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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Antonio Cruz, City of
Newark

CSC Docket No. 2017-1988
OAL Docket No. CSR 00047-17

ISSUED: JUL 14 2017 (HS)

The appeal of Antonio Cruz, a Fire Fighter with the City of Newark, of his removal, effective June 25, 2016, on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia (ALJ), who rendered his initial decision on May 4, 2017. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 21, 2017, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority removed the appellant on charges of incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. Specifically, it asserted that the appellant reported late for duty, missed assignments, was unfit for duty and tested positive for alcohol and drugs. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision and based on the testimonial and documentary evidence presented, the ALJ found that the appellant received a regular

appointment to the title of Fire Fighter on October 27, 2014. On June 25, 2016, the appellant was assigned to Engine 5, Tour 3 under the command of Orlando Alvarez, Fire Captain. On that date, the appellant reported at 8:07 a.m. for an 8:00 a.m. shift and missed roll call. After finishing a fire engine maintenance check, the appellant joined Alvarez in the firehouse kitchen and sat down with a cup of coffee. Shortly thereafter, the appellant fell asleep and dropped the coffee cup onto the floor. After cleaning the spilled coffee, the appellant left the kitchen and thereafter did not respond and could not be located when a call came in to the firehouse. The appellant missed both a response to an emergency call from St. James Hospital and an assignment at the Prudential Center. Alvarez later found the appellant sleeping in a spare room in the firehouse and contacted Steven P. DeCeuster, Battalion Fire Chief, who responded to the firehouse and observed the appellant sleeping on duty. DeCeuster and Alvarez both suspected the appellant of being under the influence of narcotics, and DeCeuster contacted his supervisor, Richard Zieser, Deputy Fire Chief, to report his observations and his suspicion of the appellant's drug use. Zeiser then contacted his supervisor, Richard Gail, Deputy Fire Chief, and advised him of the appellant's behavior and the suspicion that he may be under the influence of narcotics. Gail contacted the health officer, Ronnie L. Coco, Battalion Fire Chief, to arrange for the appellant to have his urine tested at Concentra, a private facility with which the appointing authority contracts to perform urine tests and other physical examinations. The appellant was escorted to Concentra by Kevin Aikens, Fire Fighter, a member of the Arson Squad. Justice Ntim, a nurse at Concentra, administered the appellant's urine test. The urine test results showed that the appellant was under the influence of cocaine, benzodiazepines and alprazolam, all controlled dangerous substances. Ntim also testified that he administered two breath alcohol tests and that the legal limit for blood alcohol content is 0.02%. Ntim's report reflected a reading of 0.023% on the screening test, and 0.017% on the confirming test. The ALJ found that the appellant reported for duty while under the influence of a controlled dangerous substance and was never charged with a crime.

Additionally, the ALJ found that PDP-19A is a 1992 addendum to the appointing authority's Disciplinary Action Policy (PDP-19) and that PDP-19A requires that a letter of conditional employment be issued prior to the removal of any employee suspected of drug usage. In pertinent part, PDP-19A states:

The purpose of creating a drug testing policy is to eliminate the dangers caused by on-the-job drug use/abuse by: (i) mandating testing where reasonable individualized suspicion exists and (ii) providing addicts¹ with an opportunity for rehabilitation.

¹ PDP-19A defines an addict as "[a]n individual with a disease or disability that involves a physical or mental dependency on drugs or the habitual inclination to use drugs and/or alcohol to the extent that it causes a problem in any area of life."

PDP-19A was negotiated by the union with the appointing authority and has been the working policy since 1992 and was the policy in place at the time of the appellant's removal. Raul Malave, Deputy Fire Chief, testified that he was aware of PDP-19A and the past practice of issuing a letter of conditional employment but noted that the appointing authority chose not to follow that protocol. Malave also testified that it was the appointing authority's position that it had discretion to implement PDP-19A or not. The ALJ found that the appointing authority never offered the appellant a letter of conditional employment.

The ALJ also distinguished *In the Matter of Paul Andrade*, Docket No. A-3149-14T4 (App. Div. October 12, 2016), a case that dealt with the same appointing authority and policy (PDP-19A). There, the Fire Fighter was removed for sale and distribution of controlled dangerous substances, and the removal was affirmed by the court. The court noted that PDP-19A specifically regarded the sale of narcotics as a terminable offense. Here, as the appellant was only involved in the use of narcotics, the ALJ concluded that PDP-19A should apply. Based on the foregoing, the ALJ determined that the penalty of removal should be reversed and that the appellant should be reinstated under a letter of conditional employment.

In its exceptions, the appointing authority argues that the ALJ's summary of Malave's testimony is factually inaccurate. In this regard, Malave never testified that the appointing authority had a "protocol" of automatically issuing a letter of conditional employment. Malave testified that PDP-19 is primarily used by non-uniform departments because there is no set uniform policy. Rather, the Fire Department is governed by the Rules and Regulations due to its nature as a paramilitary organization. The Rules and Regulations set forth a particular code of conduct to ensure safety. He testified that when instituting discipline of a Fire Fighter, the appointing authority looks at the Rules and Regulations, not PDP-19. All Fire Fighters are responsible for knowing the Rules and Regulations, and Malave testified that they specifically provide that a Fire Fighter may be terminated for being under the influence of drugs and alcohol. Malave testified that the offer of a letter of conditional employment is, and has always been, at the appointing authority's discretion.

The appointing authority also contends that PDP-19A does not require the issuance of a letter of conditional employment to any employee suspected of drug use, prior to removal. In this regard, it notes that PDP-19A is an addendum to PDP-19. PDP-19 contains a specific "Disclaimer" that, in part, states:

This policy is subject to modification or cancellation, by the City in whole or in part, at any time, and it is not intended nor should it be construed as providing any employee with past practice or vested rights.

Therefore, the appointing authority argues, an employee cannot infer any requirement of a letter of conditional employment. The appointing authority asserts that it is arbitrary and capricious for the ALJ to dictate that a letter of conditional employment is required under any circumstances excepting criminal matters.

The appointing authority further points to the Commission's decision in *In the Matter of Michael Larino* (CSC, decided May 4, 2011), wherein the Commission affirmed the removal of a Fire Fighter who reported to work under the influence of drugs. In *Larino*, the Commission noted that under *In the Matter of Daniel Cahill*, 245 N.J. Super. 397 (App. Div. 1991), the refusal to employ a handicapped person is lawful where it would be hazardous to the person or others and that Larino had not made any requests for reasonable accommodations prior to the reasonable suspicion drug testing. Similarly, the appellant in this case never indicated that he had a substance abuse issue prior to the date in question. Thus, the appointing authority maintains that he was not entitled to any accommodation. Further, as the appellant is a Fire Fighter, the handicap he alleges places himself, his fellow Fire Fighters and the public at risk. The appointing authority notes that Charles West, Fire Fighter, testified that in his capacity as President of the Firefighter's Union, no Fire Fighter came to work under the influence in the past 12 years.

In his reply to exceptions, the appellant disputes the appointing authority's claim that Malave's testimony was inaccurately summarized. He notes that Malave testified that PDP-19 covers "all of the employees for the City of Newark . . . including fire." Malave confirmed that the Fire Department's use of letters of conditional employment for disciplinary actions involving positive drug or alcohol tests was part of the policy contained in PDP-19 and PDP-19A and that this policy works in conjunction with the Fire Department's Rules and Regulations. Moreover, in *Andrade, supra*, the appointing authority did not argue that PDP-19 and PDP-19A were inapplicable to Fire Fighters. Rather, the appointing authority argued that the letter of conditional employment did not apply to Andrade because he was terminated for his drug-related criminal offenses, not for failing a drug test. The appellant notes that under the Rules and Regulations, termination of a Fire Fighter for being under the influence of drugs and alcohol is not mandated but may be justified in cases of addiction, while a positive test for drugs or alcohol while on duty is not addressed. He argues that the Rules and Regulations are consistent with the letter of conditional employment, which requires treatment and rehabilitation in order to avoid addiction, which could lead to dismissal.

The appellant also disputes the appointing authority's claim that case law supports his removal. He notes that the concept of a "second chance" has been a long-established policy of the appointing authority as found in court decisions. *Cahill, supra; Andrade, supra*. The appellant also distinguishes *Larino, supra*, stating that unlike the circumstances in that case, here there was a current policy

in existence, PDP-19A, that provided for a second chance. He maintains that the policy must be applied to him and states that more than 50 Fire Fighters over the last 25 years have been given second chances pursuant to PDP-19A. The appellant argues that PDP-19A has established that a first-time positive test for a controlled dangerous substance is not egregious. Rather, it is conduct that triggers progressive discipline in the form of the offer of a letter of conditional employment.

The appellant further notes that courts have held that addiction to drugs or alcohol renders a person handicapped under the New Jersey Law Against Discrimination (LAD) and entitles that person to its protections. *Clowes v. Terminex Intern., Inc.*, 109 N.J. 575, 590-595 (1988). He argues that providing him with an accommodation for this handicap is not inconsistent with prior cases where Fire Fighters were given one opportunity for treatment before removal. *Cahill, supra; In the Matter of Henry Jackson*, 294 N.J. Super. 233 (App. Div. 1996).

Based on its *de novo* review of the record, the Commission disagrees with the ALJ's assessment of this matter. The appellant claims that he is an addict rendered handicapped under the LAD, which, similar to the situation in *Cahill, supra*, requires the appointing authority to provide him with an accommodation. In *Cahill*, the court acknowledged that addiction, habituation or dependency that results from use of one drug or a combination of drugs renders a person handicapped. However, the court emphasized that N.J.S.A. 10:5-4.1 prohibits discrimination against a handicapped person "unless the nature and the extent of the handicap reasonably precludes the performance of the particular employment." It also underscored that Cahill was a Fire Fighter and that:

the negligent or improper performance of that function can result in serious harm to persons and property . . . The nature of Cahill's job duties satisfies the city's burden of proving with a reasonable certainty that his handicap would probably cause injury to himself or to others.

Cahill at 400-401. The court in *Cahill* also noted that a Fire Fighter is subject to being called when needed, anytime of the day or night, and that a Fire Fighter under the influence of drugs cannot do the job. While the court in *Cahill* did consider that an employer, where feasible, should afford an opportunity for rehabilitation to an employee handicapped by substance abuse, it did not mandate that a Fire Fighter should not be removed for a first positive drug test. In this regard, the court stated that "refusal to continue employment of a handicapped person is lawful where employment in a particular position would be hazardous to that individual or to others." *Id.* While in this case, PDP-19A provided for the issuance of a letter of conditional employment, the appointing authority has persuasively argued that the policy was discretionary. In this regard, the appointing authority indicates that PDP-19A is an addendum to PDP-19. PDP-19, in turn, includes a "Disclaimer" that, in part, provides:

This policy is subject to modification or cancellation, by the City in whole or in part, at any time, and it is not intended nor should it be construed as providing any employee with past practice or vested rights.

Therefore, as also noted by the appointing authority, an employee could not infer a requirement that a letter of conditional employment be issued. Even if PDP-19A was to be applied, it bears noting that its stated purpose was to eliminate the dangers caused by on-the-job drug use/abuse by mandating testing where reasonable individualized suspicion exists and "providing addicts with an opportunity for rehabilitation" (emphasis added). However, there is no evidence in the record either that the appellant is an addict or that he requested an accommodation or sought assistance of any kind for his asserted handicap prior to his drug test that was based on the appointing authority's reasonable suspicion. Further, second chances for drug related infractions are not generally afforded public safety employees, who, as compared with non-public safety employees, are held to a stricter standard of conduct. See *In the Matter of John Simpson* (MSB, decided March 26, 2008) (Removal of a Truck Driver modified to a four-month suspension and appellant ordered to undergo a return to work drug test prior to reinstatement and be required to undergo monthly random drug testing for a period of one year); *In the Matter of Brian Huntley* (CSC, decided February 12, 2014) (Heavy Equipment Operator); *In the Matter of John Daraklis* (MSB, decided June 11, 2008) (Laborer Heavy); *In the Matter of Glenn Steiger, Borough of Rutherford* (MSB, decided July 11, 2007) (Truck Driver); *In the Matter of Richard Wilkins, Jr., Township of Irvington* (MSB, decided September 21, 2005) (Police Aide).

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission 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 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. Moreover, 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).

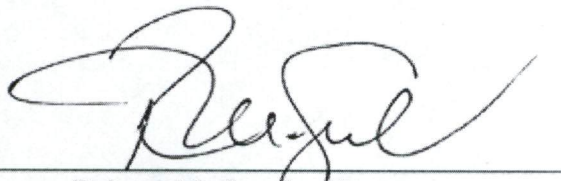
The Commission has long recognized that Fire Fighters hold very unique positions, and any disregard for the law is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization. See *In the Matter of Bart Giaconia* (MSB, decided February 22, 2006); *In the Matter of James Alessio* (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, especially police officers.” *Karins v. City of Atlantic City*, 152 N.J. 532, 552 (1998). This is especially true where, as here, the appellant is a Fire Fighter who has tested positive for drug use. Indeed, as noted in *In the Matter of Russell Strother* (MSB, decided December 6, 2006), any use of an illegal drug constitutes a violation of the law and of a Fire Fighter’s duty to exhibit conduct, both on and off duty, that is commensurate with his position. Here, along with illegal drugs, the appellant had alcohol in his system (albeit not over the legal limit). Moreover, the actual alleged misconduct, sleeping on duty and missing assignments, was not disputed. Finally, the appellant was not a long term employee as he had been serving as a Fire Fighter for less than two years prior to the date in question. Under these circumstances, the appellant’s offense is sufficiently egregious to warrant his removal. Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the appointing authority’s action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant’s appeal.

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 21ST DAY OF JUNE, 2017



Robert M. Czedh, 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 00047-17

**IN THE MATTER OF ANTONIO CRUZ,
CITY OF NEWARK FIRE DEPARTMENT.**

Craig S. Gumpel, Esq., for appellant Antonio Cruz (Law Offices of Craig S. Gumpel, LLC)

France Casseus, Assistant Corporation Counsel, for respondent, City of Newark
(Kenyatta K. Stewart, Acting Corporation Counsel, attorney)

Record Closed: April 3, 2017

Decided: May 4, 2017

BEFORE **JUDE-ANTHONY TISCORNIA, ALJ**:

STATEMENT OF THE CASE

Antonio Cruz appeals his removal by the City of Newark Fire Department (Department). On June 25, 2016, Cruz reported late for duty and was found sleeping on the job while under the influence of a controlled dangerous substance. The Department removed Cruz without first issuing him a "last chance agreement," also known as a "letter of conditional employment." Can the Department remove a suspected drug user without first issuing him a letter of conditional employment? No. PDP-19A of Newark's disciplinary policy and procedures requires that the Department issue a letter of conditional employment before removal.

PROCEDURAL HISTORY

Appellant, Antonio Cruz, served as a Newark City firefighter from October 27, 2014. On June 25, 2016, appellant was served with a notice of suspension effective immediately. (R-2.) On June 27, 2016, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) seeking a suspension effective June 25, 2016, and a removal with the effective date to be determined. (R-3.) Appellant was charged with violating the following Newark Fire Department Rules and Regulations, in addition to the New Jersey Administrative Code:

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 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 14: Punctuality shall be strictly insisted upon and only the best of reasons that a member's delay in reporting for duty on time was unavoidable will be accepted

Article 15: Members shall devote their entire time while on duty to the work of the department.

Article 17: Members shall not absent themselves from Quarters or any assignment of duty without permission of a Superior Officer.

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

Article 59: Members whose performance is demonstrably inadequate or unsuitable and fails to meet, obtain or produce the effects or results mandated by Department Rules and Regulations, shall be deemed in violation of the Department Rules and Regulations.

N.J.A.C. 4A:2-2.3(a)(1) Incompetency, inefficiency or failure to perform duties;

- N.J.A.C. 4A:2-2.3(a)(3) Inability to perform duties;
- N.J.A.C. 4A:2-2.3(a)(4) Chronic or excessive absenteeism or lateness;
- 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;
- N.J.A.C. 4A:2-2.3(a)(11) Other sufficient cause.

SPECIFICATIONS OF CHARGES

1. On June 25, 2016 you, Firefighter Antonio Cruz, were late reporting for duty at your assignment, Engine 5, Tour 3.
2. On June 25, 2016 you, Firefighter Antonio Cruz, did not fulfill your duties as a Firefighter and missed an assignment that Engine 5, Tour 3 was given. The company was forced to respond without you.
3. On June 25, 2016 the Captain and Battalion Chief observed your condition and demeanor to be unfit for duty.

On June 28, 2016, appellant requested a departmental hearing. (A-2.) The departmental hearing was held on August 23, 2016, and on December 16, 2016, the Department served a Final Notice of Disciplinary Action via certified mail removing appellant retroactive to June 25, 2016. (A-1.) His appeal was filed at the Office of Administrative Law on December 27, 2016 (N.J.S.A. 40A:14-202(d)), and was heard on February 24, and 27, 2017. Post-hearing submissions were received on April 3, 2017, on which date the record closed.

TESTIMONY

Captain Orlando Alvarez

Newark Fire Department captain Orlando Alvarez testified on behalf of the Department. He stated that he has been employed by the Department for twenty-seven

and a half years and that his current duties include monitoring and commanding his "crew" and overseeing day-to-day activities, including administering roll call at precisely 8:00 a.m. every morning. Alvarez testified that appellant was assigned to his command on June 25, 2016. Alvarez noted that appellant had recently transferred from another firehouse and that June 25, 2016, was appellant's second day working under his command.

Appellant was not present for roll call at 8:00 a.m. on June 25, 2016. Alvarez instructed one of the firefighters under his command to contact appellant via cell phone at approximately 8:01 a.m. Appellant arrived to the firehouse within five or six minutes of roll call. Alvarez stated that upon arrival appellant apologized for being late and immediately went about his duties. Alvarez testified that it was appellant's turn to drive the fire engine that day and that appellant's first set of duties was to conduct a daily maintenance check of the fire engine.

After finishing the maintenance check appellant joined Alvarez in the kitchen area of the firehouse. Appellant poured himself a cup of coffee and sat down. Shortly thereafter appellant fell asleep and dropped the cup of coffee he was holding onto the floor. Alvarez instructed appellant to clean the coffee off the floor. Appellant proceeded to clean the spill with a mop and then exited the kitchen with the mop. Upon exiting the kitchen appellant was out of Alvarez's range of vision, and appellant did not return for an extended period of time.

Captain Alvarez testified that during this time a "run" came into the firehouse. Alvarez explained that a "run" is a response to an emergency call. This particular "run" was in response to an internal alarm at St. James Hospital, which is located in close proximity to the firehouse. Alvarez recounted that he and his crew got into the fire engine and that appellant was absent. Appellant's absence was particularly notable because it was appellant's turn to drive, and there was no one there to drive the fire engine. Alvarez ordered a crew member to blow the horn and sound the siren in order to alert the appellant of the run. Alvarez then ordered a crew member to call for the appellant over the intercom. The appellant did not respond. Alvarez then ordered a

crew member to drive the fire engine in Cruz's absence, and the company responded to the call without Cruz.

After returning to the firehouse from the run (approximately twenty minutes), Captain Alvarez, along with several members of his crew, searched the firehouse but were unable to locate appellant. Alvarez then notified his supervisor, battalion chief Steven P. DeCeuster, of the situation. Chief DeCeuster informed Captain Alvarez that he would come to the firehouse as soon as possible.

Captain Alvarez then testified that the company had received orders to report for duty at a Korean cultural festival taking place near the Prudential Center in downtown Newark. The assignment was to last from 9:00 a.m. to 10:00 a.m. Alvarez stated that the company reported to the event without appellant.

Upon returning to the firehouse the company once again looked for Cruz, and eventually found him upstairs sleeping on a loveseat in a spare room. It was about this time that Chief DeCeuster arrived at the firehouse. Alvarez informed DeCeuster that they had located Cruz sleeping in a spare room and that they could not wake him up. DeCeuster accompanied Alvarez to the spare room where Cruz was sleeping, and both attempted to wake him up by shouting his name, but could not wake him. DeCeuster then kicked appellant's boot, which woke him up for a short moment. Cruz looked at the officers and went back to sleep. Deputy Chief DeCeuster then notified Deputy Chief Zeiser of the situation. Alvarez and DeCeuster proceeded to the kitchen area of the firehouse, where they were soon met by Deputy Chief Zeiser and Deputy Chief Gail.

Alvarez testified that appellant eventually came downstairs into the kitchen area, accompanied by a member of the Newark Fire Department Arson Squad. He stated that appellant eventually left the firehouse, along with the arson detective.

Battalion Chief Steven P. DeCeuster

Newark Fire Department battalion chief Steven P. DeCeuster testified on behalf of the Department. He stated that he has been employed by the Newark Fire

Department for over thirty-two years and that he currently serves as battalion chief of the fifth battalion, supervising nine companies, including the company to which appellant was assigned on June 25, 2016 (Engine 5).

DeCeuster's testimony corroborated that of Captain Alvarez, in that it reiterated many of the same facts. DeCeuster testified that he witnessed appellant sleeping in the spare room at the firehouse. DeCeuster noted that though he did not detect the odor of any alcohol around the appellant, based on his observations he determined that appellant was not able to perform his duties as a firefighter, and therefore called his supervisor, Deputy Chief Zeiser, to inform him of the situation. Deputy Chief Zeiser informed DeCeuster that he was going to notify his supervisor, Deputy Chief Gail, of the situation. Shortly thereafter both deputy chiefs responded to the firehouse.

DeCeuster testified that he was following the protocol in place for when a member of the Department is suspected of reporting for duty while under the influence of alcohol or a controlled dangerous substance. He testified that protocol includes reporting the incident up the chain of command, and usually results in the suspected member being taken by the Department to Concentra. DeCeuster explained that Concentra is a private facility that the City of Newark contracts with to perform urine tests and other physical examinations.

Deputy Chief Richard Zeiser

Newark Fire Department deputy chief Richard Zeiser testified on behalf of the Department. He stated that he has been employed by the Newark Fire Department for thirty-eight years and that he currently serves as the deputy chief in charge of the third tour.

Zeiser's testimony corroborated that of Captain Alvarez and Battalion Chief DeCeuster, in that it reiterated many of the same facts. He testified that he received a phone call from Battalion Chief DeCeuster concerning Captain Alvarez's concern for firefighter Cruz. Zeiser instructed DeCeuster to go to Engine 5 in order to see if he agreed with Captain Alvarez's assessment of the situation. Zeiser noted that it is

common protocol for two officers to assess a situation of a firefighter suspected of being under the influence of drugs or alcohol. Zeiser contacted his supervisor, Chief Gail, and alerted him of the situation. Chief Gail indicated that he was going to contact the Arson Squad to escort Cruz to get "tested." Zeiser noted that by the time he arrived at the firehouse, the appellant had already left with a member of the Arson Squad to go "get tested."

Deputy Chief Richard Gail

Newark Fire Department deputy chief Richard Gail testified on behalf of the Department. He stated that he has been employed by the Newark Fire Department for twenty-three years, and that he currently serves as the chief of operations for the Department.

Deputy Chief Gail's testimony corroborated that of Captain Alvarez, Battalion Chief DeCeuster and Deputy Chief Zeiser, in that it reiterated many of the same facts. Gail testified that he received a phone call from Deputy Chief Zeiser informing him of the situation regarding firefighter Cruz. Gail was told by Zeiser that Cruz was acting out of sorts, and that both he and DeCeuster suspected that Cruz was under the influence of drugs or alcohol. Deputy Chief Gail relayed this information to the fire chief (Centanni), who then told Gail to contact Battalion Chief Coco (the health officer) in order to schedule a drug/alcohol screening at Concentra. Gail then communicated with Battalion Chief Coco as instructed, and traveled to Engine 5 to meet with detective Kevin Aikens, a member of the Newark Fire Department Arson Squad. Gail instructed Aikens that he was to transport/escort Cruz to Concentra, which he did.

Justice Ntim

Justice Ntim has been employed by Concentra as a nurse for four years. Ntim is certified by Concentra to perform drug screenings and breath alcohol tests. (See R-4; R-4(a).) Ntim testified that Concentra conducts drug and alcohol tests for the City of Newark, and that he administered two breath alcohol tests and a urine analysis/drug test on appellant on June 25, 2016. (R-8.) Ntim testified that the legal limit for blood

alcohol content is 0.02% and that any result above that amount is considered a failed test. Ntim testified that appellant failed both tests. This statement conflicts with Ntim's report (R-5), which reflects a reading of 0.023 on the first test and 0.017 on the second (R-6). Nevertheless, it is undisputed that appellant's urine analysis/drug test was positive for the following drugs: cocaine, benzodiazepines, and alprazolam. (R-7.) Ntim testified that these last two drugs, benzodiazepines and alprazolam, are commonly prescribed as antidepressants. No evidence or testimony was provided that appellant had a prescription for these or any drugs. Ntim testified that appellant was compliant at all times.

Deputy Director Raul Malave

Raul Malave testified for the Department. He has been a firefighter for the City of Newark for approximately twenty-two years and has served as the assistant public safety director for almost one year.

Malave stated that he was familiar with appellant's case and was familiar with cases similar to it that have occurred in the past. He stated that he is aware of PDP-19A and the Department's past practice of issuing a "last chance letter," but noted that the director in this case chose not to follow that protocol. Upon direct inquiry by the judge, Malave testified that it was the Department's position that the director had the discretion to either implement PDP-19A of the City of Newark's Disciplinary Action Policy or not.

David Giordano

David Giordano testified on behalf of appellant. Giordano was a Newark firefighter from November 1985 to July 1, 2006. He testified that during his career as a firefighter he served as the Newark Firefighter Union's financial director (1990–1992), vice president (1992–1993), and president (1993–2006).

Giordano recalled the circumstances surrounding the adaptation of PDP-19A to Newark's disciplinary policy back in 1992. He testified that at that time there was a

problem in the Department regarding firefighters suffering from drug addiction, and the City of Newark enacted PDP-19A to address this issue. Giordano testified that he was involved in the negotiations between the Firefighter's Union and the City of Newark regarding the drug-testing policy. He further testified to twelve specific instances wherein a Newark firefighter was disciplined under PDP-19A after being suspected of drug abuse, and testified that in all instances the firefighter was given a letter of conditional employment and an opportunity to rehabilitate, as required by PDP-19A. Giordano then identified and discussed four specific letters of conditional employment issued by the Department (A-4; A-5; A-6; A-7). He testified that it was always his understanding that the Department was obligated to adhere to PDP-19A.

Charles West

Charles West testified for appellant. Charles West has been a Newark firefighter for twenty-eight years, and currently serves as the Firefighter's Union president. He testified that he is familiar with PDP-19A, and identified and discussed two specific letters of conditional employment (A-8; A-9) that he was familiar with. He further testified that the Department cannot change disciplinary policy without first notifying and negotiating the changes with the union. He further testified that no such notification or negotiation regarding the Department's current decision to disregard PDP-19A had occurred.

FINDINGS OF FACT

The facts in this case are largely undisputed, and 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 firefighter On October 27, 2014.
2. On June 25, 2016, appellant was assigned to Engine 5, Tour 3, under the command of captain Orlando Alvarez.

3. On June 25, 2016, appellant reported at 8:07 a.m. for an 8:00-a.m. shift on Engine 5, Tour 3, and missed roll call.
4. After finishing a maintenance check of a fire engine, appellant joined Alvarez in the kitchen area of the firehouse. Appellant poured himself a cup of coffee and sat down. Shortly thereafter appellant fell asleep and dropped the cup of coffee he was holding onto the floor.
5. After cleaning up the spilled coffee, appellant left the kitchen area, and thereafter he did not respond and could not be located when a call came in to the firehouse.
6. Appellant missed a run to St. James Hospital.
7. Appellant missed an assignment at the Prudential Center.
8. Captain Alvarez ultimately located appellant sleeping in a spare room in the firehouse.
9. Captain Alvarez contacted Battalion Chief DeCeuster, who responded to the firehouse and observed appellant sleeping while on duty.
10. DeCeuster and Alvarez both suspected Cruz of being under the influence of narcotics, and DeCeuster contacted his supervisor, Deputy Chief Zeiser, to report his observations and his suspicion of Cruz's drug use.
11. Zeiser then contacted his supervisor, Deputy Chief Gail, and advised him of Cruz's behavior and of the suspicion that he may be under the influence of narcotics.
12. Gail contacted the Department's health officer, Chief Coco, to arrange for Cruz to have his urine tested at Concentra.

13. Cruz was escorted to Concentra by Detective Aikens of the Arson Squad.
14. Justice Ntim, a nurse at Concentra, administered the urine test on appellant.
15. The results of the urine test administered at Concentra showed that appellant was under the influence of the following controlled dangerous substances: cocaine, benzodiazepines, and alprazolam.
16. The appellant was never charged with a crime.
17. Appellant reported for duty while under the influence of a controlled dangerous substance.
18. PDP-19A is a 1992 addendum to the Disciplinary Action Policy of the City of Newark.
19. PDP-19A requires that a letter of conditional employment be issued to any employee suspected of drug usage prior to removal.
20. The Department never offered the appellant a letter of conditional employment.
21. The aforementioned policy was negotiated by the union with the City and has been the working policy since 1992, and was the policy in place at the time of Cruz's removal.

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 the 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). The greater weight of credible evidence in the case—preponderance—depends not only on the evidence of the greater number of witnesses, but on that evidence that “carries the greater convincing power to our minds.” State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted).

The general causes for this discipline are set forth in N.J.A.C. 4A:2-2.3(a). In the case at bar, the appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; 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)(11),¹ other sufficient cause. He is also charged with violating various provisions of the Newark Fire Department Rules and Regulations.

Appellant Cruz argues that all of the alleged bad acts that gave rise to the disciplinary action against him were the direct result of his being under the influence of a controlled dangerous substance. He argues that under the City of Newark’s Drug Testing Policy, PDP-19A, he is entitled to a letter of conditional employment and must be afforded a chance at rehabilitation before he can be removed.

PDP-19A states in pertinent part: “The purpose of creating a drug testing policy is to eliminate the dangers caused by on-the-job drug use/abuse by: (i) mandating testing where reasonable individualized suspicion exists and (ii) providing addict with the opportunity for rehabilitation.” (R-1 at 1.) In the case at bar, the Newark Fire Department did not provide appellant with an opportunity for rehabilitation as provided by PDP-19A.

¹ Former N.J.A.C. 4A:2-2.3(a)(11) was recodified as N.J.A.C. 4A:2-2.3(a)(12) effective March 5, 2012.

The Department's position is that its adherence to PDP-19A is discretionary, and that appellant should be terminated in the interest of public safety. In furtherance of its argument, the Department points to a recent unpublished Appellate Division case, In re Andrade, No. A-3149-14T4 (App. Div. October 12, 2016), <<http://njlaw.rutgers.edu/collections/courts/>>. Though unpublished, given that the case deals with the same City of Newark Fire Department, addresses the same disciplinary regulation (PDP-19A), and contains many of the same facts, the opinion is persuasive and it cannot be ignored in the discussion of this case. In Andrade, the firefighter was removed upon investigation and incitement for sale and distribution of controlled dangerous substances. The removal was ultimately upheld by the administrative law judge (ALJ) and affirmed by the Appellate Division. Both the ALJ and the Appellate Division cited the distinction between the sale of narcotics and the personal use of narcotics in their reasoning. The Appellate Division cites PDP-19A, which regards the sale of narcotics as a terminable offense, distinct from the personal use of narcotics:

The City had adopted an addendum to its disciplinary policy and procedures in 1992 entitled "Drug Testing Policy." The addendum incorporated the concept of a last chance agreement. See, e.g., Watson v. City of E. Orange, 175 N.J. 442, 444 (2003) (generally explaining these type of agreements). However, the City's policy had no application to this case since it explicitly provided that "[i]t [was] a terminable offense for a City employee to dispense, sell, traffic, or facilitate in the sale of, any controlled dangerous substance or possess any drug paraphernalia."

[In re Andrade, supra, No. A-3149-14T4 (App. Div. October 12, 2016), <<http://njlaw.rutgers.edu/collections/courts/>>].

The Department now argues that just as the firefighter's removal was upheld in Andrade, so should the appellant's removal in the current case be upheld. I reject the City's argument, because in Andrade the Appellate Division made it clear that PDP-19A allowed for termination without a chance for rehabilitation where the employee was involved in the sale or distribution of narcotics, and not just the use of same.

Therefore, based upon the above facts and applicable law, I **CONCLUDE** that PDP-19A should apply.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that appellant's appeal be and is hereby **GRANTED**, and appellant should be reinstated as a Newark firefighter under a conditional letter of employment.

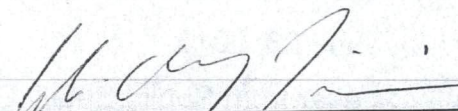
I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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.

May 4, 2017

DATE

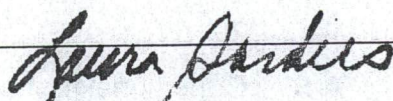


JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

MAY 4 2017

Date Mailed to Parties:



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Appellant:

David Giordano
Charles West

For Respondent:

Captain Orlando Alvarez
Battalion Chief Steven P. DeCeuster
Deputy Chief Richard Zeiser
Deputy Chief Richard Gail
Justice Ntim
Deputy Director Malave

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

- A-1 Final Notice of Disciplinary Action dated December 13, 2016, with specification of charges attached
- A-2 Letter from Antonio Cruz to Public Safety Director Anthony Ambrose dated June 28, 2016
- A-3 Letter from Public Safety Director Anthony Ambrose to Antonio Cruz dated August 11, 2016
- A-4 Conditional Letter of Employment from Newark to G.M. dated June 19, 2015
- A-5 Conditional Letter of Employment from Newark to M.C. dated April 26, 2012
- A-6 Conditional Letter of Employment from Newark to J.R. dated October 26, 2006

- A-7 Conditional Letter of Employment from Newark to A.D. dated November 1, 2006
- A-8 Conditional Letter of Employment from Newark to R.S. dated July 22, 1993
- A-9 Conditional Letter of Employment from Newark to S.C. dated April 10, 2007

For Respondent:

- R-1 Drug Testing Policy PDP-19A
- R-2 Letter to Antonio Cruz from Public Safety Director Anthony Ambrose dated June 25, 2016
- R-3 Preliminary Notice of Disciplinary Action dated June 27, 2016
- R-4 Certificate of Completion of Justice Ntim dated December 6, 2012
- R-4(a) Breath Alcohol Certificate of Justice Ntim dated December 6, 2012
- R-5 Custody Control Form
- R-6 Breath Alcohol Testing Form (results)
- R-7 Urine testing results