In the Matter of Steven Hubbs, City of Camden
DOP Docket No. 2007-215
(Merit System Board, decided October 10, 2007)

The appeal of Steven Hubbs, a Police Officer with the City of Camden, of his fine of $6,902 (equal to 25 days pay) (five days held in abeyance) on charges, was heard by Administrative Law Judge (ALJ) Ronald W. Reba, who rendered his initial decision on August 31, 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 October 10, 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 fine of $6,902 (equal to 25 days pay) (five days held in abeyance). Rather, the Board increased the penalty to a 60-working day suspension.

DISCUSSION

The appellant was suspended for 30 days, with 25 days to be served and 5 days held in abeyance for one year. However, in lieu of the suspension, the appellant was fined $6,902, which equals his salary for 25 days, on charges that he failed to prepare for a trial and that he was untruthful regarding testimony in a deposition he provided in a Superior Court case involving David Lee, a Police Officer with the City of Camden. Specifically, it was asserted that on June 17, 2004, the appellant gave a sworn oral deposition at the office of the appointing authority's attorney which differed from his sworn testimony given at Lee's trial on July 15, 2005. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

On June 17, 2004, the appellant was called to give a deposition for a case involving racial and ethnic slurs directed at his former partner, Lee. When Lee's attorney specifically asked the appellant if he had ever heard anyone at the police department use racial or ethnic slurs regarding Lee, he testified at that time that the only name he had heard anyone use against Lee was the term "double negative," which the appellant explained was used with Lee as a joke when they were partners. When asked if he had ever heard other people say things about Lee's ancestry or call him names regarding his ancestry, the appellant's answer was "no." His answer was also "no" when asked if Lee ever complained about his treatment or if Lee believed his treatment was based on his race. The appellant indicated that during his

partnership with Lee, Lee never complained and the appellant did not know of any pending problems until the lawsuit was filed and he was contacted to give a deposition. On May 4, 2005 and June 30, 2005, the appellant was subpoenaed for the July 2005 trial and directed by Camden City Attorney Frank A. Salvati to schedule a pretrial meeting to review his testimony. The appellant never met with Salvati. On July 15, 2005, the appellant gave testimony that contradicted the testimony he provided in his deposition of June 17, 2004. During direct examination at the trial, the appellant testified that he had in fact heard disparaging remarks directed towards Lee based on his ancestry, that he was aware of this abuse since he first met Lee, that it continued during Lee's entire time with the police department, that Lee complained to him about several officers, and that he himself had heard disparaging remarks directed to Lee. The appellant explained at the trial that after he gave his deposition he recalled that Lee had been called certain names, but did not tell anyone because the City Attorney's Office never contacted him about meeting with someone from that office to prepare for the trial.

At the OAL hearing, the appellant stated that during the time of his deposition, he was having personal problems and could not recall any derogatory ethnic or racial remarks in reference to Lee. However, he recalled them after the deposition but did not inform anyone of this prior to the trial. He also admitted that he received the subpoena to appear and assumed the City Attorney's Office would contact him in a more personal manner in order to prepare for the trial. William Rummel, a Police Officer with the City of Camden, testified during the hearing that he was Lee's partner for one to two years and recalled ethnic and racial slurs being directed at Lee, which was prior to the appellant becoming Lee's partner.

In his initial decision, the ALJ found that the appellant was untruthful during the deposition when he testified that he never heard disparaging remarks. The ALJ also found incredible his explanation that the "familiar language" police personnel use in jokes they play with each other confused him into thinking his testimony at the deposition was somehow accurate. The ALJ further found that Rummel's testimony was credible and that the appellant was prepared to testify in a completely different manner at the trial than at the time of his deposition. He also determined that the appellant knew his testimony at the deposition was untruthful and that he failed to notify the City Attorney of his purported change in memory, that his testimony at the trial was truthful, and that he failed to prepare himself for trial. Therefore, the ALJ sustained the charges against the appellant and recommended upholding the 25-day suspension (five days held in abeyance), or, in lieu of the suspension, to be fined $6,902, which equals his salary for 25 days.

Upon an independent review of the record, the Board agrees with the findings of the ALJ that the appellant failed to testify truthfully at the deposition and that he did not prepare himself for trial and, therefore, concludes that the appointing authority has met its burden of proof in this matter. However, for the reasons set forth below, the Board determines that the penalty should be increased to a 60-working day 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 the appellant's testimony incredible that police personnel use "familiar language" to play jokes on each other that confused him into thinking that his testimony at the deposition was accurate. Conversely, the ALJ explained that the testimony of Rummel was credible in that he clearly remembered that Lee was the brunt of ethnic and racial slurs, even after many years had elapsed since he was his partner. 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 only has a minor disciplinary history in that he was fined for three days in 1997 and received two reprimands since his employment began in September 1994. However, the ALJ specifically indicated that the appellant was untruthful in providing testimony at a deposition and changed his testimony more than a year later at the trial without notifying the City Attorney. It is imperative that law enforcement officers fully, and truthfully, cooperate with any type of investigation, be it for a criminal or civil matter. For example, in *In the Matter of Wayne Truex, Lakewood Township*, Docket No. A-3720-03T1 (App. Div. June 20, 2005), *cert. denied*, 185 *N.J.* 267 (2005), despite the ALJ's recommendation of a lesser penalty, the Board upheld the removal of a Police Officer who failed to comply with requests for a blood sample and *provided untruthful statements in an investigation*. In the same vein, in *In the Matter of Randy Sandifer* (MSB, decided September 6, 2006), the Board imposed a six-month suspension on a Police Officer, who refused to cooperate in a Prosecutor's investigation. Thus, in this case, the Board finds that the appellant's untruthful statements in his deposition constitute egregious conduct and are worthy of a severe sanction. 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). Accordingly, notwithstanding the appellant's prior history, the Board determines that a 60-working day suspension is the appropriate penalty. It is noted that the additional 30 working days imposed by the Board should be considered a suspension, unless the appellant agrees to a fine. *See N.J.S.A.* 11A:2-20 and *N.J.A.C.* 4A:2-2.4(c).

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 30-day suspension to a 60-working day suspension. Therefore, the Board dismisses the appeal of Steven Hubbs.

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