponderance of the believable evidence. In re Polk, 90 N.J.

550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In order for evidence to meet that threshold, it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). That is to say, the tribunal 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). Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but “greater convincing power to our minds.” State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony “must not only proceed from the mouth of a credible witness, but it must be credible in itself.” In re Perrone, 5 N.J. 14, 522 (1950).

The general causes for this discipline are set forth in N.J.A.C. 4A:2-2.3(a). In this matter appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, as a result of his arrest on charges of possession of marijuana and what the Prosecutor’s Office determined to be distribution of CDS.

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. The conduct need not 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.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Although not strictly defined by the Administrative Code, “conduct unbecoming” has been described as that “which adversely affects the morale or efficiency” of the public entity or tends “to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” Id. at 140 (citation omitted); see Karins v. City of Atlantic City, 152 N.J. 532 (1998). I **CONCLUDE** that Appellant engaged in conduct unbecoming a public employee when knowingly was in possession of and distributing marijuana.

Courts have held that conduct of public employee was unbecoming “[w]here the personal behavior is illegal per se or becomes public through arrest. . . .” See In re Neshan, CSV 03285-08, Initial Decision (July 14, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>. Furthermore, there is a higher standard

expected or imposed on firefighters and police officers than other non-law enforcements, and that an “[u]nrefuted positive test result for a controlled substance use has uniformly been held by the Commission to warrant removal from employment for law enforcement employees.” See In re Lopez, CSV 08205-08, Final Decision (Feb. 24, 2010), <<http://njlaw.rutgers.edu/collections/oal/>>. Appellant’s urinalysis tested non-negative for drugs.

Although the term “conduct unbecoming” is not defined in the regulations, it has been described as an “elastic” phrase that includes “conduct which adversely affects the morale or efficiency” of the public entity or “which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” Emmons, supra, 63 N.J. Super. at 140 (citation omitted). It is recognized that conduct unbecoming need not be predicated upon a violation of the employer’s rules or policies. See City of Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955). Rather, it “may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye . . . .” In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

In this instance, it is undisputed that appellant possessed marijuana, and admitted to smoking marijuana when asked by the police. Although appellant is participating in PTI, it cannot overcome the very nature of the illegal act of, by his own admission, possessing and smoking marijuana. Nor can there be any tolerance of a member of a fire department distributing marijuana. Appellant is assumed to be on duty whether physically or on call at all times and conduct such as his is unbecoming and warrants removal. Therefore, his conduct was unbecoming a public employee.

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(a)(7). Although not defined by the regulation, it generally means that a person is not performing his or her job. The person may have failed to perform an act that the job requires or may have been negligent in the discharge of a duty. The duty may arise by specific statute or from the very nature of the job itself. I **CONCLUDE** that respondent has not proven by a preponderance of the credible evidence the charge of neglect of duty and inability to perform duties based

upon the Department's rules and regulations as charged since respondent has not proven that appellant was not able to perform his duties or was in any way absent or negligent when on duty.

As a firefighter, appellant must be considered a special kind of public employee, and he is subject to a higher standard of conduct and responsibility than is required of most other public employees. See Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). It also has been long recognized that fire fighters hold very unique positions, and any disregard for the law is unacceptable. See In the Matter of Bart Giaconia (MSB, decided February 22, 2006); In the Matter of James Alessio (MSB, decided March 9, 1999); see also Migliaccio v. Trenton City Dep't of Public Safety, CSV 4498-98, Initial Decision (April 7, 1999), aff'd, Merit Sys. Bd. (May 18, 1999), <<http://njlaw.rutgers.edu/collections/oal/>>, (in which a police officer was dismissed from his position as a result of testing positive for marijuana use).

Appellant violated the law by both possessing marijuana, and on at least one occasion, distributing it. Appellant's conduct clearly violated the very norms expected of fire fighters and was against public interest. Therefore, under the reasoning of Giaconia, and Migliaccio, if a fire fighter not only knowingly possessed CDS but actively engaged in its distribution, the penalty of termination was proper. As the court in In re Martinez, CSR 14643-11, Final Decision, Civil Service Commission (August 15, 2012), <<http://njlaw.rutgers.edu/collections/oal/>>, stated "[a]t least in the law enforcement field, public employees who engage in conduct that is criminal in nature involving the illegal possession of controlled substances cannot complain when their employer deems their continued employment inimical."

Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has proven by a preponderance of the competent, credible evidence, the charge of conduct unbecoming a public employee and other sufficient cause sufficient to warrant removal. I further **CONCLUDE** that respondent has not proven by a preponderance of the competent, credible evidence, the charges neglect of duty and inability to perform duties.

The Department seeks to remove appellant. To determine whether a conduct constitutes cause for removal requires an evaluation of the conduct in terms of its relationship to the nature of the office itself, whether the offense "involves or touches" the employee's job and the actual or potential negative impact to the public interest as the result from the conduct in question. See Moore v. Youth Correctional Institute, 119 N.J. 266, 268-69 (1990).

Appellant argued that since he never pled nor was found guilty of the charges against him, and his subsequent entry into PTI, made his termination unfounded. He further avers that he has no prior disciplinary action and should therefore not be subject to removal. The facts surrounding the circumstances remain unchanged. CDS was found in his home and car. By his own admission, he regularly possessed and used marijuana, an illegal substance in this State. Where the conduct of a public employee forms the basis for disciplinary proceedings and also is a violation of the criminal law, failure to convict on a criminal charge bars neither discipline nor finding of guilt for misconduct in an administrative proceeding. Sabia v. Elizabeth, 132 N.J. Super. 6 (App. Div. 1975); see also Spencer v. Dep't of Corr., CSV 10320-98, Initial Decision (August 17, 1999), adopted, Merit Sys. B. (September 28, 1999), <<http://njlaw.rutgers.edu/collections/oal/>>. In Spencer, a correction officer was arrested for possession of marijuana. Following his arrest, he admitted that he had used marijuana on special occasions and even the day before was arrested. He successfully completed PTI and the criminal charges against him were dismissed. Nevertheless, the Department of Corrections still conducted a disciplinary hearing, and terminated the officer based on the conduct underlying the charges. The Administrative Law Judge affirmed the termination, and it was adopted by the Merit System Board. Ibid.

It is well-established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See W. New York v. Bock, 38 N.J. 500 (1962). The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial Decision (October 10, 2003), <<http://njlaw.rutgers.edu/collections/oal/>>; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages

in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 49 N.J.A.R. 2d (CSV) 463, 465. "[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>. Therefore I **CONCLUDE** appellant's underlying conduct warrants termination. The Commission has long recognized that fire fighters, all of which are part of a paramilitary organization, hold very unique positions, and any disregard for the law is unacceptable. See Giaconia, supra, (MSB, decided February 22, 2006); Alessio, supra, (MSB, decided March 9, 1999). Fire fighters "are not only entrusted with the duty to fight fires; they must also be able to work with the general public and other municipal employees." Karins, supra, 152 N.J. at 552.

Based upon the above facts and applicable law, I **CONCLUDE** that appellant's employment was properly terminated on charges of conduct unbecoming an employee and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(6) and (11), as well as its policy and procedures in Article 11, 13, 23, and paragraph 2 and Article 28 and paragraph 2 and 3.

### **ORDER**

Based upon the foregoing, it is hereby **ORDERED** that appellant's appeal be and is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 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, P.O. 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 10, 2014  
DATE

Joann Lasala Candido  
JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Nov. 10, 2014  
Lucia Sardes  
DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

NOV 14 2014

ljb

**APPENDIX**

**WITNESS LIST**

**For Appellant:**

David Giordano  
John Centenni  
Alessandra Sfirri  
Jose Rodriguez  
Daniel Kramer  
Paul Andrade

**For Respondent:**

Faten A. Ziyad  
Joseph A. DiLauri  
John DeGroot  
Ramon Irizarry

**EXHIBIT LIST**

**For Appellant:**

- A-1 Letter from Craig S. Gumpel, Esq. to Fatten A. Ziyad dated May 4, 2013, with Pre-Trial Intervention attached
- A-2 Letter from Kenneth G. Calhoun, Esq. to Craig S. Gumpel, Esq. dated, July 1, 2013
- A-3 Letter from Newark Police Officer John Paulo Oliveria dated March 22, 2013
- A-4 Letter from Newark Fire Captain now Battalion Chief Matthew R. Cordasco dated March 23, 2013
- A-5 Letter from Newark Fire Captain Jose Rodriguez dated March 23, 2013
- A-6 Newark Fire Department General Order G-2 dated January 12, 2006
- A-7 City of Newark, Division of Personnel, Operating Policies and Procedures PDP-19 and Amended Policies and Procedures PDP-19A
- A-8 Union Grievance dated March 7, 1996

- A-9 Criminal conviction of Sergeant Irving Bradley and Firefighter Abnathy Mason
- A-10 Letter from Peter N. Gilbreth, Esq. to Newark Fire Department dated July 9, 2013, with letter certifying enrollment in Pre-Trial Intervention Program
- A-11 Letter from COPE Center Inc. dated July 10, 2013, and September 27, 2013
- A-12 Newark Fire Department Firefighter Evaluation form for Paul Andrade
- A-13 Photo of Alessandra Sfirri
- A-14 Picture from parking spot across from St. Charles
- A-15 George Street garage into garage toward St. Charles
- A-16 Sidewalk in front of St. Charles Street
- A-17 End of parking lot looking at garage
- A-18 George Street looking into garage
- A-19 Garage door into building on St. Charles looking toward George Street garage door (inside garage)
- A-20 Picture of white car on Street from sidewalk looking at parking lot
- A-21 Picture of 39 St. Charles from public parking lot
- A-22 Picture looking into garage on St. Charles from across the Street
- A-23 Picture looking into garage
- A-24& Diagram
- A-25

For Respondent:

- NWK001 Preliminary Notice of Disciplinary Action dated, June 11, 2013
- NWK008 Final Notice of Disciplinary Action dated, August 16, 2013
- NWK012 Final Notice of Disciplinary Action re: Indefinite Suspension/Criminal Charges, dated December 20, 2012
- NWK013 Preliminary Notice of Disciplinary Action dated, December 13, 2012
- NWK018 Letter dated December 12, 2012 from Anthony Ambrose, Chief of Detectives, ECPO, to Faten Ziyad, Director, NFD
- NWK019 Report, Viper Unit, ECPO
- NWK028 Pre-Trial Intervention, State v. Paul Andrade, May 3, 2013
- NWK032 Arrest Report, ECPO, December 10, 2012
- NWK033 Complaint-Summons, State v. Paul Andrade, December 11, 2012
- NWK038 Drug Testing Results, Paul Andrade

NWK038 Memorandum dated December 11, 2013, from Det. Ray Irizarry to Director Faten Ziyad, NFD

NWK039 Letter dated December 12, 2012, from Chief John Centanni, NFD, to Paul Andrade

NWK040 Memorandum dated December 12, 2012, from Det. Ray Irizarry to Director Faten Ziyad, NFD

NWK041 Letter dated December 12, 2012, from Paul Andrade to Director Faten Ziyad, NFD, re: Arrest Explanation

NWK042 Memorandum dated December 14, 2012 from DC Richard Zieser re: PNDA effective date of suspension, Paul Andrade

NWK044 Letter dated December 14, 2012, from Paul Andrade to Chief John Centanni, NFD, requesting limited purpose hearing re: PNDA issued December 13, 2012

NWK045 Letter dated December 20, 2012, from Director Faten Ziyad to Paul Andrade re: Suspension/Limited-Purpose Hearing

NWK046 Report dated February 4, 2013 from Detective Anthony Graves to Director Faten Ziyad re: Paul Andrade hearing, Essex County Superior Court

NWK047 Letter dated June 13, 2013, from Paul Andrade to Chief John Centanni, NFD requesting Departmental hearing re: PNDA dated June 11, 2013

NWK048 Delivery of Envelopes dated June 13, 2013, from Captain J. Osorio to Director Faten Ziyad re: Paul Andrade accountable while being excused for sick leave

NWK 050 Rules and Regulations, Newark Fire Department

NWK066 General Order G-2, NFD, Drug and Alcohol Testing

NWK069 PSP-19A, City of Newark, Drug Testing Policy

NWK 086 General Order G-1, NFD, Charges Suspensions and Trials

NWK 087 ECPO, return of search warrant re: residence at 37 St. Charles St, Newark, dated December 12, 2012

NWK089 ECPO, United States Currency Seizure Report dated December 10, 2012

NWK090 ECPO, Prisoner Property Inventory, dated December 11, 2012

NWK091 ECPO, return of search warrant re: motor vehicle

NWK094 ECPO, Affidavit of Detective Joseph DiLauri, December 10, 2012

NWK110 ECPO, photographs of residence

NWK123      ECPO, photographs of motor vehicle