

In the Matter of Keith Ricciardi, West Milford Township
DOP Docket No. 2006-2149
(Merit System Board, decided April 25, 2007)

The appeal of Keith Ricciardi, a Police Sergeant with West Milford Township, of his 20-day suspension beginning November 13, 2005 on charges, was heard by Administrative Law Judge (ALJ) J. Howard Solomon, who rendered his initial decision on March 22, 2007. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on April 25, 2007, accepted and adopted the Findings of Fact as contained in the attached initial decision. However, the Board did not adopt the ALJ's recommendation to uphold the 20 working day suspension. Rather, the Board increased the penalty to a six-month suspension.

DISCUSSION

The appellant was suspended for 20 working days on charges of conduct unbecoming a public employee, neglect of duty, use of excessive force, and violations of department rules and regulations. Specifically, it was asserted that on May 27, 2004, the appellant became abusive and struck a distraught woman. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that on May 27, 2004, A.S., the mother of a 15-year old son, went to his bedroom and discovered that her son had taken his life by hanging in his bedroom closet. A.S. became hysterical and summoned help from a neighbor, who in turn called 911, which resulted in emergency medical technicians (EMTs) and the police responding to the scene. Among the police who responded, the appellant was the officer-in-charge. While the EMTs were attempting to resuscitate A.S.'s son, she remained hysterical, disruptive, and constantly interfered with the efforts of the technicians. It was ultimately determined to take her to the hospital. EMTs Lisa Alber and Susan Testerman and Police Officer William Greer accompanied the appellant, who was carrying A.S., in a "bear hug," to an ambulance. The appellant wanted cravats used to restrain A.S., but Testerman indicated that she could calm A.S. down. As she was flailing,

thrashing and kicking, A.S struck the appellant in his mouth, which caused the appellant to become angry, and he told A.S., “your son is dead because of you.” The appellant then called A.S. a “f--king c-nt” and punched A.S. with a closed fist to the right side of her head. The ALJ determined that the appellant and A.S. exchanged words, and the appellant was about to deliver another blow to A.S. when Testerman admonished him to stop. The ALJ noted that the appellant then directed his profanity toward Testerman and Alber and left the ambulance. A.S. was then transported to the hospital. The ALJ found that the testimony of Testerman and Albers was credible and compelling. For example, both were straightforward in recounting the event and were clear in their independent recollections. However, the ALJ found that the testimony of the appellant lacked credibility. For example, the ALJ noted that the appellant delivered his testimony in a very calm and deliberate manner, claiming that he retained that same equanimity throughout the incident. Therefore, the ALJ concluded that the charges of conduct unbecoming a public employee, neglect of duty, and use of excessive force were sustained. Based on the appellant’s long employment history and the lack of prior discipline, the ALJ recommended that the 20 working day suspension be sustained.

Upon an independent review of the record, the Board agrees with the findings of the ALJ that the appellant’s actions were “totally egregious” and concludes that the appointing authority has met its burden of proof in this matter. However, for the reasons set forth below, the Board determined that the penalty should be increased to a six-month suspension.

The Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ’s decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, the ALJ specifically found that the appellant’s testimony lacked any credibility, particularly since he claimed to have retained the same equanimity throughout the incident as he displayed during the hearing. Indeed, the appellant testified that A.S.’s blow caused his lip “to

split open,” yet he simply used a “palmed fist” to push this hysterical person back down on the cot in the ambulance. Conversely, the ALJ explained that Testerman and Alber’s testimony was straightforward and clear in their independent recollections of the event. Upon review of the entire record, the Board finds that there is sufficient evidence in the record to support the ALJ’s credibility determinations.

In determining the proper penalty, the Board’s review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant’s offense, the concept of progressive discipline, and the employee’s prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Additionally, *N.J.S.A. 11A:2-19* and *N.J.A.C. 4A:2-2.9(d)* specifically grant the Board authority to increase or decrease the penalty imposed by the appointing authority. The only limitation on this authority is that “removal shall not be substituted for a lesser penalty.” Increases in disciplinary penalties have been upheld in prior cases, where the circumstances warranted such an increase. *See Sabia v. City of Elizabeth*, 132 *N.J. Super.* 6 (App. Div. 1974); *Dunn and Shogeke v. Merit System Board*, Docket No. A-4645-96T1 (App. Div. March 20, 1998); *In the Matter of Craig Davis, South Woods State Prison, Department of Corrections*, Docket No. A-4345-02T3 (App. Div. August 2, 2004) (Board affirmed increase from a 15-day suspension to a six-month suspension for a Senior Correction Officer found guilty of inappropriate touching of an inmate during a strip search); *In the Matter of Sonny Washington* (MSB, decided February 8, 2006) (Board increased 15-day suspension of a Truck Driver, who was charged with making inappropriate sexual comments to a co-worker, touching the co-worker in a sexual manner, and verbally and physically threatening the co-worker, to a six-month suspension); *In the Matter of Frederick Dusche* (MSB, decided April 23, 2003) (Police Officer found guilty of falsely arresting civilian had 30-day suspension increased to six-month suspension).

In this case, the appellant had been serving as a Police Officer for nearly 14 years with no prior disciplinary history. In this regard, the ALJ specifically indicated that he was “constrained to suspend him for only twenty days, as was the determination made by respondent” and characterized his actions as “totally egregious.” Indeed, it must be emphasized that the appellant struck an emotionally distraught woman who had just discovered her son’s dead body in his bedroom closet. But for Testerman’s intervention, the appellant could have delivered a second blow to this hysterical woman who was half the appellant’s size and weight.

Moreover, the appellant blamed this anguished woman for the death of her son and directed profanity at her.

The Board must underscore that a Police Sergeant is a supervisory law enforcement officer and that even when a supervisory law enforcement officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense may nevertheless warrant a significant penalty where it is likely to undermine the public trust. In the instant matter, despite the absence of any disciplinary history, the appellant's offense is sufficiently egregious to warrant his six-month suspension. The fact that such a supervisory law enforcement officer is guilty of such conduct compounds the seriousness of the offense. In this regard, the Board notes that a law enforcement officer is held to a higher standard than a civilian public employee. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). The Board is particularly mindful of this standard when disciplinary action is taken against a superior law enforcement officer in a police department. Moreover, the Board agrees with the ALJ's characterization of the appellant's reprehensible actions as totally egregious. Accordingly, notwithstanding the appellant's prior history, the Board determines that a six-month suspension is the appropriate penalty.

ORDER

The Merit System Board finds that the action of the appointing authority in imposing disciplinary action was justified. However, the Board modifies that action to increase the 20 working day suspension to a six-month suspension. Therefore, the Board dismisses the appeal of Keith Riccardi.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.