

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JUNE, 2018

Deirdre' L. Webster Cobb

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Chairperson
Civil Service Commission

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and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 12849-12

AGENCY DKT. NO. 2013-618

**IN THE MATTER OF JASEN T. MITCHELL,
BOROUGH OF WILDWOOD CREST
DEPARTMENT OF PUBLIC SAFETY.**

**Amie E. DiCola, Esquire, for appellant (Fusco & Macaluso Partners, L.L.C.,
attorneys)**

Kyle D. Weinberg, Esquire, for respondent (Blaney and Karavan, attorneys)

Record Closed: April 3, 2018

Decided: May 15, 2018

BEFORE DEAN J. BUONO, ALJ:

STATEMENT OF THE CASE

The Borough of Wildwood Crest ("respondent") sustained a charge of "Resignation Not In Good Standing" in violation of N.J.A.C. 4A:2-6.2. The discipline stemmed from an allegation that appellant failed to report for training from June 4, 2012 through June 8, 2012, as a public safety telecommunicator without approval of his superior. He was considered to have abandoned his position. Appellant contends that he acted appropriately and did not abandon his position.

PROCEDURAL HISTORY

On June 11, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions. A Final Notice of Disciplinary Action was issued on August 23, 2012, sustaining the charge and penalty. A timely appeal was filed and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law ("OAL") as a contested case on September 20, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held on March 10, 2014, February 12, 2016, April 20, 2016 and May 25, 2017. The matter was originally assigned to The Honorable Bruce M. Gorman, who retired from the bench and the matter was then reassigned to The Honorable W. Todd Miller, who was appointed to the Atlantic County Superior Court in 2016. The Honorable Edward T. Delanoy, Jr., Assignment Judge, sent correspondence to counsel on August 24, 2016, notifying them of the appointment of Judge Miller and requesting a telephone conference. A telephone conference was held on October 18, 2016, with counsel and Judge Delanoy to discuss how the parties wished to proceed. This matter was reassigned to the undersigned in late October 2016 and a final hearing was held on May 25, 2017. Post-hearing briefs were scheduled to be received by the parties on March 15, 2018. However, appellant's brief was received on April 2, 2018 and the record closed on that date.

FACTUAL DISCUSSION

Testimony

For Respondent

Kevin Yecco ("Yecco") was the Borough's administrator and clerk from 1986 through 2013. In his role as Borough administrator/clerk, part of his responsibility was

dealing with employee and personnel matters. He was familiar with the circumstances surrounding this case and his office was responsible for insurance matters. He knew Mitchell was injured and would no longer be able to function in full capacity as an EMT. Yecco received documentation from Shore Orthopedic University Associates indicating Mitchell could return to work on modified duty and placed restrictions and limitations on his future assignments including, but not limited to: climbing stairs, running, jumping, ladder climbing, and squatting.

As a result, Yecco had a conversation with the Borough's Mayor, Carl Groon, and Chief of Police Thomas DePaul, about the possibility of appellant becoming a public safety telecommunicator ("dispatcher"), a position still in the Department of Public Safety, because appellant's limitations did not preclude him from completing the Civil Service Commission's job functions of a dispatcher. After conferring with both the Mayor and the chief of police, Yecco determined there was a position of employment available for appellant. The Borough had previously discussed creating a relief dispatcher position and believed appellant could fill schedule voids. The need to add a dispatcher was because of low retention rates and having to pay police officers overtime to fill the voids.

At the time, the exact title for appellant's new position could not be determined, it would either be as a public safety telecommunicator or public safety telecommunicator trainee, because Mitchell had to undergo training for the position. Thereafter, in April 2012, Yecco, the Chief of Police, and the Borough's chief financial officer, Neil Young, met with appellant to advise him that a dispatcher position would be made available, which would not conflict with his work restrictions as expressed by his doctors. Yecco indicated to Mitchell that he would be keeping the same salary he had while serving as an EMT, and would be made whole in all respects, including but not limited to, retaining all seniority rights and benefits afforded to him as an EMT. In fact, in his new position of dispatcher, Mitchell would receive more money than the already employed dispatchers at that point in time. During the above meeting, Yecco does not recall Mitchell ever indicating that he had concerns with attending training for the dispatcher position. However, Yecco recalled having a discussion with Mitchell about his hesitation with being able to fully

understand the requirements of the dispatcher position. After appellant expressed his apprehensions, Yecco informed him that the Borough would find out exactly what his limitations were but the training would determine his ability to perform in one of the two capacities. Yecco was under the impression Mitchell voluntarily wanted to take the training.

Yecco testified the training for Mitchell was scheduled at the expense of the Borough for June 4 through June 8, 2012 and June 11 through June 14, 2012. Additionally, notice was provided to appellant of the training schedule. T1:26-14. Yecco acknowledge he received a letter on June 1, 2012 dated May 30, 2012, from appellant indicating he was pursuing an accidental disability retirement and would remain on sick leave until that time. Yecco wrote back to Mitchell on June 1, 2012 indicating that his disability request would not preclude him from serving as a dispatcher and he was ordered to appear for the training as required. Yecco added the Borough was making reasonable accommodations to appellant and there would be problems with his disability application because he was not totally and permanently incapacitated. Yecco reviewed the New Jersey Administrative Code with regard to Civil Service transfers and it was determined appellant's transfer would be considered lateral, which does not require the consent of appellant. The Borough never received anything from appellant or someone acting on his behalf objecting to the transfer.

Mitchell was scheduled to appear for training on June 4, 2012, but he did not appear. On the same date, Yecco stated the Borough received notification from the Borough police department that Mitchell was lugging heavy-duty sound equipment to and from the Borough's elementary school. This observation was later confirmed through video. Yecco indicated that from the time appellant received notice to appear at training he did not receive any notification from appellant that he would not be attending the training or that he was requesting an extended leave of absence. According to Yecco, Mitchell did not attend the training as instructed for a period of five (5) consecutive days without authorization to otherwise be absent, which constituted a resignation not in good standing. Thereafter, a Preliminary Notice of Disciplinary Action (31-A) was generated.

Aside from his employment with the Borough, Yecco stated Mitchell had his own landscaping business, a position with the Borough elementary school, and a Christmas light decorating business.

On cross-examination, Yecco explained his understanding of what a permanent/lateral transfer meant, that it was a transfer simply within one department and that the Administrative Code gives the Borough the right to make such a transfer without the consent of the employee. Mitchell was being moved to a public safety telecommunicator trainee on a permanent basis. Yecco acknowledged that under the Administrative Code a thirty-day notice requirement for a permanent transfer is needed and the permanent transfer needs to be approved by the Civil Service Commission. Yecco said in this case, Civil Service approval was not yet sought related to appellant's transfer because the Borough did not know the title for Mitchell until he completed his training. During Mitchell's training, Yecco indicated Mitchell would have remained in his Civil Service title of EMT, and paid as such, until the Borough could determine if he would be titled as a dispatcher or dispatcher trainee. At no time would he have lost Civil Service protection and his rights under the Administrative Code because his status was guaranteed.

Yecco stated that although Mitchell never signed an agreement with respect to the transfer to dispatcher, there was an oral agreement between the parties. As noted above, at the meeting between Yecco, chief of police, chief financial officer, and Mitchell, the job specifications of the dispatcher position and his salary were discussed. Yecco added that Mitchell was being paid a higher salary than other full-time dispatchers because the Borough was trying to maintain his employment. Yecco acknowledged that Mitchell had some misgivings about the dispatcher position, specifically, he was unsure if he could perform the duties of a dispatcher. However, Yecco stated had he not been able to fulfill his duties, Mitchell would have been placed in the position of dispatcher trainee and he would have had the opportunity to learn the position.

The position of relief dispatcher was created because of the void primarily in the Borough's dispatch department as well as to accommodate Mitchell. Yecco stated that Mitchell's experience as an EMT would be invaluable to his transfer to the position of dispatcher. Appellant had experience in dealing with calls as an EMT and handling the same, although Yecco did not know whether or not EMTs in the Borough ever used dispatching computer equipment.

Yecco reiterated he had a meeting with Mitchell on April 20, 2012. At the meeting, Mitchell was offered the position of dispatcher or dispatcher trainee. It was relayed to him that he would be made to suffer no loss of wages and he would be making the same amount of money working less hours, no loss in seniority. Prior to offering this position, Yecco did not recall the Borough having the position of relief dispatcher. After the meeting, Yecco believed Mitchell understood and accepted the conditions of the dispatcher position, including that he would be going to training. Yecco was not sure whether or not the training provided by the Borough to Mitchell was in compliance with N.J.A.C. 17:24-2.2. However, Yecco stated Mitchell made no requests for accommodations related to the training because of his mental or physical hardships or incapacibilities. Although Mitchell stated he had some concerns with the training, he did not ask for further assistance or accommodations. Additionally, the Borough indicated to Mitchell the training would be provided and if there were issues, they would deal with them. Yecco testified the Borough determined sometime in March 2012 that appellant would be transferred once he had a declaration from his doctor that he was being released with limitations.

Yecco acknowledged he received Mitchell's letter dated May 30, 2012 indicating he was applying for disability pension. However, at the time of the April 20, 2012 meeting, Yecco understood that Mitchell was going to appear for the training and the Borough would schedule the same through the police department. In response to Mitchell's May 30, 2012 letter, Yecco sent a letter to Mitchell stating he was still required to attend the training because the Borough maintained that Mitchell and his doctor certified that he was not totally and permanently incapacitated. The assignment of dispatcher was a reasonable accommodation so that Mitchell could continue as a productive employee in

the Borough through retirement. The Borough could not approve Mitchell's request for a pension or disability pension because he was not totally and permanently incapacitated.

Yecco was not aware that Mitchell filed for retirement in March of 2012 because the letters sent from the Division of Pension and Benefits would have been sent to the Borough's CFO, not Yecco. Yecco held the April 20, 2012, meeting based on the receipt of Mitchell's doctor's note indicating he had limitations, not because he was aware that he filed for retirement. Yecco was unaware of whether any police officer, EMS employee, or firefighter was working as a full-time scheduled dispatcher. However, Yecco felt Mitchell could do the job because it was in the same Department that he was currently situated and the duties of the two positions were related. Yecco had no knowledge as to what appellant's schedule would have been as a dispatcher.

Yecco felt Mitchell's disability pension claim was not a legitimate claim because he had three other jobs, all of which involved lifting heaving lighting and sound equipment. In fact, on the day he was supposed to report to training, appellant was at the elementary school doing just that. Additionally, Yecco personally observed Mitchell moving heavy-duty sound equipment at a park and was provided photographic evidence that Mitchell was operating a lawn mower on September 12, 2012, well after he was deemed to be permanently restricted as to the type of work he could perform.

Neil Young ("Young") is the former chief financial officer ("CFO"), for the Borough of Wildwood Crest. Part of Young's duties were to review budgetary items. He would occasionally meet with the Borough's commissioners to review budgets. Young recalled having discussions with DePaul or Mayor Groom regarding excessive pay to the police officers to cover when dispatchers did not come in or when they did not have a relief dispatcher available. In fact, salary and wage line items were always on their minds. As a result, Young remembered discussing the possibility of adding a relief dispatcher to eliminate the use of police officers on overtime to cover dispatch duties.

Young had little involvement with Mitchell until he was on a workers' compensation case. At that time, the workers' compensation check would be sent to Young, and in turn he would give it to Mitchell. Aside from his role as Borough CFO, Young served as the Borough's certifying officer for pension reasons. As far as pensions, Young recalls receiving documentation from the Division of Pensions with regard to Mitchell and sending records/letters back and forth. Young acknowledged he received a letter from the Division of Pensions dated April 10, 2012, asking if there was a job available for the Mitchell. As to whether there was a position available for Mitchell, Young would not have determined that, rather the Borough administrator would make that decision. After it was determined if a job was available, Young's response to the pension board would be based upon the Borough administrator's determination.

Young sent a letter dated May 1, 2012 to the Division of Pension and Benefits. (T1:161-10.) In said letter, Young stated he was unable to complete the pension forms because Mitchell was not totally and permanently disabled. His understanding of the law was that an applicant must be permanently and totally disabled to receive a disability retirement; Mitchell was not. The letter stated that Young was notifying the Division that a reasonable accommodation had been made and that a job was offered and subsequently accepted by Mitchell. This representation was based upon a meeting Young had with Mitchell, Yecco, DePaul and Mr. Hawthorne.

According to Young, Yecco presented Mitchell with the offer to become a dispatcher. Mitchell had some concerns about a learning disability and that he may not be able to complete the training. However, at the end of the meeting, Young assumed all parties were on board with the assignment. Young thought Mitchell was going to take the position as dispatcher and would attend the training. Additionally, the Borough paid for the training. Young testified that also at the meeting, Mitchell was informed that he would keep the same salary as he had as an EMT, the same benefits, and the same seniority. Young added Yecco told Mitchell the Borough would do everything in its capacity to help him make it through the training. Mitchell did not attend training.

On cross-examination, Young reviewed letters and determined appellant applied for his pension before May 1, 2012. The reason it took the Borough some time to respond to the Division of Pension and Benefits letter of March 2012 was because the Borough disagreed with Mitchell's application for disability retirement. Although there was no actual letter sent to Pensions until May, Young recalled being in communication with the Division throughout the process.

Young stated Yecco dealt with personnel matters, including making reasonable accommodations. Young had no involvement in title changes or position changes of employees, only salaries. (T2:182-7.) There were no adjustments to appellant's salary because he never showed up for work after the April 2012, meeting as he was out on paid personal leave until training was to begin on June 4, 2012.

Chief Thomas DePaul ("DePaul") is the Borough's former chief of police. Part of his duties included supervising the dispatchers and the rescue squad, both fell under the Department of Public Safety. Although the dispatchers were under his command, DePaul did not directly supervise the dispatchers, they were supervised by sergeants or medium level supervisors.

DePaul became involved when the Borough was attempting to find continued, suitable employment to accommodate Mitchell. After discussions with the Borough's administrator, DePaul made the determination that a position of dispatcher could be offered to him. DePaul stated during budgeting that he frequently had discussions with administration related to overtime payments to police officers for fill-in dispatcher duties. If he made Mitchell a dispatcher, it would have allowed the Borough to have a relief dispatcher on staff and eliminate the overtime payments to the police officers.

DePaul testified he first spoke to Mitchell about the position in March 2012. It was a short conversation and DePaul advised Mitchell they needed to sit down with the administrator with respect to the dispatcher position. During this first meeting, Mitchell did not indicate to DePaul that he did not want to consider the job being offered to him.

(T2:193-17.) Additionally, during the conversation, DePaul did not recall if Mitchell indicated he was going to submit his retirement papers. (T2:193-20.)

Thereafter a second meeting was held in April between DePaul, Yecco, Young and Mitchell. At the meeting, the individuals discussed the position of dispatcher for Mitchell, the time he had on the books, how the time would be utilized, seniority and the job duties. Mitchell's salary was to remain the same as the EMT job and he would maintain his seniority. In order to have the position of dispatcher, he would have to complete training just as any other dispatcher would; 911 training and EMD training. At the meeting, it was DePaul's understanding that Mitchell was going to be enrolled at training. DePaul stated that Mitchell was concerned whether or not he was able to complete the training, but DePaul compared the dispatcher position/training to the EMT job he already had and expressed to Mitchell the similarities between the two. DePaul believed the training for the EMT position is more difficult than the dispatcher training.

DePaul first learned that Mitchell was not going to attend the training on June 4, 2012; the first day he was scheduled to report. DePaul received a call from Borough Administrator Yecco advising him that Mitchell was down at the elementary school with DJ equipment. In response to the telephone call, DePaul viewed the video of the cameras from the elementary school which showed Mitchell coming in and out of the school on the day he was supposed to be at training. Mitchell never informed DePaul that he would not be at the training or that he intended to file for retirement.

DePaul was aware of Mitchell's additional businesses, including a landscaping business and a lighting business. DePaul had asked his officers that if anyone noticed Mitchell working a second job, that they document the same. As to the particular incident of August 17, 2012, DePaul personally saw Mitchell pushing a wheelbarrow working with mulch.

DePaul indicated that he did not know the extent of Mitchell's limitations but knew they included lifting. Additionally, had there been concerns about his ability to sit for

extended periods of time; it would have been a non-issue because the Borough was in the process of redoing the dispatch center to include tables that allowed the employee to stand and work.

On cross-examination, DePaul recalled the April 20, 2013 meeting and the participants which included: Yecco, Young, Mitchell, and himself. DePaul did not recall if Hawthorne was present. Although DePaul could not remember if Mitchell used the exact words of "yes, I am accepting the position of dispatcher", DePaul recalls that was his understanding of what was being said. DePaul reassured Mitchell the Borough would get him the proper training and would work with him, as they all were experiencing a learning curve with this situation. It was never discussed that if Mitchell was not able to obtain the certification through training that he would be subject to termination. At all times relevant, DePaul stated that he did not know if Mitchell had notified anyone of his intentions to retire until after training had started.

Mayor Carl Groon was Mayor of Wildwood Crest for twelve years and in charge of the Department of Public Safety. Mitchell was initially hired as an EMT and had one prior discipline about lying about some issue on the job.

Mitchell was offered the job of Dispatcher but declined it and does not know why. "He was able to do the EMT job. . . even with his issues, he would have been able to be a dispatcher." Mitchell was offered the job because "it would have been a good fit" and "it was close to his then current salary as an EMT." Incidentally, his salary would have been higher than the rest of the dispatchers.

Two years later, the offer of the dispatcher position was open and, again, rejected by Mitchell. After that, they discussed the County dispatch system and the job was no longer opened (March 12, 2015) but instead a local dispatcher, not county dispatcher.

On cross-examination, Mayor Groon testified that Mitchell was not the reason that the Borough joined the County dispatch, in fact, it was a monetary issue with the 2 percent

cap that the Governor imposed, coupled with the fact that a fifth dispatcher is not financially possible.

He confirmed that the offer to Mitchell of the dispatcher position was never put in writing. Mitchell as a dispatcher would have been "good" for Wildwood Crest, but he never took accepted the position and never showed up for training. In fact, Mitchell submitted a letter prior to training that said he would not be attending.

For Appellant

Jasen Mitchell, is currently thirty-seven years old and had been employed by Wildwood Crest as an EMT. He responded to emergencies and provided medical assistance. In 2003, he passed the EMT exam and started at Wildwood Crest soon after. Admittedly he had a hard time passing the test but spent eight years as a full-time EMT.

He recalled that in February 2010, he slipped on ice and fell while on a call as an EMT loading a patient and hurt his knee. He went to a workers' compensation doctor for two years before reaching maximum medical improvement. However, he was told that he was going to need knee surgery by the age of forty-seven.

After the two years, he applied for PERS accidental disability because the doctor said he could not perform the duties of an EMT. Sometime thereafter, he received a letter offering him the position of dispatcher (March 21, 2012; R-2). (R-6). At that time, Mitchell had a lot of questions, especially what would happen if he could not pass the test, or if he could not perform the duties of the job. He had concerns about performing the job duties because, by himself he was concerned about "doing 7 things at once" and the "high turnover rate."

He claims that he was told that if he received an accidental pension, it would cost the Borough "one to two million dollars" over the course of his life and if he had trouble with the job, the town would "cross that bridge" when they got to it. He noted that he

never received anything in writing regarding training. Only orally was he noticed that he must go to training. (R-10). Mitchell thought he was being scammed and was uneasy about the job of dispatcher. Although the salary and seniority were the same, the raises were different and it made no sense to him because the "top out" salary for dispatcher was a little lower. He said he never accepted the position and said he would let them know.

There was clearly an "expectation" from Gecko that he would go to training. However, Mitchell never led them on that he was going to accept the job. In fact, his impression was that he was only offered the job because if he got a pension it would cost the City too much money.

When confronted with Exhibit R-34, Mitchell described that "this was what the Borough was supposed to fill out but did not." However, Mitchell received several letters from pensions that stated. (Exhibits R-8 through R-11.) When confronted with (R-13), Mitchell claimed that the letter came "after the fact" and was "late" on June 5, 2012 or June 6, 2012, and was in response to his May 30 letter and was clearly a rejection of his accidental pension application.

Mitchell testified that he did not go to training because he did not want to go and that he rejected the job to pursue his pension claim. He recalled that on June 4, 2012, the day of training, he was at school performing duties as a DJ for "Play Day" in the school. A detective did surveillance on him and used school video to do surveillance on him. (R-33).

There are allegations that he can perform the duties of the job and is not injured. However, appellant explained that he makes accommodations to get through the day. He is a DJ and owns a Christmas lighting company. He uses hand-trucks and has employees do the work. He noted that the Borough never restricted side-job participation.

He indicated that the PNDA lists for removal on June 11, but nothing after June 4, 2012 (day of training) that said removal. In fact, (R-1) indicates that he failed to show up for work for five consecutive days, from June 4, 2012 through June 8, 2012.

Lastly, he noted that the sedentary nature of the job is also a problem because his knee bothers him when sitting for a long period of time. Also, the fact that the Borough has not brought on a fifth dispatcher is a problem because when there are money problems the people who get fired first are the ones not needed.

On cross-examination, Mitchell testified that he had a diagnosis of a disease similar to dyslexia but was not sure what it was and did not disclose it in his application to Wildwood Crest where it asks for his disability. His application enclosed twenty certificates that he performed fine but he was still worried about not passing the dispatcher test because he thought he would be fired. Again, he was told "we would cross that bridge when we cross it." (R-37).

When he decided to pursue the disability, he claimed that a dispatcher is more complicated and "harder." "An EMT has one job, a dispatcher has as many as five." He claims that Yecco threatened that he would not get a pension. Mitchell claimed that he corresponded to the Borough that he was not attending the training. (R-12). However, the letter is not indicative of that fact.

He still has the DJ and tree lighting business. Fortunately, now as a DJ he has six trailers and the Christmas lighting is "not a small business." He has employees for every business and does not really have to be involved.

Mitchell Hawthorne was formerly employed by Wildwood Crest as a lieutenant in the police department.

He alleges that he talked to Mitchell in March 2012, about putting in papers for disability for the injury that he sustained. He recalled a meeting where Mitchell expressed

concerns about what the dispatcher job entailed and whether or not an EMT and dispatcher were similar.

He recalled that he was ordered by DePaul to issue a letter and scheduled training for Mitchell. So, he did it. He was never "ordered to cancel training" and the Borough still paid for it. (R-10). On June 4, DePaul told him to check the school security cameras and observe Mitchell around the school. He made the recordings as ordered and gave them to the Chief. He remembered that Mrs. Yecco was the one who called the Chief and reported Mitchell at the school on June 14.

There was an indication that there was a "Brady Letter" issued by prosecutor Robert Taylor regarding Michael Hawthorne. The letter noted that Hawthorne is "deceitful and demonstrated dishonesty and lacks integrity." Hawthorne noted that Taylor was the "Judge, Jury and Executioner of Michael Hawthorne." He thinks it is "hogwash" and would never not tell the truth.

On cross-examination, Hawthorne testified that the letter says he is "deceitful and demonstrated dishonesty and lacks integrity." Also, Mitchell never asked for a Union representative, wife, or witness at the meeting, contrary to what Mitchell said.

He was ordered by DePaul to photograph Mitchell if he saw him when not working as an EMT. He saw him using a "stand on and steer" lawn mower. Also, he was asked to be a soccer coach on July 16, 2013. He said the Chief asked him to move one of the school cameras so that it would cover the soccer field. He took photo R-33, because he was following up on DePaul's request (September 10, 2012 lawn mower photo).

Findings Of Fact

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must 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). Also, "[t]he 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) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I **FIND as FACT** that Mitchell was injured on the job when employed as an EMT while loading a patient. I **FURTHER FIND as FACT**, that as a reasonable accommodation, Mitchell was offered a position as dispatcher. I **FURTHER FIND as FACT** that Mitchell was ordered to attend training as dispatcher and failed to do so.

Interestingly, the underlying facts in this case are somewhat uncontested. In that I mean, all the witnesses testified that Mitchell was injured and offered the job of a dispatcher. However, the divergence is explanations on how it was offered and why he failed to show for the training. It is this explanation where Mitchell lacks credibility. The testimony of appellant's witnesses was especially credible and persuasive. Their testimony, as a whole, was more convincing and explained the logical facts without embellishing or piling on.

Conversely, Mitchell's testimony was not credible in terms of his factual recitation of the cases nor with the manner in which it was given. His own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. Mitchell

simply was not credible, he was evasive and condescending in the tone of his testimony as well as sarcastic. He claims that he was bullied by the Borough in taking the dispatcher job but just wanted to be out on disability. However, it was the conspiracy theory he attempted to portray against him that fell short on believability.

It was obvious that Mitchell attempted to "sell" his version of the facts to the undersigned. His recitation and demonstration of the contact with the Borough officials was not credible nor true.

LEGAL ANALYSIS AND CONCLUSION

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended or removed, the employer must show just cause for its proposed action. The law provides that the duty is to ensure the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and

regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(11). If sufficient cause is established, then a determination must be made on what is a reasonable penalty. In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in Bock, 38 N.J. at 519. In Bock, the officer had received a thirty-day suspension and seventeen minor disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, 38 N.J. at 522-24.

In disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), <http://njlaw.rutgers.edu/collections/oal/> (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a) (2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't., CSV 7553-02, Initial Decision (October 27, 2003), <http://njlaw.rutgers.edu/collections/oal/> (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

The rule governing resignation not in good standing is found at N.J.A.C. 4A:2-6.2(b). It provides:

Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

The Civil Service Code also provides "the appointing authority or the Board may modify the resignation not in good standing to an appropriate penalty or to a resignation in good standing," Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (1963). Although the record may clearly establish that an appellant was absent without authorization in excess of five consecutive business days, if the appellant was unable to work due to medical reasons (no evidence was presented on this issue), a resignation not in good standing should be modified to a resignation in good standing. Sykes v. New Jersey Judiciary, Middlesex Vicinage, CSV 4461-04, Initial Decision (July 12, 2005), adopted, Comm'r (September 23, 2005), <<http://njlaw.rutgers.edu/collections/oal/final/csv4461-04.pdf>>; Taylor v. New Lisbon Medical Center, CSV 2842-05, Initial Decision (December 9, 2005), adopted, Comm'r (January 18, 2006), <<http://njlaw.rutgers.edu/collections/oal/final/csv2842-05.pdf>>; Salley v. Hudson County Dep't of Roads and Public Property, CSV 11813-09, Initial Decision (January 4, 2011), adopted, Comm'r (February 18, 2011), <<http://njlaw.rutgers.edu/collections/oal/final/csv11813-09.pdf>>. The validity of modifying a resignation not in good standing has been settled law in this New Jersey for some time. See Weil v. Atl. County Dep't of Public Safety, 97 N.J.A.R.2d (CSV) 413, 418; McLaughlin v. N.J. Civil Serv. Comm'n, 137 N.J. Law 338 (Sup. Ct. 1948), aff'd, 1 N.J. 284 (1949); Griffin v. City of Jersey City, 4 N.J. Super. 81 (App. Div. 1949).

Here, there is no dispute that appellant had medical issues that precluded him from performing the duties of an EMT. There also is no dispute factually that Mitchell was offered a job as a dispatcher, was scheduled to appear for training and failed to appear for the training without notice to the Borough. Respondent argues that Mitchell is seeking relief by asserting he filed his paperwork seeking a disability pension and, unfortunately,

his application for a disability pension does not excuse his failure to appear at training without notice under either the law or equity. I agree.

The Borough of Wildwood Crest is a Civil Service municipality and is, therefore, governed by the Civil Service Act, N.J.S.A. 11A:1-1, et seq. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed towards attainment of merit appointment and broad tenure protection. Moore v. Central Transp. New Jersey Dept. of Corrections, 92 N.J.A.R.2d (CSV) (N.J.Admin.), 1992 WL 240328 (citing Essex Cty. No. 1, N.J. Civ. Serv. Assoc. v. Gibson, 114 N.J. Super. 576, 580-581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972)). The Act recognizes the public policy of this State that an appointment authority must not be saddled with an employee who is "absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing." Id.; see also N.J.A.C. 4A:2-6.2.

Here, appellant admits he did not attend the dispatcher training sessions on June 4, 2012 through June 8, 2012. At that time, he was still an employee of the Borough and would have been compensated as such, had he appeared for training. Mitchell argues that he was unaware the training was required because he was not going to accept his accommodation to the position of dispatcher and instead would continue his claim for a disability pension. It is argued that his application for a disability did not act as a resignation of his employment. Respondent argues that he cannot "have his cake and eat it too." "Had appellant simply filed a disability pension application and resigned from his position as an EMT using proper procedures, we would not be in this Court." I agree.

Factually, by his own admission, after filing a disability pension application in March 2012, Mitchell continued to meet with Borough administration and explore reasonable accommodations that would allow him to continue his employment with the Borough. This led to the Borough offering him dispatcher training with the ultimate intent of a lateral transfer to public safety telecommunicator or trainee with the same pay and

status. He never rejected this proposed accommodation, allowing the Borough to make arrangements for training and appellant's future employment.

Respondent's counsel correctly argues that Mitchell's indecisiveness in accepting or rejecting a reasonable accommodation resulted in an expense to the Borough when he failed to show for training. As expressed through the testimony of Yecco, appellant's claim that his filing of a disability pension application somehow altered his position with the Borough is without merit. Respondent further correctly argues that, in order to collect as an employee in the Public Employees' Retirement System ("PERS"), said employee must be permanently and totally disabled from participating in work their employer has available. Kelly v. Board of Trustees, Public Employees' Retirement System, 2017 WL 1548705 (App. Div. 2017), (citing Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 130-31 (App. Div. 2008) (finding in order to establish entitlement to ordinary benefits, an applicant must establish an incapacity to perform duties in the general area of their regular employment, rather than merely showing an inability to perform his or her specific job). By contrast, a public safety employee under the Police and Firemen's Retirement System ("PFRS"), may collect a disability pension and continue working in a non-police and fire related position. See State of New Jersey Division of Pensions and Benefits Fact Sheet #86, Post-Retirement Employment Restrictions. Because of this distinction, appellant's argument that his application for a disability pension somehow impacts his obligations to the Borough, under the circumstances, is not appropriate because he was not permanently and totally disabled and could complete the duties which the Borough was attempting to assign. Bueno at 131 (finding an applicant is not entitled to benefits by merely "establishing incapacity to performing duties in the general area of their employment," but rather the applicant must demonstrate physical inability to perform substantially different duties or produce evidence of general physical unemployability).

Respondent argues correctly that it was obvious that Mitchell sought to keep the Borough and the potential dispatcher position in limbo while proceeding with his disability application. The determination as to whether or not there is a reasonable accommodation

for his disabilities must pre-date a determination on a PERS disability application because the application cannot be processed until a determination on whether a reasonable accommodation was necessary. Mitchell would have had to resign from his position as EMT or be terminated for inability to perform duties. That is not the case here.

Under N.J.A.C. 4A:2-6.2(b), five or more consecutive days absence without approval of an employee's supervisor is regarded as abandonment of the position and deemed a resignation not in good standing. In the current instance, Mitchell did not return to work for training.

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Perth Amboy v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at this de novo hearing are whether Kinion is guilty of the charge brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry, 81 N.J. 571; Bock, 38 N.J. 500. In this matter, the City bears the burden of proving the charges against Kinion by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Suero, CSV 5039-04, Final Decision (June 22, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>.

There is no debate that Mitchell failed to report to work for training, or that he failed to contact anyone to advise them. Mitchell's attempts to cloud the issue by arguing that he was confused, did not understand, and was unaware of the training is not persuasive.

The record establishes that Mitchell had the duty to appear for training. Based upon the foregoing, I **CONCLUDE** that the Borough has met its burden of proving by a preponderance of the credible evidence, that Mitchell was absent from training duty for five or more consecutive business days without approval of his supervisor. It is within the discretion of an appointing authority as to whether a request for a leave of absence should

or should not be granted. See Smith v. College of New Jersey, CSV 977-98, Final Decision (October 14, 1998), <<http://njlaw.rutgers.edu/collections/oal/>>. I, therefore, **CONCLUDE** that the Borough did not grant Mitchell any leave of absence from the training. Accordingly, I **CONCLUDE** that Mitchell's absence from training effectuated a resignation not in good standing. Mitchell is charged with resigning from his position, not in good standing, pursuant to N.J.A.C. 4A:2-6.2(b). Based upon the above findings, I **CONCLUDE** that Mitchell has resigned from his position not in good standing effective June 1, 2012.

In an appeal, from a major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.A.C. 11A:2-21, N.J.A.C. 4A:2-1.4(a). This burden requires the appointing authority to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty of the stated offenses. Atkinson, 37 N.J. 143; Polk, 90 N.J. 550. Here, the respondent charges the appellant with resignation not in good standing.

Based on testimonial and documentary evidence presented, in regard to charges creating violations of N.J.A.C. 4A:2-2.3(a), I **CONCLUDE** that the Civil Service Rule N.J.A.C. 4A:2-6.2(b), resignation not in good standing, if an employee is absent from duty for five or more consecutive business days, or has not returned to work for five or more business days following an approved leave of absence, without the approval of his superior, he shall be considered to have abandoned his position and shall be recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b)(c). In the instant matter, appellant was absent for more than five consecutive days without a supervisor's approval. Respondent has proven that Mitchell abandoned his employment by failing to attend training. I, therefore, **CONCLUDE** that the penalty of a resignation not in good standing on the charges as set forth herein, is reasonable and warranted and the charge should be upheld.

ORDER

It is **ORDERED** that Jasen T. Mitchell is hereby deemed to have **RESIGNED** from his position not in good standing, effective June 1, 2012.

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.

May 15, 2018

DATE



DEAN J. BUONO, ALJ

Date Received at Agency:

5/15/18

Date Mailed to Parties:

5/15/18

/dw

APPENDIX

WITNESSES

For Appellant:

Jasen T. Mitchell
Michael Hawthorne

For Respondent:

Kevin Yecco
Neil Young
Former Borough Chief of Police Thomas DePaul I
Former Borough Mayor Carl Groon

EXHIBITS

For Appellant:

None

For Respondent:

- R-1 Preliminary Notice of Disciplinary Action to Jasen Mitchell dated June 11, 2012
- R-2 Letter dated March 21, 2012, by clerk/administrator Kevin Yecco to Mr. Mitchell
- R-3 Letter dated April 10, 2012, from NJ Division of Pension and Benefits to Borough asking if there is "any other job duty available" for Mr. Mitchell
- R-4 Shore Orthopedics modified duty form dated April 10, 2012
- R-5 Shore Orthopedics maximum medical improvement discharge with restrictions dated April 17, 2012

- R-6 Exchange of emails dated April 17, 2012, between clerk/administrator Yecco and the Borough's workers' compensation senior lost time adjuster at Scribal Associates concerning reasonable accommodation position
- R-7 Letter from NJ Division of Pensions dated April 23, 2012, to Borough CFO Neil Young - notice of Mitchell submission application for disability retirement
- R-8 Second notice letter from NJ Bureau of Retirement dated April 27, 2012, to Mitchell for documents needed
- R-9 Letter from Borough CFO Neil Young dated May 1, 2012, to NJ Division of Pensions as to CFO's inability to complete form
- R-10 Letter from Lieutenant Michael Hawthorne, Sr. to Mitchell dated May 16, 2012 – depletion of accumulated time and assignment to telecommunicator operator notice effective June 2, 2012, with copies of training enrollment
- R-11 Final notice from NJ Bureau of Retirement to Mitchell dated May 29, 2012 – documents needed for application
- R-12 Letter from Mitchell to "Whom It May Concern" dated May 30, 2012 – submission of application, accidental disability pension
- R-13 Letter dated June 1, 2012, from Kevin Yecco, Clerk, to J. Mitchell regarding depletion of time, reassignment of duties, opposition to disability retirement, no approved sick leave
- R-14 Memo from Lieutenant Michael Hawthorne to Chief DePaul dated June 27, 2012, with copy of May 16, 2012, letter of instructions to J. Mitchell providing required training and dates and instructions for same [See exhibit No. 10]

- R-15 Copies dated June 2, 2012, NJ Civil Service Commission job specifications for public safety telecommunicator and emergency medical technician job specifications
- R-16 Agreement between Borough of Wildwood Crest and Wildwood Crest police safety telecommunicators, January 1, 2011 through December 31, 2013, with approval resolution
- R-17 Agreement between Borough of Wildwood Crest and Wildwood Crest rescue career employees, January 1, 2012 through December 31, 2014, with approval resolution
- R-18 Copy of N.J.A.C. 4A:2-6.1, resignation in good standing
- R-19 Copy of N.J.A.C. 4A:2-6.2, resignation not in good standing
- R-20 Employment application of Jasen Mitchell dated January 12, 2006
- R-21 NJ Civil Service Commission disciplinary action history, J. Mitchell suspension, September 21, 2009 to December 4, 2009
- R-22 Copy of City of Wildwood resolution and contract awarding grass cutting bid to Back to Roots LLC (entity owned by Jasen Mitchell)
- R-23 Wildwood Crest incident report dated August 23, 2012, Chief Thomas DePaul, observation of Jasen Mitchell providing landscaping services at Fox Park, Wildwood
- R-24 Final notice of disciplinary action dated August 23, 2012, resignation not in good standing