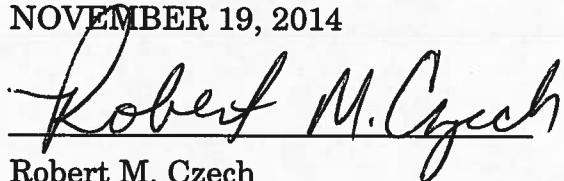


Re: Gregory Brooks

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
NOVEMBER 19, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 17226-13

AGENCY NO. CSC 2014-I319

GREGORY BROOKS,

Appellant,

v.

CITY OF NEWARK POLICE DEPARTMENT,

Respondent.

Alfred V. Gellene, Esq., for Appellant (Fusco and Macaluso, attorneys)

Kenneth G. Calhoun, Assistant Corporation Counsel, for Respondent (City of Newark Law Department)

Record Closed: October 1, 2014

Decided: October 15, 2014

BEFORE **SANDRA ANN ROBINSON, ALJ:**

STATEMENT OF THE CASE

Appellant, Detective Gregory Brooks, has been employed with the Newark Police Department for eighteen years. On July 27, 2013, appellant's regularly assigned supervisor was not on duty and Sergeant Luis Osorio was named acting supervisor for that date. Detective Brooks started work at 7 p.m. on July 27 and was scheduled to end his shift at 3 a.m. on July 28. When Sgt. Osorio came on duty at approximately 11:30

p.m., he checked the duty records for the shift, learned there would be a minimum manpower shortage from 3:00 a.m. to 8:00 a.m., and determined that one officer had to work an involuntary overtime tour. Allegedly, Sgt. Osorio followed the instructions for "Equitable Distribution of Involuntary Overtime" as per Newark Police Department Director's Memorandum – Number 04-1052, dated July 27, 2004, prior to appellant's name being placed in a hat with three other officers names and appellant's named being picked to work overtime. The three other officers were present for the name-picking, but appellant was not present nor was he informed of the picking prior to being told by Sgt. Osorio that his (appellant's) name was selected by another officer, Heriberto Eddie Figueroa.

Det. Brooks informed Sgt. Osorio that he could not work overtime from 3 a.m. to 8 a.m. because of a doctor's appointment in the morning. Sgt. Osorio insisted that Det. Brooks could work and still make the appointment since he would get off at 8:00 a.m. Sgt. Osorio and Det. Brooks had a brief dialogue about the overtime that ended with appellant saying, "I am not staying, do what you have to do and I am doing what I have to do." Det. Brooks booked-off sick with a migraine headache one hour later.

On August 28, 2013, respondent, Newark Police Department, filed a Preliminary Notice of Disciplinary Action (PNDA) charging appellant with acts of insubordination, malingering, and other sufficient cause, with removal as a disciplinary action. The PNDA was personally served on appellant on September 6, 2013. On November 8, 2013, respondent issued a Final Notice of Disciplinary Action (FNDA) that sustained the charges of acts of insubordination, malingering, and other sufficient cause and amended the disciplinary action to a fifteen-day suspension, from December 2, 2013, ending December 20, 2013. Appellant pleaded not guilty and waived a hearing for the matter to be transferred to the Office of Administrative Law (OAL). The following are the actual charges and specification respondent sustained against appellant:

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 18:8 - ACTS OF INSUBORDINATION — Department members shall not commit acts of insubordination or disrespect to any superior officer.

CHARGE I B: Violation of Civil Service Rule 4A:2-2.3(a) 2. An employee may be subject to discipline for: 2. Insubordination.

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 18:11 - MALINGERING - Department members shall not feign illness, injury or incapacity to perform required duties, nor shall they fail to follow a lawful order issued by the Police Surgeon or other Surgeon acting in his stead.

CHARGE II B: Violation of Civil Service Rule 4A:2-2.3(a) 11. An employee may be subject to discipline for: 11. OTHER SUFFICIENT CAUSE.

SPECIFICATION: On July 27, 2013, Police Officer Gregory Brooks did commit an act of insubordination to Sergeant Luis Osorio, a superior officer, to wit: after being ordered to work an involuntary tour of overtime due to a minimum manpower shortage, Police Officer Brooks stated to Sergeant Osorio, "I am not staying, do what you have to do and I am doing what I have to do." Police Officer Brooks then booked-off sick with a headache.¹

PROCEDURAL HISTORY

The Civil Service Commission Division of Appeals and Regulatory Affairs transmitted this matter to the Office of Administrative Law (OAL) on November 27, 2013, as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. The case was scheduled for settlement conferences on January 3 and 28, 2014 with The Honorable Robert J. Giordano and The Honorable J. Howard Solomon, respectively. The January 28 conference was postponed at the request of Alison Brown Jones, Assistant Corporation Counsel - Newark.

¹ "I am not staying, do what you have to do and I am doing what I have to do" is the phrase used in the specification. The testimony of Sgt. Osorio is that appellant said, "You do what you have to do and I will do what I have to do," which could yield a different interpretation; meaning that appellant had made a previous commitment. The testimony of P.O. Vargas about the actual statement made by appellant was of little use because Lt. Mos paraphrased appellant's statement when asking P.O. Vargas if he heard appellant say "Do what you have to do and I will do what I have to do" P.O. Vargas answered "Yes, he said it at one point." The phrase Lt. Mos used is not the phrase used in the specification. P.O. Vargas testifies that he heard appellant say, he had a medical emergency the next day and could not stay.

On February 19, 2014, the case was assigned to the undersigned. On February 28, 2014, Anna P. Pereira, Corporation Counsel–Newark, notified OAL that Kenneth G. Calhoun, Assistant Corporation Counsel would replace Alison Brown Jones on the case. A prehearing was scheduled for April 23, 2014, and postponed due to a medical emergency of one attorney. The parties continued talks to resolve the matter prior to a litigation date and held a status conference on July 31, 2014, and provided a written status report on August 6, 2014. The hearing date of October 1, 2014, was agreed on and on that date testimony was completed, the exhibits listed in the Appendix were marked into evidence and the hearing record was closed.

ISSUES

The issues are whether (A) respondent has set forth and established by a preponderance of credible evidence that appellant has committed Acts of Insubordination, is guilty of malingering and demonstrated other significant cause, so as to be in violation of Newark Police Department Rules and Regulations and New Jersey Administrative Code Civil Service Rule N.J.A.C. 4A: 2-2.3(a)(2) and N.J.A.C. 4A:2-2.3(a)(11); (B) If the charges are substantiated, is the penalty of a fifteen-day suspension warranted when considering the circumstances that led to the charges of insubordination, malingering and other sufficient cause?; and (C) Did Sgt. Osorio follow the instructions set forth in the Newark Police Department Director's Memorandum on "Equitable Distribution of Involuntary Overtime" - Number 04-1052, dated July 27, 2004?

SUMMARY OF TESTIMONY

Respondent's Witnesses

Sgt. Luis Osorio has been employed with the Newark Police Department for eighteen years. He became a Sgt. in 2007 and works in the Fifth Precinct South District. Sgt. Osorio graduated from Police Academy with appellant Det. Brooks. Sgt. Osorio testified as follows,

I was Det. Brooks' supervisor only on July 27, 2013; I was the Acting Lieutenant. I completed an Investigation of Personnel Report, which is my complaint about the infraction that happened between appellant and me on July 27. I submitted the report to the Captain.

Three officers had called out sick for the July 27 11 pm to July 28 7 am shift and more manpower was needed. Det. Brooks' name went into a hat with three other names because no one volunteered for the overtime shift. I am aware of the memorandum on Equitable Distribution of Involuntary Overtime, dated July 27, 2004. I believe I put out a general announcement to request volunteers. I know I did not get volunteers.

Det. Brooks told me he was not there when his name was picked. I informed him that Officer Heriberto (Eddie) Figueroa picked his name.

Det. Brooks told me he had a doctor's appointment the next morning. I told him he would get off at 8:00 am and could make the appointment. This led to a verbal altercation and I ordered him to stay and work. Det. Brooks was upset, irate and not happy. He said his blood pressure was high and booked-off an hour later.

On cross-examination Sgt. Osorio responded,

On July 27, 2013, I came on duty at 11:30 pm and looked at the roster and saw it was short-staffed. I finished checking on things at 11:50 pm. An officer can book-off up to one hour before the shift begins.

It is true that my Investigation of Personnel Report does not include that I followed the procedures outlined in the Memorandum on Equitable Distribution of Involuntary Overtime, dated July 27, 2004.

My tour of duty ended at 7:00 am on July 28. Det. Brooks would have gotten off at 8:00 am on July 28, 2013. It was after 11:50 pm on July 27 when I ordered Det. Brooks to work overtime; he was still on duty.

I do not know if Det. Brooks complained of a headache to the previous supervisor. I just know he booked-off with a

migraine headache and said, "You do what you have to do and I will do what I have to do."²

Wayne Vargas is a police officer with the Newark Police Department assigned to the Second Precinct on Lincoln Avenue. He has known appellant for eighteen years. P.O. Vargas testified as follows,

At the request of Sgt. Osorio I submitted a memo dated July 27, 2013 entitled "Officer Booking Off After Being Held Over." My memo includes that I heard Sgt. Osorio notify Det. Brooks that he had to work another five hours after his tour of duty and that Det. Brooks stated "He could not stay cause he had a doctor's appointment."

I was aware there was a shortage of manpower when I heard Sgt. Osorio order Det. Brooks to stay and when I heard Det. Brooks say he had a medical emergency the next day and could not stay.

Det. Brooks did not raise his voice, he spoke in a normal voice and was not loud. Lt. Camil Mos who investigated this matter ordered me to prepare a submission, which I dated August 21, 2013. I was asked to answer three questions about my observations on July 17, 2013:

1.
Question: Describe Det. Brooks' demeanor and tone of voice towards Sgt. Osorio.
Answer: Demeanor and tone of voice were normal.
2.
Question: Did Det. Brooks say "Do what you have to do and I will do what I have to do?"³
Answer: Yes he said it at one point.
3.
Question: Where there anyone else present that witness(ed) the conversation?
Answer: Sgt. L. Osorio, P.O. A. Ramos and this writer (Vargas).

Lt. Camilo Mos has been employed with the City of Newark Police Department for twenty-three years. During the most recent three and one-half years his assignment

² See footnote # 1.

³ See footnote # 1.

has been with Internal Affairs in the Office of Special Standards. Lt. Mos was instructed by the Commander of the Second Precinct, Captain Ivonne Roman, to investigate the July 27 incident between Sgt. Osorio and Det. Brooks. Lt. Mos testified as follows,

There is a core minimum mandatory number of officers that must be present on each shift. If the number is below core there is a Director's Memorandum to follow certain steps to seek volunteers. The memorandum is entitled "Equitable Distribution of Involuntary Overtime" as per Newark Police Department Director's Memorandum – Number 04-1052, dated July 27, 2004.

The Equitable Distribution of Involuntary Overtime Memorandum reads and requires that "When overtime arises unexpectedly that is less than seventy-two (72) hours advanced notice for planning and obtaining overtime personnel, the command responsible for the obtaining (of) personnel shall attempt to locate volunteer personnel using (the) following guidelines:

1. Seek volunteers from on-duty personnel, including broadcast on all dispatch channels and announcement at roll calls;
2. Seek off-duty volunteers from the command overtime list
3. Seek off-duty volunteers from the overtime list of other commands.

I did not investigate whether Sgt. Osorio followed the Director's Memorandum. I was directed to determine if Det. Brooks was insubordinate. I spoke with P.O. Wayne Vargas and P.O. Angel Ramos. P.O. Vargas submitted two Administrative Submissions. I did not speak with Sgt. Osorio, but I used his (Sgt. Osorio's) written Investigation of Personnel Report, dated July 27, 2013, to base my Summary, Findings and Recommendations in my investigation submission to Captain Roman, dated August 27, 2013.

In part, I recommended that the charges against Det. Brooks be sustained because of the closeness of the sequence of events and the time frame. The likelihood of the truth of having a headache was considered in regard to whether an illness was feigned. I considered the declarative nature and

timing of the statement, "Do what you have to do and I will do what I have to do."⁴

On cross-examination Lt. Mos responded,

The statement "Do what you have to do and I will do what I have to do" has to be taken in context.⁵ I do not make recommendations about punishments or penalties. If I find mitigating factors those factor are given to the upper staff personnel.

I was asked to investigate Det. Brooks because Sgt. Osorio filed an Investigation of Personnel Report. I was to determine if Det. Brooks had been insubordinate, malingered or had other sufficient cause for being disciplined. I was not asked to investigate whether Sgt. Osorio followed the Director's Memorandum and procedures for "Equitable Distribution of Involuntary Overtime."

**APPELLANT'S ADMINISTRATIVE SUBMISSION TO CAPTAIN IVONNE ROMAN,
DATED JULY 27, 2013 RECEIVED JULY 30, 2013**

Appellant Det. Brooks titled his Administrative Submission Improper Notification of Overtime/Improper Conduct of Duty Supervisor. In pertinent part, as appellant's Administrative Submission relates to the incident of July 27, 2013, and the resulting charges, it is summarized as follows,

This writer received improper notification of mandatory overtime. Sgt. Osorio displayed improper conduct inside of your command and illustrated a shameful and humiliating manner to notify me of overtime requirements. I am hereby initiating an internal complaint against Sgt. Osorio that should be investigated thoroughly by this command.

I have been with the Newark Police Department for seventeen and one-half years and have worked in various commands.⁶

⁴ See footnote #1.

⁵ See footnote # 1.

⁶ Appellant's Administrative Submission is dated July 27, 2013. As of the date of the instant OAL hearing appellant had been with the NPD for eighteen years and two months.

During all of my years with this department this is the first time that I have encountered a Supervising Sergeant who has talked to me in an undignified and humiliating manner as if I was child of his.

His deliverance and approach that evening of trying to man an open position on the midnight tour was a definite violation of General Order 5.4.5 (page 5-4) Manner of Issuing Orders: "Superior Officers shall issue orders in clear and understandable language that is civil in tone and pursuant to Department Business."

I have never in any command that I have (had) the pleasure to work under had any disciplinary charges placed against me, which is a testament and (shows) my respect of supervision and my peers.

The sequence of events that prompted this investigation, is that I was instructed to report to the second precinct by the dispatcher to speak with the desk sergeant. Upon arrival Sgt. Osorio said, "I have bad news for you." I replied "Ok what is the news." He told me my name was picked out of a hat along with four other officers and my name was chosen to remain on duty an additional five hours until the next shift. The practice of selecting personnel from a hat is a clear violation of Directors Order # 04-1052 "Equitable Distribution of Involuntary Overtime" that was drafted in 2004 by Director Anthony Ambrose. I asked Sgt. Osorio if this is the selection process that we are going to use. I also asked him why was I the only individual (whose name was placed in the hat) not notified to be present when the names were placed inside of a hat and then selected. Sgt. Osorio said to me, "You didn't need to be there I was there on your behalf." With that type of response from him it was clear to me that what was taking place was selective enforcement.

In a respectful manner I attempted to inquire of Sgt. Osorio if all means of finding personnel were exhausted as per the Director's Memorandum 04-1052 "Equitable Distribution of Involuntary Overtime" by 1) Seeking volunteers from on-duty personnel, including broadcast on all dispatch channels and announcement at roll calls; 2) Seek off-duty volunteers from the command overtime list, and 3) Seek off-duty volunteers from the overtime list of other-commands. Sgt. Osorio (while) in front of visitors of the Second Precinct making criminal reports and (in front of) on-duty personnel, went on a tirade about having earned his sergeant stripes and that he wasn't going to search for anyone else because I was going to stay regardless of what ongoing personal issues I might

have. (His) outburst in front of my peers and visitors was so demoralizing to me that it prohibited me from continuing on with my work tour due to sudden elevation of my blood pressure causing me to have a severe migraine headache, which resulted in me having an abbreviated work tour.

(Sgt. Osorio's) sudden outburst about his personal accomplishments within the police Department and (his) open threats of Departmental Charges to be placed against me, is clearly a violation of Newark Police Department Rules and Regulations Demonstration of Respect (Page 3-1) Offense 3:1.2-4 – "Officers shall demonstrate respect towards subordinates."

(Sgt. Osorio) then referenced to me "You shouldn't have come to work if you didn't want to get held over." (It is) my opinion that a supervising sergeant should not say that to a subordinate or any person who has come to work at their scheduled time to do their job. Supervisors are suppose to lead not demoralize the employees. Rules and Regulations 5:12 - "Officers should not use indecent, profane, or uncivil or threatening language regardless of provocation."

I attempted to have a private conversation with him (Sgt. Osorio) and advise him of (my) family crisis and child care issue that (my working) would bring to me and my family, if I was unable to arrive at the scheduled pre-set time to pick up my child from a nighttime sitter. My issues were never heard by the Sgt. Osorio due to his continuous outburst and rants about passing the sergeant's exam and earning his stripes.

FINDINGS OF FACT

Based on the testimony and evidence presented and having had the opportunity to observe and determine the credibility of the witnesses, I **FIND the FACTS** as follows,

1. Appellant has been employed with the NPD for eighteen years;
2. On July 27, 2013, appellant's regularly assigned supervisor was not on duty;
3. On July 27, 2013, Sgt. Osorio was named acting supervisor for that date only;

4. On July 27, 2013, when Sgt. Osorio came on duty at approximately 11:30 p.m., he checked the duty records for the shift, learned there would be a minimum manpower shortage from 3:00 a.m. to 8:00 a.m. and determined that one officer had to work an involuntary overtime tour;
5. Sgt. Osorio is required to follow the instructions for "Equitable Distribution of Involuntary Overtime" as per Newark Police Department Director's Memorandum – Number 04-1052, dated July 27, 2004, when selecting officers to work overtime;
6. Appellant's name and the names of three other officers were placed in a hat for selection of who would work overtime, from 3 a.m. on July 27 to 8 a.m. on July 28;
7. Appellant was not present for the name picking nor was he informed of the picking prior to being told by Sgt. Osorio that his (appellant's) name had been selected out of the hat by officer Heriberto (Eddie) Figueroa;
8. The three other officers were present for the name picking;
9. No evidence was submitted to show Sgt. Osorio followed or used the instructions for "Equitable Distribution of Involuntary Overtime," which would include the following three steps: 1) Seek volunteers from on-duty personnel, including broadcast on all dispatch channels and announcement at roll calls; 2) Seek off-duty volunteers from the command overtime list, and 3) Seek off-duty volunteers from the overtime list of other commands;
10. On July 27, 2013, appellant started work at 7 p.m. and was scheduled to end his shift at 3 a.m. on July 28;
11. When Sgt. Osorio told appellant to work overtime, appellant immediately told Sgt. Osorio that he could not work overtime because of a doctor's appointment in the morning;

12. Sgt. Osorio insisted that appellant could work until 8:00 a.m. and still make the medical appointment;
13. Sgt. Osorio and appellant briefly discussed overtime and the dialogue ended with appellant saying, "I am not staying, do what you have to do and I am doing what I have to do";
14. Appellant's disclosure in his Administrative Submission that the process of picking a name out of a hat to determine who would work involuntary overtime is inappropriate, if the "Equitable Distribution of Involuntary Overtime" instructions are not first implemented, is not disputed;
15. Appellant's disclosure in his Administrative Submission that selective enforcement was used on July 27, 2013, is believable;
16. Appellant's disclosure in his Administrative Submission that he attempted to have a private conversation with Sgt. Osorio, (which was unsuccessful because Sgt. Osorio did not let appellant talk), to advise of family crisis and child care issues that would occur for the entire family, if he was unable to arrive at the scheduled pre-set time to pick up his child from a nighttime sitter, is believable;
17. Appellant's disclosure on his Administrative Submission that he could not work a five-hour overtime shift because of a medical appointment on the morning of July 28 and because of night baby-sitter arrangements requiring him to pick up his child after work and the problems that would flow to his family and himself if he failed to follow through with previous plans, is believable;
18. Appellant's disclosure on his Administrative Submission that his blood pressure increased after the dialogue with Sgt. Osorio causing a severe migraine headache to come on, which caused him to book-off early, is credible;

19. Appellant booked-off sick with a migraine headache one hour later after the dialogue with Sgt. Osorio;
20. The testimony of P.O. Vargas that appellant spoke in a normal tone and did not raise his voice to Sgt. Osorio, is credible;
21. The testimony of P.O. Vargas that appellant's demeanor was normal when speaking with Sgt. Osorio, is credible;
22. Sgt. Osorio's testimony that "I believe I put out a general announcement request for volunteers," is incredible;
23. Sgt. Osorio did not write in his Investigation of Personnel Report that he used or did not use the Director's Memorandum instructions on "Equitable Distribution of Involuntary Overtime" on July 27, 2013;
24. Sgt. Osorio never testified that he followed the instructions for seeking overtime workers by implementing the three step instructions set forth in the "Equitable Distribution of Involuntary Overtime" Newark Police Department Director's Memorandum – Number 04-1052, dated July 27, 2004.

LEGAL ANALYSIS AND DISCUSSION

The New Jersey Department of Personnel rules, N.J.A.C. 4A:1-1.1 et seq., do not define insubordination; however, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g., Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). And, although the charge of "insubordination" is not defined in the Civil Service Act, the definition of the term in Webster's II New College Dictionary (1995) refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361

(2002). Insubordination generally involves a refusal by an employee to follow a direct order of a superior. Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981).

In In re Rudolph, CSV 03787-00 (consolidated), Initial Decision (December 18, 2000), <<http://lawlibrary.rutgers.edu/oal/search.html>>, the Merit System Board upheld the removal of a public works repairer for refusing to respond to the reasonable orders of his supervisor to complete an assignment. The administrative law judge (ALJ) found that appellant's employment history evidenced a pattern of refusal to accept supervision and disrespect for those who attempted to supervise him. The ALJ concluded that appellant's conduct constituted insubordination and upheld appellant's removal.

In Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967), where disrespectful conduct and a contemptuous attitude demonstrated by a police officer toward his superior constituted conduct unbecoming a police officer and insubordination, the court outlined the standards underlying civil service disciplinary procedures:

[T]he primary object and purpose of the civil service law is to secure for government, at its various levels and in all its many functions, efficient public service – “The welfare of the people as a whole, and not specifically or exclusively the welfare of the civil servant, is the basic policy underlying the law.” The provisions of such laws, as they relate to discharge or removal, “are designed to prevent the disturbance of the system, not to benefit individuals in the service except as it may assure them of a recognition of faithful and capable conduct.”

[Id. at 325.]

The purpose of civil service legislation is to secure for county, state and municipal governments efficient public service and to advance the welfare of people as a whole, not specifically or exclusively just the welfare of the civil servant. Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956); N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Civil Service Act includes provisions authorizing the discipline and termination of public employees. See N.J.A.C. 4A:2-2.3(a).

In these disciplinary cases, the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the evidence that it had just cause to discipline the appellant. See Coleman v. E. Jersey State Prison, 2004 WL 417803 (N.J. Adm) (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). A preponderance of evidence has been defined as that which "generate[s] belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, 2003 WL 22700916 (N.J. Adm) (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div 1959)).

In the present matter, the city has carried the burden of proof in establishing that appellant was insubordinate by refusing to work a tour of involuntary overtime. However, the weight of the evidence does not provide sufficient proof that appellant raised his voice, changed the tone of voice, or spoke irately to his superior. Nor does the weight of the evidence provide sufficient proof that appellant was malingering in regard to his inability to work because of the need to go home due to a headache, night baby-sitter arrangements and medical concerns to be attended to the next morning. The weight of the evidence sways a belief that appellant had pre-planned a medical appointment and had to pick up his child from a night-sitter and was upset (to the point of an increased blood-pressure and severe migraine headache) about the order to work and the selection process used to determine who would work.

It is noted that no evidence was offered that may have warranted an undisputable determination of appellant's inability to work an extra five hours and/or to exonerate him in total of the charge of insubordination, based on proof of extenuating circumstances. It is also noted that no evidence was offered to prove that the "Equitable Distribution of Involuntary Overtime" Newark Police Department Director's Memorandum was used on July 27, 2013.

The extent of the July 27, 2013, incident was an argument or dialogue back and forth between Sgt. Osorio and Det. Brooks about whether Det. Brooks was properly selected to work overtime in accord with the instructions for "Equitable

Distribution of Involuntary Overtime” as per Newark Police Department Director’s Memorandum - Number 04-1052, dated July 27, 2004.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness’s credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness’s story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings “are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). However, the finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962).

The testimony of Lt. Mos and P.O. Vargas is credible. The testimony of Sgt. Osorio that “I believe I put out a general announcement request for volunteers” meaning he did not recall whether he followed the instructions for “Equitable Distribution of Involuntary Overtime” as per Newark Police Department Director’s Memorandum – Number 04-1052, dated July 27, 2004, makes the truth of his testimony doubtful. Sgt. Osorio’s testimony that appellant was irate and raised his voice is contradicted by P.O. Vargas during his (Vargas’) testimony.

DISCIPLINARY HISTORY

An employee’s past disciplinary record may be reviewed to determine the appropriate penalty for the current specific offense. W. New York v. Bock, 38 N.J. 500

(1962). The concept of “progressive discipline,” the imposition of penalties of increasing severity, is an appropriate consideration in determining the reasonableness of the penalty. Id. at 523-24. In addition to considering an employee’s prior disciplinary history when imposing a disciplinary penalty, other appropriate factors to consider include the nature of the misconduct, the nature of the employee’s job, and the impact of the misconduct on the public interest. Ibid.

Appellant’s prior disciplinary history contains two charges for neglect of duty that were exonerated (August 23, 2007) and unfounded (August 19, 2009) respectively. Any charges brought against appellant between 1997 and 2000 were not sustained or exonerated. Appellant has never, before the within incident, been charged with insubordination. For seventeen years prior to the July 27, 2013, incident appellant held a stellar disciplinary record. The isolated incident of arguing with an acting superior on duty for one day, July 27, 2013, has in-part been attributed to appellant’s agitation for not obeying an order due to appellant’s prior family medical issue that was to be attended to on the morning of July 28, 2013, a prior commitment to pick up his child from the night baby-sitter, the general welfare and safety of his child, and the problems that would flow to him and the entire family if he did not follow through his pre-arranged plans. Appellant’s scarce record demonstrates his understanding and fulfillment of the disciplinary requirements of the NPD Rules and Regulations and the New Jersey Civil Service Rules.

MITIGATION

Mitigating circumstances must be taken into consideration when determining whether there is just cause for the penalty imposed. The credible evidence and credibility of the witnesses will assist in resolving whether the charges and discipline imposed should be sustained; or whether there are mitigating factors, which should impact the charges and the penalty. The following mitigating circumstances have been taken into consideration:

1. The uncertainty of Sgt. Osorio as to whether he followed the instructions set forth in the Director’s Memorandum “Equitable Distribution of Involuntary Overtime”;

2. Appellant's unsuccessful attempt to have a private conversation with Sgt. Osorio to explain what was happening in his (Det. Brooks') family;
3. The reasonableness of appellant's explanations for his unwillingness to work overtime - a family medical appointment that needed to be attended to in the morning, the night baby-sitter arrangements and having to pick up his child from the sitter, the general welfare and safety of his child and the problems that would flow to him and the family;
4. The reasonableness of blood pressure rising and causing a severe migraine headache after arguing with a superior and then trying unsuccessfully to talk about the concern with the superior;
5. Appellant has been an employee of the Newark Police Department for approximately eighteen years and two months;
6. During eighteen years and two months of employment with the Newark Police Department appellant has received in total, one (1) citizen complaint and two (2) departmental complaints;
7. Major Disciplinary Action charges have never been sustained against appellant;
8. Appellant has never been charged for insubordination prior to the instant matter;
9. Appellant has never been charged for malingering prior to the instant matter;
10. Prior allegations of offenses against appellant were determined to be unfounded, not sustained or appellant was exonerated;
11. Appellant has a scarce disciplinary history.

PENALTY

Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. Ducher v. Dep't of Civil Service, 7 N.J. Super. 156 (App. Div. 1950). Appellant's record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. Bock, supra, 38 N.J. 500. In the instant matter, the record reflects that appellant does not have a prior infraction that was sustained and had never been subject to an alleged infraction pertaining to insubordination. Under the circumstances, when taking into consideration the type and nature of this case and appellant's scarce disciplinary history, the penalty imposed of a

fifteen-day suspension on charges of insubordination, malingering and other sufficient cause is unreasonable, excessive and unwarranted.

CONCLUSION

Based on all of the above, I **CONCLUDE** that appellant did not follow the order of Sgt. Osorio to work overtime and therefore was insubordinate in that respect. I **CONCLUDE** appellant spoke in a normal tone, did not raise his voice or use harsh words to Sgt. Osorio, and therefore was not insubordinate in that respect. I **CONCLUDE** that without the disclosure of the full context of the conversation between Sgt. Osorio and Det. Brooks that it remains inconclusive as to whether the phrase "do what you have to do and I am doing what I have to do," should be categorized as insubordinate, and therefore was not insubordination in that respect. I **CONCLUDE** that because Sgt. Osorio only has a belief, but is not sure he followed the "Equitable Distribution of Involuntary Overtime" instructions and because Lt. Mos lacks information on whether Sgt. Osorio used or adhered to the instructions that Det. Brook's concerns about enforcement and whether he was properly chosen to work involuntary overtime pursuant to instructions, must be afforded due consideration. I **CONCLUDE** that even if Sgt. Osorio failed to follow the "Equitable Distribution of Involuntary Overtime" instructions that appellant is not exonerated for disobeying a superiors order without demonstrating extenuating circumstances. I **CONCLUDE** that the charges of malingering and other sufficient Cause were not proven.

ORDER

The possibility of faulty memories due to the length of time that elapsed since the July 27, 2013, incident and the actual hearing date for this matter, the strength of the consistent testimony, the possible conflicting position(s) of witnesses, and witness demeanor, were taken into consideration prior to finalizing an Order in this case.

It is **ORDERED** that the determination of respondent, City of Newark, finding

appellant guilty of violating Newark Police Department Rules and Regulations, Chapter 18:8 - Acts of Insubordination and Civil Service Rule 4A:2-2.3(a)(2) - insubordination, be **AFFIRMED**.

It is **ORDERED** that the determination of respondent, City of Newark, finding appellant guilty of violating Newark Police Department Rules and Regulations, Chapter 18:11 - malingering, be **REVERSED**.

It is **ORDERED** that the determination of respondent, City of Newark, finding appellant guilty of violating Civil Service Rule 4A:2-2.3(a)(11) - other sufficient cause, be **REVERSED**.

It is **ORDERED** that the subsequent determination regarding a fifteen-day suspension be deemed inappropriate, unreasonable, and unwarranted as a penalty when weighing the evidence and focusing on the type and nature of the incident, the lack of proof, recollection and uncertainty by respondent's witness as to whether the instructions for "Equitable Distribution of Involuntary Overtime" as per Newark Police Department Director's Memorandum – Number 04-1052, dated July 27, 2004, was adhered to. It is **THEREFORE ORDERED** that a penalty of a four-day suspension be substituted.

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.

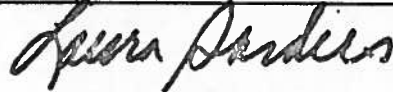
Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**,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

October 15, 2014
DATE


SANDRA ANN ROBINSON, ALJ

Date Received at Agency:

October 15, 2014



Date Mailed to Parties:

OCT 16 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Appellant:

None

For Respondent:

Lt. Camilo Mos

Sgt. Luis Osorio

Police Officer Wayne Vargas

EXHIBITS

For Appellant:

P-1 (a) Preliminary Notice of Disciplinary Action, dated August 28, 2013

(b) Final Notice of Disciplinary Action, dated November 8, 2013

See Respondents Exhibits

P-2 Investigative Submission submitted by Detective Gregory Brooks, dated

July 27, 2013

See Respondents Exhibits

For Respondent:

R-1 (a) Preliminary Notice of Disciplinary Action, dated August 28, 2013

(b) Final Notice of Disciplinary Action, dated November 8, 2013

R-2 Newark Police Department Rules and Regulations (Relevant Sections)

R-3 Newark Police Department Director's Memorandum No. 04-1052 re: Equitable
Distribution of Involuntary Overtime, dated July 27, 2004

R-4 Concise Officer Disciplinary History – Police Officer Gregory Brooks

R-5 Newark Police Department Investigation of Personnel Report, dated July 27, 2013

R-6 Investigative Submission submitted by Lieutenant Camilo A. Mos, dated

August 27, 2013

LIMITED – Exclude Ramos

R-7 Investigative Submission submitted by Police Officer Wayne Vargas, dated

July 27, 2013

R-8 Investigative Submission submitted by Police Officer Wayne Vargas, dated August 21, 2013

R-9 Investigative Submission submitted by Detective Gregory Brooks, dated July 27, 2013

R-10 Newark Police Department Personnel Charging Form, date stamped August 29, 2013