



STATE OF NEW JERSEY

In the Matter of Gerrell Elliott,
 City of Newark, Department of Public
 Safety

CSC DKT. NO. 2017-653
 OAL DKT. NO. CSV 18316-16

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2018 BW

The appeal of Gerrell Elliott, Battalion Fire Chief, City of Newark, Department of Public Safety, nine working day suspension, on charges, was heard by Administrative Law Judge Julio C. Morejon, who rendered his initial decision on September 21, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

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 October 17, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the nine working day suspension to a five working day suspension.

Since the penalty has been modified, the appellant is entitled to four days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty

was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the nine working day suspension to a five working day suspension. The Commission further orders that appellant be granted four days of back pay, benefits, and seniority.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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 17th DAY OF OCTOBER, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 18316-16

AGENCY DKT NO. CSC 2017-653

GERREL ELLIOT,

Appellant,

v.

CITY OF NEWARK, DEPT. OF PUBLIC SAFETY,

Respondent.

Sebastian B. Ionno, Esq., for appellant, Gerrel Elliot (Ionno & Higbee, L.L.C., attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent City of Newark, Department of Public Safety (Corporation Counsel, City of Newark, attorneys)

Record Closed: August 10, 2018

Decided: September 21, 2018

BEFORE **JULIO C. MOREJON, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Captain Gerrell Elliott,¹ City of Newark, appealed the respondent, City of Newark, Department of Public Safety's (Newark) action imposing a major discipline of

¹ Appellant's name was misspelled as "Gerrel Eliot" in the original pleadings filed with the OAL. Elliott was elevated to Battalion Chief on September 2016.

a nine-day working suspension effective August 20, 2018, for violating the civil services regulations for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty, and other sufficient cause. In addition, respondent found that Elliott violated the Newark rules and regulations for duties and responsibilities; care, prevention maintenance, and repair of department vehicles; neglect, proper use of Newark equipment, services and supplies, and acts of omission constituting neglect of duty.

Elliott requested a fair hearing and the matter was filed at the Office of Administrative Law (OAL) on December 5, 2016, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. A telephonic prehearing conference was held on March 2, 2017. Sebastian Ionno, Esq., (Mr. Ionno) appeared for Elliot, and Corrine Rivers, Esq., (Ms. Rivers), appeared for respondent. A hearing was scheduled for July 14, 2017. On July 5, 2017, Joyce Clayborne, Esq. (Ms. Clayborne), wrote to Mr. Ionno that she had taken over the handling of the case from Ms. Rivers. The hearing was adjourned to October 3, 2017 and October 5, 2017, to allow for the exchange of discovery.

A hearing was conducted on October 3, 2017, and October 5, 2017. Prior to the commencement of the hearing on October 5, 2017, Elliott made a motion to exclude his disciplinary history, as the document discovery concerning the same was not provided by Newark during the time allowed under the Prehearing Order. The motion was granted, and a ruling was made by the undersigned excluding Elliott's disciplinary history as Newark failed to provide a compelling reason for not providing the same during the discovery period.

At the conclusion of the hearings on October 5, 2017, counsel were allowed to file written summations by December 15, 2017. Newark filed its written summation on December 11, 2017, and Elliott, with Newark's consent, filed his written summation on January 17, 2018, and the record was closed.

An Order of Extension was entered on March 5, 2018, under N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, allowing the undersigned to complete the initial decision by April

19, 2018. The record was re-opened on April 17, 2018, to allow Newark to re-submit a CD containing recorded departmental interviews of Elliott and other witnesses, as the same submitted in evidence was inaudible. Respondent provided the original CD sometime in June 2018, and the same was heard by the undersigned on August 10, 2018, at which time the record was closed.

ISSUES

The issues to be determined in this matter are the following:

1. Whether Elliott is guilty of the alleged conduct, that he failed to have the replacement apparatus restocked with the necessary tools and equipment, and in doing so, is his conduct unbecoming a public employee, failure to perform duties and inability to perform duties.
2. Whether the disciplinary action against Elliott should have been a reprimand or lesser suspension on principles of progressive discipline.

FACTUAL DISCUSSION AND FINDINGS

Summary of Testimony

Kyle White, Fire Fighter/Driver:

Kyle White, ("White") is employed as a Fire Fighter with Newark since May 1998. On direct-examination, White testified that on April 22, 2016, he was the scheduled driver for Tour 4, Ladder 12, which commenced a twenty-four tour at 800 hours through April 23, 2018. White testified that Elliott was on twenty-four hours overtime, working the tour for Captain Edward Wilcher (Wilcher), the Captain assigned to Tour 4. White testified that it is the driver's job to make sure that the "apparatus (fire truck or rig) is in operating condition and that all of the necessary equipment on the apparatus is in working condition. If the apparatus is/are not functioning properly or essential equipment is missing, it is the driver's responsibility to notify his or her Captain.

White testified that during his routine vehicle preventative maintenance check at about 7:45 am, he discovered multiple tools and equipment missing from the apparatus, including some ladders and power tools such as the "Holmatro" spreaders and cutters. White testified that he verbally notified Elliott of the same, and that Elliott responded: "I'll take care of it." White stated that Elliott did not address the missing equipment. White also testified that the apparatus he inspected was an older model, as the regular apparatus was out for repair.

In addition to the vehicle preventative maintenance check, White testified that he also performed a mechanical inspection of the apparatus and he prepared a report which was placed on Elliott's desk. White testified that the mechanical inspection report is not a missing equipment checklist. A mechanical inspection report concerns specific issues with the apparatus. White testified that the Newark does not have a missing equipment checklist, and that if something is missing he verbally reports it to his Captain.

White testified as to the protocol for the fire station log book. He testified that Firefighters are not permitted to make entries in the log book regarding missing equipment. The log entries for missing equipment is the responsibility of the Fire Captains (See, R-8 and R-10).

On cross-examination, White testified that he was instructed by "one of the Chiefs" to prepare a memo concerning the missing equipment and who he informed as result of the same. As a result, White prepared a memo dated April 27, 2016, addressed to Fire Chief John Centanni (Centanni), indicating that he informed Elliott of the missing equipment on April 23, 2017, after performing the preventive maintenance check (See, R-5). White also prepared a second memo to Chief Centanni dated May 17, 2016, which contained a detailed description of the items that were missing from the apparatus on April 23, 2016, that White reported to Elliott (See, R-6).

White testified that he believed he complied with that obligation on April 23, 2016. White also testified that he was suspended for fourteen (14) hours because of the missing equipment on April 23, 2016. As to the memo White prepared May 17, 2016 (R-6), White

was asked to compare the same to the memo prepared by Captain Miguel Fresse (Fresse) dated April 24, 2016, to Centanni, concerning the missing equipment on April 23, 2016 (See, A-11). The two memos appeared identical, even as to a typographical error regarding the word "exemption", which White acknowledged should have been "exception". White testified that he prepared the memo on a computer at the fire station, after he was told to do so because of the missing equipment on April 23, 2016.

On questioning from the undersigned, White testified that he prepared the May 17 memo concerning the detailed missing items from memory and that he had verbally informed Elliott on April 23, 2016, of the items listed in the May 17 memo.

Captain Miguel Fresse:

Captain Miguel Fresse ("Fresse") is employed as a Captain by Newark for the last two and one-half years, and twenty-years with Newark overall. On direct-examination, Fresse testified that on April 23, 2016, he was assigned overtime to Engine Company 26, which is in the same command station as Ladder 12. Fresse stated that he was working the engine in the same firehouse that night; however, his overtime shift did not begin until 1800 hours or 6:00 p.m. From that time up until April 24, 2016, at 8:00 a.m. Elliott and Fresse were working together. Fresse further testified that if there were any fires during the time frame that they were both working that both he and Elliott would have to respond to said fire.

Fresse also testified that the replacement fire truck used by Ladder 12 on April 23, 2016, was an antiquated fire truck and he made a joke regarding the condition of the replacement truck. On direct, Fresse testified that his comment was directed at the fire engine assigned to Elliott's command as it appeared unequipped and bare following Fresse's visual inspection. Fresse stated that Elliott respond to his comment, that "it was like that when I got here", and that Elliott did nothing to rectify the unequipped/ bare fire truck under his command. Freese admitted that he did not act to rectify Elliott's replacement fire truck at the time, as Elliott was still in command of the tour. He testified "that anyone who walked into the garage would notice that the truck was deficient, it was quite obvious."

On cross-examination, Fresse testified further that when Elliott's shift was done, he took charge as Captain of Ladder 12, (Tour 1), and made sure to rectify the equipment missing from the replacement fire truck. Fresse stated that he called "Mr. Maya", the civilian caretaker in charge of the garage in order to restock the replacement fire truck with all the necessary ladders, tools and equipment. Fresse confirmed that he and Elliott's shift had overlapped for fourteen-hours, but that he did not take any action on the replacement fire truck during the fourteen-hour overlap "out of respect" for Elliott's command of his tour.

Fresse testified that he was instructed by his superiors to submit a report listing all of the missing equipment, which he had observed during Elliott's shift (See, R-9). Fresse testified on April 24, 2016, he prepared a memo, which stated that "at 1800 while performing preventative maintenance on spare rig 1312 [replacement fire truck] we discovered that the majority of tools and equipment was missing." (See, R-9). Fresse testified that he did not include Elliott's name in the memo because there's a "brotherhood" among the firemen, and he did not want to "rat out" Elliott.

On cross-examination, it was pointed out to Fresse that both his memo and that of White dated May 17, 2016, were identical, including the typographical error. (See, R-6 and R-9). Fresse denied giving White a copy of his memo dated April 24, 2016, and also denied allowing White to use the personal computer located in the Captain's desk at the fire station.

Fresse testified further that he followed the chain of command and notified the Battalion Chief on duty as to the missing equipment in the replacement fire truck. Fresse confirmed the log book entry of April 23, 2016, which contained White's findings and Freese's actions (See, R-8).

Battalion Chief Ciottariello:

On direct-examination, Battalion Chief Ciottariello ("Ciottariello") was on duty during the time of the incident and had no knowledge of any issues with Ladder 12. (See,

R-4). On direct, Ciottariello testified that Elliott did not notify him of any missing equipment from the replacement fire truck during his shift. Ciottariello testified that it is the Standard Operating Procedure ("SOP") for a Captain to notify the Battalion Chief, in the event any issues occur during the Captain's tour.

Ciottariello further testified that the document admitted into evidence as A23-3, identified as a City of Newark vehicle check list is a check list that is utilized by the driver who is supposed to inspect the vehicle and list any missing equipment on the check list. Ciottariello testified that he was presented with a copy of the check list from the shift in question but the same cannot be located.²

Fire Detective Dwane Cobbs:

Fire Detective Duane Cobbs (Cobbs), has been with Newark for twenty-one years, and is currently assigned to the Newark Fire Department Internal Affairs Unit. Cobbs' testified on direct that he was assigned to investigate White and Elliott's conduct concerning the missing equipment in the fire truck at Ladder company 12 on April 23, 2016. As part of his investigation, Cobbs took a recorded statement from White and Elliott (See, R-10 and R-10).

Cobbs' testified that his investigation concluded that the allegations that Elliott was aware that tools and equipment were missing from the fire truck at Ladder company 12 on April 23, 2016, were founded (See, R-19).

Battalion Chief Gerrell Elliott:³

² The check list was not provided by respondent as part of the discovery in this matter. Elliott requests a ruling by the undersigned of an adverse inference by respondent as to the missing checklist as it fails to contain the alleged missing items from Ladder 12 and supports Elliott's position that he was never made aware of a majority of the equipment that was missing from Ladder 12 on the shift at issue. Elliott's request will be addressed in the legal analysis which follows.

³ When this incident occurred on April 23, 2016, Elliott held the rank of Captain. On September 2016, Elliott obtained the rank of Battalion Chief.

On direct-examination, Elliott testified that he has been employed with Newark since, January 8, 2000. Elliott testified that during his employment he has never received a major discipline, other than the within matter.

Elliott testified that on April 22, 2016, he was the Captain for Tour 4, Ladder 12, which commenced a twenty-four tour at 800 hours through April 23, 2018. Elliott testified that he was on twenty-four hours overtime, working the tour for Captain Wilcher, the Captain assigned to Tour 4.

Elliott testified that for the shift in question the normal fire truck used by Ladder 12 was in the vehicle repair shop and they had a replacement fire truck that was already in the station when he commenced his shift. Elliott testified that when the prior platoon dropped off the fire truck for repairs it failed to switch out whatever equipment and ladders that would fit on the antiquated back up fire truck that Ladder 12 needed to use. Elliott testified that he was never advised by the Captain he relieved that certain equipment and ladders were not transferred over and that information did not appear in the log book or any of the vehicle check sheets.

Elliott confirmed that White was the driver for the tour and date in question, and that it is the driver's job to make sure that the apparatus is in operating condition and that all of the necessary equipment is on the apparatus and in working condition. Elliott testified that If the fire truck is not functioning properly or essential equipment is missing it is the responsibility of the driver to advise his or her Captain.

Elliott testified that White informed him that the fire truck was missing ladders and some tools/equipment. Elliot further testified that the Holmatro spreaders and cutters, which is used to rescue individuals trapped in vehicles, was missing as well.

Elliott also testified that he was never advised that the majority of the equipment or tools were missing from the replacement fire truck, as Fresse and White stated in their testimony and in their respective memos. Elliott admitted as testified to by Fresse and White, that Elliott was aware that some ladders were missing and also the extraction tools, the Holmatro cutters, spreaders and the power unit for the Holmatro tools was missing.

Elliott also testified that based on the age of the fire truck there was limited space and not all of the equipment tools and ladders from a normal fire truck would fit on the replacement fire truck; that some of the storage units were smaller and that you could not fit all of the normal ladders on truck.

Elliott testified that despite the replacement fire truck missing some equipment and tools, the rig was "fire ready" in the event of a fire. Elliott testified that neither White or Fresse informed him that the replacement fire truck was not fire ready. Elliott testified that he was being disciplined for not having proper tools and equipment on a replacement rig that was assigned to another Captain whose shift Elliott was covering, and that Elliott did not create the problem but inherited it.

On cross-examination, Elliott testified that he has worked with missing equipment on a fire truck before. He stated that it was not uncommon for Newark not to properly stock the rigs that were in service, and that he was always working in "unfit conditions". Elliott testified that if he were to respond to a fire or emergency with the replacement fire truck assigned to him, any missing equipment that was needed could be obtained from another rig or fire station.

Findings

FINDINGS OF FACT

Most of the facts in this case are undisputed. Below are the facts derived from the testimony of the parties submitted and my assessment of its credibility, together with the documents that the parties submitted and my assessment of their sufficiency, I **FIND** the following as **FACT**:

Elliott is charged with violating the following listed charges:

New Jersey Administrative Codes:

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) (7): Neglect of duty;

N.J.A.C. 4A:2-2.3(a) (11): Other sufficient cause;⁴

Newark Fire Department General Orders:

G.O. A-3: Duties and responsibilities of rank and titles of the Department.

G.O. F-3: Care, prevention maintenance and repair of Department vehicles.

Newark Fire Department Rules and Regulations:

Articles 6:

Para 1: Members of the Department shall not violate the Oath of Office, nor be guilty of neglect or cowardice or shirk any duty.

Article 40:

Para 2: Economy shall be exercised by all Members in the use of all Newark equipment.

Article 58:

Para 1: Members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

Article 59:

Para 1: 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.

Para 2: Members found guilty of Official Inefficiency or Incompetence shall be subject to Departmental charges. See, J.1.

⁴ Subsequently re-codified as N.J.A.C. 4A:2-2.3 (a) (12). Hereinafter referred to as N.J.A.C. 4A:2-2.3 (a) (11). As originally charged.

The disciplinary charges in this matter result from an overtime shift for Ladder 12 that then Captain Elliott worked on April 23, 2016. At the time Ladder 12 was not Elliott's normal assignment as he was filling in for another Captain. For the shift in question the fire truck used by Ladder 12 was in the vehicle repair shop and they had a replacement truck that was already in the fire station when Elliott arrived for the start of his shift.

When the prior squad dropped off the truck for repairs it failed to switch out whatever equipment and ladders that would fit on the replacement truck that Ladder 12 needed to use. Elliott was never advised prior to starting the shift by the Captain he relieved that certain equipment and ladders were not transferred from the truck over to the replacement truck. The log book and vehicle check sheets did not reflect the lack of transfer of equipment and tools.

Elliott's tour started at 800 hours on April 23, 2016. White was the driver for Elliott that day on Ladder 12. It is the driver's job to make sure that the truck is in operating condition and that all of the necessary equipment is on the truck and in working condition. If the truck is not functioning properly or essential equipment is missing it is the responsibility of the driver to advise his or her Captain. White was disciplined for his conduct in failing to make sure the replacement truck contained adequate tools and equipment, and he served a 14-hour suspension.

The replacement fire truck utilized in Elliott's shift was antiquated and did not have the full capacity to hold all regulation ladders and equipment. It is also undisputed that the replacement truck utilized on April 23, 2016, was missing all of the equipment identified by White in his May 17, 2016, memorandum which was marked and admitted into evidence as R6 and also the equipment outlined by Fresse in R9 that was also admitted into evidence at the hearing. White provided Elliott with an oral list of the tools and equipment that was missing from the replacement truck, which included ladders and some of the power tools such as the Holmatro spreaders and cutters. White did not communicate to anyone else in the chain of command that additional tools or equipment were missing the entire time he was on his shift.

Elliott and Fresse were working together for part of the twenty-four-shift on April 23, 2016. Fresse was working the engine in the same firehouse that night; however, his overtime shift did not begin until 1800 hours or 6:00 p.m. During the time Fresse and Elliott worked together, Fresse took notice of the poor condition of the replacement truck and joked about the same with Elliott. In addition, Fresse could see that the replacement truck was missing ladders and equipment. When Elliott's tour ended, Fresse took the necessary steps to rectify the situation of missing ladders and equipment, including contacting the garage to see about the return of an updated fire truck.

As a result of the incident at issue, White and Fresse were instructed to prepare a memorandum concerning the equipment that was missing on the replacement truck, and their actions concerning the same. Thereafter, an internal affairs investigation was conducted and White and Elliott were issued Preliminary Notices of Disciplinary Action (PNDA). White did not contest the charges and served a seven-day suspension. Elliott did contest the same, which resulted in a Final Notice of Disciplinary Action (FNDA), and the within appeal. No PNDAs were issued as to Fresse or any Battalion Chief over-seeing Tour 4 of Ladder company 12.

After the incident on April 23, 2016, Captain Elliot was promoted to Battalion Chief in September 2016.

Credibility

Prior to conducting a legal analysis and making a conclusion as to the testimony provided herein, it is necessary to address the credibility of the testimony of White, Freese and Elliott. "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be

approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, 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). A fact finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

I **FIND** the testimony of all of the witnesses to be credible concerning the condition of the replacement truck on April 23, 2016. They have all been consistent as to their observations that equipment was missing on the replacement truck. The same is conceded by Elliott as he does not dispute that the replacement truck was lacking certain equipment and supplies. There is a witness credibility issue, however, concerning whether White and Freese informed Elliott as to all of the items that were missing in the replacement truck on April 23, 2016. In addition, there is a credibility problem regarding what White communicated to Elliott on April 23, 2016.

The credibility issue concerns White and Fresse's memoranda, which were prepared more than three weeks apart, containing identical list of equipment that was missing in the same order with the same punctuation and even the same typo. Clearly, one of them had to copy the exact list from the other. Since Fresse's list was prepared on April 24, 2016, and White's memo was prepared May 7, 2016, I **FIND** that White copied word for word from Fresse's April 24, 2016 memo, and therefore my finding questions White's veracity that he verbally informed Elliott on April 23, 2016, that all of the items listed in his memo of May 17, 2016, was in fact communicated to Elliott. Consequently, I **FIND** White's testimony not credible that he verbally informed Elliott on April 23, 2016, that the replacement truck was missing the equipment and ladders referenced in White's memo of May 17, 2016.

I **FIND** that White and Fresse collaborated in preparing their respective memos, and consequently, I **FIND** Freese's testimony not credible that he took no action to correct the missing equipment during Elliott's tour out of "respect" for him. Similarly, I **FIND** Freese's testimony not credible that the replacement truck was "not fire ready" as his failure to take corrective action during Elliott's tours is inconsistent with the items listed in his memo. In other words, how can I believe Freese that the replacement truck was missing all the items listed in his memo and that of White, when he is concerned that the truck is not fire ready, and Freese does not take corrective action until Elliott has concluded his tour? The answer is contained in my **FINDING** concerning Freese's lack of credibility.

I **FIND** Elliott's testimony consistent with that of Fresse and White that Elliott was aware that some equipment was missing; specifically ladders, extraction tools, the Holmatro cutters, spreaders and the power unit for the Holmatro tools was missing.

I **FIND** Elliott's testimony credible that based on the age of the replacement truck, there was limited space and not all of the equipment tools and ladders from a normal fire truck would fit, including that the storage units were smaller and that you could not fit all of the normal ladders on the replacement truck.

I **FIND** Elliott's testimony convincing that based on what was reported to him and based on what he actually observed, that the replacement truck was fire ready.

LEGAL ANALYSIS AND CONCLUSION

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007).

Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)). Indeed, progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest, such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. at 33.

In the within matter, Elliott is charged with violating the civil services regulations for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty, and other sufficient cause. In addition, respondent found that Elliot violated the Newark Fire Department rules and regulations for duties and responsibilities; care, prevention maintenance, and repair of department vehicles; neglect, proper use of Newark equipment, services and supplies, and acts of omission constituting neglect of duty.

The basis for Newark's findings that Elliott violated the civil services regulations, and the rules and regulations arise from Elliott's failure to take any corrective actions concerning the missing equipment and ladders from the replacement fire truck. I **CONCLUDE** that Newark has proven by a preponderance of the credible evidence that Elliott was aware that some of the equipment was missing from the replacement fire truck and that he took no action to correct the same, and the respondent's decision concerning the same is **AFFIRMED**.

I **CONCLUDE** further that Newark has failed to prove by a preponderance of the credible evidence that Elliott's admission that the items he thought to be missing from the replacement truck rendered the replacement truck unsafe or not fire ready.

Having concluded that Elliott's conduct was in violation of the civil services regulations and the Newark Fire Department rules and regulations, I must determine if

the penalty assessed by Newark is consistent with the concept of progressive discipline inherent in the Civil Service Commission ability to increase or decrease the penalty, under N.J.S.A. 11A:2-19; In re Carter, 191 N.J. 474, 483–86 (2007).

In determining if the nine-day suspension is consistent with the concept of progressive history, I am limited in considering Elliott's complete disciplinary history, as Newark did not provide the same in discovery, and I have ruled that the same was excluded as a result of Newark's conduct. However, I can consider Elliott's testimony that he had some prior disciplinary history in his file and I can also factor that Newark elevated Elliott to the rank of Battalion Chief on September 2016, five months after this incident occurred. In addition, my conclusion that Newark failed to prove that the replacement fire truck was not fire ready is also factored into my decision of a proper penalty to be imposed on Elliott.

As such, I **CONCLUDE** that the nine-day suspension assessed by Newark against Elliott, deemed a major suspension, should be **REVERSED** and that the appropriate suspension should be five-days, a minor suspension.

My decision is formed from Newark's inability to prove that Elliott was made aware of all items missing from the replacement truck and limited to what he personally knew to be the case. In addition, no proof was presented that Elliott had violated civil service rules or departmental rules and regulations in the past to justify the imposition of a major disciplinary charge.

ORDER


Given my findings of fact and conclusions of law, I **ORDER** that respondent's decision that Elliott violated the civil services regulations and the Newark Fire Department rules and regulations, is **AFFIRMED** and I further **ORDER** that respondent's decision to suspend appellant for nine-days is **REVERSED** and the appropriate suspension should be five-days.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 24, 2018
DATE


JULIO C. MOREJON, ALJ

Date Received at Agency: September 24, 2018

Date Mailed to Parties:
lr September 24, 2018

APPENDIX

Witnesses

For Appellant:

Battalion Chief Gerrell Elliott

For Respondent:

Firefighter Kyle White

Captain Miguel Fresse

Battalion Chief Ciottariello

Fire Detective Duane Cobbs

Exhibits

Joint:

J-1

Oath of Office

- Article 1 Compliance with Rules and Regulations, General Orders, Executive Orders, and Directives
- Article 2 Chain of Command
- Article 3 Orders from Superiors
- Article 4 Respect to Superiors
- Article 5 Disciplinary Penalties
- Article 6 Neglect of Duty
- Article 7 Arrangement of Equipment
- Article 8 Receiving of Personal Services
- Article 9 Changing or Annuling of Standing Orders
- Article 10 Acting Officers
- Article 11 Personal Example
- Article 12 False Statements
- Article 13 On Duty, At All Times and Subject to Recall
- Article 14 Punctuality

- Article 15 Time, While on Duty
- Article 16 Smoking in Public
- Article 17 Absence from Quarters or Assignments
- Article 18 Absence Without Authorized Leave
- Article 19 Departmental Identification to Citizens
- Article 20 Citizenship Requirements
- Article 21 Residence and Telephone Number
- Article 22 Driver's License Requirements
- Article 23 Conduct of Members
- Article 24 Payment of Debts
- Article 25 Discrimination
- Article 26 Political and Religious Discussions
- Article 27 Entering Taverns While on Duty
- Article 28 Use of Intoxicating Beverages and/or Controlled Dangerous Substances

For Appellant:

- A-1 3/1/1988 General Order A-3- Duties and Responsibilities of Ranks and Titles
- A-2 6/12/97 General Order A-4 Internal Affairs Unit
- A-3 7/1/98 General Order A-2 Responsibilities of the Various Divisions and Offices of the Department
- A-4 5/1/01 General Order A-5 Discriminatory Workplace Harassment Policy and Complaint Procedure
- A-5 10/18/02 General Order A-1
- A-6 5/15/03 General Order A-6 Emergency Appointment
- A-7 6/4/03 General Order F-3 Care, Prevention Maintenance and Repair of Vehicles
- A-8 2/27/16 Memo from BC Ciottariello to Chief Centanni Re: Ladder 12 Change Over
- A-9 4/22/16 Log Book
- A-10 4/24/16 Memo from Anthony Maya to Chief Centanni re: L-12 No Tools
- A-11 4/24/16 Memo from Captain Fresse to Chief Centanni
- A-12 4/24/16 Memo from Captain Fresse to Chief Centanni Re: Missing Equipment Follow Up

- A-13 4/27/16 Memo from FF White to Chief Centanni Re: Preventative Maintenance
- A-14 5/2/16 Memo from Captain Fresse to Chief Centanni Re: Tour 1
- A-15 5/4/16 Memo from Elliott to DC Zieser Re: Change over Ladder
- A-16 5/17/16 Memo from FF White to Chief Centanni Re: Preventative Maintenance
- A-17 6/1/16 Investigation Report from Detective Cobbs
- A-18 6/8/16 Correspondence from Detective Walker to FF White re: Investigation
- A-19 6/22/16 IA Report from Detective Cobbs to BC Osorio re: Elliot Statement
- A-20 6/23/16 IA Report from Detective Cobbs to BC Osorio re: White Statement
- A-21 6/28/16 Preliminary Notice of Disciplinary Action
- A-22 8/11/16 Final Notice of Disciplinary Action
- A-23 Gerrell Elliott Appeal w/ attachments
- A-24 CD Statement of Elliott
- A-25 CD Statement of White

For Respondent:

- R-1 Final Notice of Disciplinary Action (w/ Specification of Charges), dated August 11, 2016
- R-2 Preliminary Notice of Disciplinary Action (w/ Specifications of charges), dated June 28, 2016
- R-3 Memo to Deputy Chief Zieser from Captain Elliot, dated 5/4/16
- R-4 Memo to Fire Chief Centanni from B/C Ciottariello
- R-5 Memo to Fire Chief Centanni from Fire Fighter White, dated 4/27/16
- R-6 Memo to Fire Chief Centanni from Fire Fighter White, dated 5/17/16
- R-7 & 7a Dept. of Public Safety Fire Division Internal Affairs Report to Battalion Chief Osorio from Detective Cobbs, dated 6/22/16 & 6/23/16
- R-8 Fire House Log Book Entries from April 21, 2016 to April 26, 2016
- R-9 Two Memos to Fire Chief Centanni from Capt. Fresse, dated 4/24/16
- R-10 CD Statement of Elliott
- R-11 CD Statement of White