

Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In the initial decision, the ALJ set forth that, on January 3, 2013, the appellant and Shannon responded to a stabbing incident at a tavern in West Deptford. The police at the scene advised that the victim needed emergency transport to the hospital. The victim was "uncooperative and intoxicated." Shannon treated the patient and remained in the back of the ambulance while the appellant drove to the hospital which was located in Camden. The ALJ found that, as the treating EMT, Shannon had the ultimate responsibility to decide whether to proceed in "emergency mode" to the hospital. However, based on the determination that the patient was stable, a recall of an Advanced Life Support (ALS) unit was issued. Nonetheless, the appellant drove the ambulance in emergency mode south on Route 45 with the emergency lights on and no siren. At the intersection of Griscom Drive, instead of proceeding to the jug handle to make the U-turn to Route 45 North for "time reasons," the appellant changed lanes from the right to the left in order to make the U-turn at the intersection. In doing so, the appellant collided with another vehicle travelling southbound in the left lane, which caused that vehicle to crash into a traffic light stanchion. The ALJ indicated that the appellant did not receive a traffic citation.

Additionally, the ALJ set forth the testimony of Andrew Lowell, Chief Emergency Technician, who testified, among other things, about an EMT's training and the County's policy on the use of lights and sirens. Lowell indicated that the appellant took an illegal turn without using both the ambulance's lights and siren. Further, since the ALS unit was recalled, Lowell testified that it was not necessary to travel in emergency mode or for the appellant to attempt the U-turn at the intersection instead of using the jug handle. According to County policy "almost all transports without ALS should be in non-emergency mode." In response, the appellant maintained that the ultimate responsibility as to whether to travel in emergency mode rested with his partner, Shannon, as the treating EMT. He testified that although the patient had been stabilized and there was no need for immediate ALS, there was still a need for an immediate evaluation by the hospital trauma team, as the patient's intoxication could have concealed the true nature of his wounds. Moreover, the appellant stated that he did not see the car on his left until the collision occurred. He also emphasized that he wanted to transport the patient as quickly as possible and he did not receive a ticket for the accident.

The ALJ found that, while the appellant's testimony was credible, his operation of the ambulance was the cause of the accident. The ALJ stated that the appellant and Shannon's "decision to proceed in emergency mode was not unreasonable" given that the victim was uncooperative and intoxicated. Thus, the judgment call to immediately have the hospital trauma team evaluate the patient was warranted. The ALJ also noted that the appointing authority did not present

any medical evidence to rebut the appropriateness of that decision. Furthermore, the ALJ rejected the appointing authority's argument that the charge of "misuse of public property, including motor vehicles" encompassed the unsafe use of the ambulance. The ALJ determined that involvement in a motor vehicle accident did not constitute a "misuse" of a public vehicle. Further, the ALJ stated that, as indicated in its regulatory history, *N.J.A.C. 4A:2-2.3(a)8* was promulgated for closer regulation of State car use by employees. Thus, based on the foregoing, the ALJ concluded that the charge involves conduct where public property is used for an improper purpose, such as for the gain of the employee, rather than an act of negligence. Therefore, since that criteria was not met in the appellant's case and the appointing authority did not amend the charge, the ALJ recommended dismissal of the charge against the appellant, as "his conduct does not fit the charge filed against him," and reversal of his six-month suspension.

In its exceptions, the appointing authority asserts that the ALJ erred in finding that the appellant's actions regarding the use of emergency mode were "not unreasonable," contrary to established policies. Specifically, the appointing authority argues that its policy restricts the use of emergency mode to time-dependent situations where ALS services are present. Further, it states that situations where ALS services are not available, but are needed, may warrant the use of emergency mode. However, the policy does not vest EMTs with the discretion to use emergency mode in the absence of ALS. Moreover, regardless of whether the ambulance is travelling in emergency mode, the appointing authority indicates that EMTs are taught not to break traffic laws and to use the ambulance's lights and siren upon requesting the right of way. The appointing authority notes that the recording of the on-board camera revealed that the ambulance's siren was off and that the patient was talking on a cell phone, indicating that his condition was stable. Additionally, it submits that the police report concluded that the appellant was at fault in the crash in that the appellant "should have continued to the jug handle to make the turn and not have executed a left hand turn from the right hand lane." The appointing authority also asserts that that the appellant never reported that he used the turn signal before attempting the U-turn. In addition, the appointing authority contends that the appellant's recklessness would have been inexcusable in any circumstance, but it was aggravated by the fact that he was transporting a low-acuity patient. The appointing authority emphasizes that the appellant admitted that the victim was stable and recalled the ALS unit.

Moreover, the appointing authority challenges the ALJ's dismissal of the charge of "misuse of public property, including motor vehicles," arguing that by its very definition, the cause of "misuse of public property" includes the improper and unlawful use of an ambulance, which is what occurred in this case. It submits that the plain language of *N.J.A.C. 4A:2-2.3(a)8* encompasses this interpretation regardless of the purported history of the regulation. Alternatively, the appointing authority contends that the ALJ should have amended the charge to conform to the

proofs rather than dismiss it. It states that the Preliminary Notice of Disciplinary Action (PNDA) clearly indicated that the appellant was charged as a result of his "illegal U-turn" on January 3, 2013. Further, the appointing authority notes that the appellant did not argue the sufficiency of the charge at the departmental hearing. Rather, he raised this argument for the first time during the OAL proceedings. Nonetheless, it reiterates that the charge against the appellant could have been amended to conform to the proofs which were fully and fairly litigated. The appointing authority argues that ALJs in various cases have been permitted to amend charges *sua sponte* to conform to the proofs where there would be no prejudice to the employee. In this case, there would be no prejudice to the appellant since he cannot argue that he did not receive notice or a fair hearing.

In his cross exceptions, the appellant emphasizes that although he and Shannon did not see a need for further medical attention at the scene of the incident, they could not rule out the possibility of the patient's internal injuries that would necessitate expeditious treatment at the hospital. Moreover, the appellant reiterates that Shannon was the treating EMT, and she was responsible for determining if emergency mode was necessary. He also indicates that the County's policy on the use of emergency mode allows for exceptions, but it fails to specify what those exceptions are. Thus, the appellant contends that the appointing authority has failed to show that he acted in disregard of any definitive policy. Additionally, the appellant maintains that the ALJ correctly found that he was not guilty as charged. He asserts that *N.J.A.C. 4A:2-2.3(a)8* does not pertain to operating a vehicle in a negligent manner. Furthermore, the appellant argues that the ALJ did not err in failing to amend the charge against him. He contends that it is not the ALJ's responsibility to assist the appointing authority, especially considering the fact that the Commission may only review the adverse action of the appointing authority as indicated in the FNDA. *See Hammond v. Monmouth County Sheriff's Department*, 317 *N.J. Super.* 199 (App. Div. 1999). The appellant states that at no time during the OAL hearing did the appointing authority move to have the charge against him amended. Therefore, the Commission should adopt the ALJ's initial decision. Alternatively, the appellant indicates that if the Commission rejects the ALJ's recommendation, the Commission should consider the arguments set forth in his post-hearing brief in determining the appropriate penalty.

It is noted that, according to the appointing authority, it imposed a six-month suspension based on the egregiousness of the appellant's conduct and his prior disciplinary history. As indicated by the ALJ, the appellant was previously suspended for three shifts/days for providing inadequate medical care. The appellant also received a 10-shift/day suspension for providing inadequate medical care and submitting a false follow-up report.

Upon its *de novo* review, the Commission agrees with the ALJ's Findings of Fact, but it does not agree with the ALJ's assessment of the charge. Initially, there

is no dispute as to what occurred. The appellant was attempting to execute a U-turn, and while doing so, collided with another vehicle which caused that vehicle to crash into and knock down a traffic light stanchion. The ALJ specifically found that, notwithstanding that there was an emergency situation, the appellant's operation of the ambulance was the cause of the accident. Therefore, regardless of whether the appellant received a traffic citation or whether the ambulance should have been travelling in emergency mode, the fact remains that his actions caused the accident. The appellant admitted that he did not see the other vehicle until the collision. Further, had the siren been on, there clearly would have been notice to provide the ambulance the right of way. The appellant was negligent in his duties and misused public property in the process. Therefore, the Commission finds that the ALJ's interpretation of the charge "misuse of public property, including motor vehicles" was too narrow, as the appellant's conduct may be considered under that charge. Accordingly, the charge against the appellant has been sustained.

It is noted that, as correctly indicated by the ALJ, the regulatory history of *N.J.A.C. 4A:2-2.3(a)8* states: "[t]he proposed amendment to *N.J.A.C. 4A:2-2.3* is prompted by the recently issued Executive Order No. 4 (1990). The Executive Order provides for the closer regulation of State car use by State employees and requires the promulgation of rules which may be necessary concerning discipline for State car misuse. Therefore, in compliance with the Executive Order's objective and in recognition of this issue of public concern, the [Merit System] Board proposes that another specific cause for discipline be added to *N.J.A.C. 4A:2-2.3*, applicable to both State and local service, for the misuse of public property, including motor vehicles." See 22 *N.J.R.* 1015. The regulation was enacted to curb an employee's improper use of a State car and to make such a violation a specific cause of discipline. However, it was not just limited to penalize employees for the use of the State car for their own personal gain or other inappropriate use. An improper use of a vehicle may encompass an employee's act of negligence in operating the vehicle.

Regardless, the charge against the appellant could have been amended to include "neglect of duty" for the appellant's negligent conduct in causing the accident. This amendment would not have prejudiced the appellant, since the specifications underlying the charges in the PNDA and FNDA clearly subsumed allegations of neglect. Thus, the appellant was on notice of the accusations against him via the sustained specifications. See *N.J.A.C. 1:1-6.2(a)* ("Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice"); see also, *Hammond, supra*; *Lamont Walker v. Burlington County*, Docket No. A-3485-00T3 (App. Div. October 9, 2002); *In the Matter of Charles Motley* (MSB, decided February 25, 2004) (It is well established that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing). As a final

comment with respect to the charges, the Commission agrees with the ALJ that an emergency situation existed. Nevertheless, given that the appellant's misuse of the ambulance and his negligent conduct have been sustained, the suspension, as indicated below, is warranted.

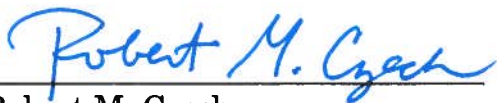
Regarding the penalty, in addition to considering the seriousness of the underlying incident, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* 463, 465 (CSV) 1996. Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In the instant matter, the appellant's actions warrant major discipline and the six-month suspension imposed on the appellant was appropriate. As indicated above, even though an emergency situation arose, the appellant's misuse of the ambulance and his negligent conduct cannot be discounted. A sufficient mitigating circumstance does not exist to modify the appellant's six-month suspension, especially considering his prior disciplinary history which includes a major suspension. Further, the Commission is mindful that this penalty should serve as a warning to the appellant that future offenses may result in removal. Therefore, based on the totality of the record, including the seriousness of the offense and the appellant's prior record, the Commission upholds the six-month suspension.

ORDER

The Commission finds that the appointing authority's action in suspending the appellant for six months was justified. The Commission, therefore, affirms that action and dismisses the appeal of Ryan J. Gray.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JUNE, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 6389-13

AGENCY DKT. NO. 2013-2693

**IN THE MATTER OF RYAN J GRAY,
GLOUCESTER COUNTY, DEPARTMENT
OF EMERGENCY RESPONSE.**

Richard Dann, President, CWA Local 1085, appearing pursuant to N.J.A.C. 1:1-5.6(a)6, for Ryan J. Gray, appellant

Eric D. Milavsky, Esq. (Brown & Connery LLP), for Gloucester County, Department of Emergency Response, respondent

Record Closed: January 8, 2014

Decided: May 27, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Appellant Ryan Gray (Gray) appeals the action of respondent Gloucester County (Gloucester) suspending him from his Emergency Medical Technician (EMT) position for "91 shifts" or six months based upon his misuse of public property. The charge arose from a traffic accident during his operation of an ambulance

PROCEDURAL HISTORY

On April 4, 2013, Gloucester issued a Final Notice of Disciplinary Action (FNDA) suspending appellant for "91 shifts". The parties are in agreement that a suspension for 91 shifts is in effect a six-month suspension. The action was based upon a violation of N.J.A.C. 4A:2-2.3 for misuse of public property as a result of an accident on January 3, 2013. On April 10, 2013, Gray appealed that action to the Civil Service Commission (Commission). The matter was transmitted to the Office of Administrative Law (OAL) on May 10, 2013, for a hearing as a contested case. The matter was heard at the OAL in Mercerville, New Jersey on December 9, 2013. The record closed on January 8, 2014, after the submission of post hearing memoranda by the parties. The time for the filing of the Initial Decision was extended.

FACTUAL DISCUSSION

Many of the material facts in this matter are not in dispute. Gray has been employed by Gloucester as an EMT since the fall of 2007. Shortly after midnight on January 3, 2013, Gray and his EMT partner, Kristi Shannon, responded to a stabbing victim at a tavern located on Route 45 in West Deptford, New Jersey. Police at the scene advised that the victim needed emergency transport to a hospital. After assessing and bandaging the patient, Shannon remained in the back of the ambulance while Gray drove to Cooper University Hospital (Cooper) in Camden, New Jersey. The EMTs had determined to proceed in emergency mode with to Cooper, with Shannon as the treating EMT having the ultimate responsibility for that decision. Based on a determination that the patient was stable, a recall of a unit with Advanced Life Support Services (ALS) was issued. (R-13)

After leaving the stabbing scene, Gray drove the ambulance with emergency lights on, but no siren, south on Route 45, a divided highway. He was accompanied by a police vehicle from the scene. Shortly after entering the roadway he approached the traffic light at the intersection of Griscom Drive. In the ordinary course a vehicle would

use the jug handle at the intersection to make the u- turn onto Route 45 North. Opting to avoid the jug handle for time reasons, Gray moved from the right lane to the left in order to make a U-turn at the intersection. As he did so he collided with another vehicle which was traveling southbound in the left lane. That vehicle then crashed into a traffic light stanchion. No traffic citation was issued to Gray as a result of the accident.

In support of its case that Gray misused public property, Gloucester presented the testimony of Gray's supervisor, Andrew Lovell its Chief of Emergency Medical Services. He reviewed Gray's job description (R-1), discussing his training and responsibilities for the position. He highlighted the need for EMTs to operate vehicle with caution and with due regard for traffic. He noted there was a department policy on the use of lights and sirens, asserting that Gray essentially took an illegal turn without both lights and siren. He reviewed the circumstances of the accident that led to the charge at issue, reviewing photos of the intersection (R 4-7), as well as a tape of the incident from a contemporaneous video inside the ambulance (R-8).

Lovell asserted that as the patient was stable and the ALS unit had been recalled from the scene, there was no need for Gray and his partner to travel to the Cooper trauma center in emergency mode and that his attempt at a u-turn at the intersection without using the jug handle was unnecessary as well. Lovell cited to the department policy on the transport of patients (R- 2), of which he was the author. According to that policy "almost all transports without ALS should be in non-emergency mode." He noted that as a result of the accident, not only did the county vehicle and the other car sustain damage, both Gray and his partner were injured and lost time at work.

Gray testified in response to respondent's case. He did not dispute the facts of the accident. He did, however, take issue with the county's premise that he should have been traveling in non-emergency mode. Although he was driving the ambulance, he noted that department policy provided that the ultimate decision on whether to travel in emergency mode was made by his partner as the treating EMT. He further described the circumstances under which that decision was made. The stabbing victim had been

found in the bar's parking lot and was uncooperative and intoxicated, providing little information. The police at the scene had called for ALS support as well. After arriving on the scene Gray and his partner assessed the patient and his injury, an abdominal stab wound. After stabilizing him, they decided he did not need immediate ALS support but did need an immediate evaluation by the trauma team at Cooper to ascertain whether any organs had been penetrated. He noted that the victim's intoxication could have masked the true nature of his condition. As a result they went "emergency" to the trauma center. Shortly after entering the roadway with lights on, and with a police car following, they approached the intersection and the collision occurred. Gray said he never saw the car on his left until the collision. His decision to make the u-turn at the intersection instead of the jug handle was motivated by his desire to get the patient to the trauma center as quickly as possible. He said such a maneuver is commonly used by EMTs and that he received no ticket as a result of the accident.

Gray was credible in his testimony regarding the circumstances of the accident and the events leading up to it. He was direct and articulate in discussing the factors of the victim's condition and the resulting decision to proceed in emergency mode. I **FIND** that Gray's operation of the ambulance was the cause of the accident. However, I further **FIND** that on the record before me, his and his partner's decision to proceed in emergency mode was not unreasonable. After assessing the uncooperative and intoxicated stabbing victim's wound, their judgment call to have him immediately evaluated by the trauma team for internal damage was warranted under the circumstances. Gloucester presented no medical evidence to rebut the appropriateness of that decision.

DISCIPLINARY HISTORY

Gray has two prior disciplinary actions against him. The first was a three-shift suspension in 2009 (R-10) for failure to provide adequate medical care and the second was a ten-shift suspension in 2010 for failure to provide adequate medical care and falsification of a post incident report (R-11).

LEGAL ANALYSIS AND CONCLUSIONS

A public 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. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-2.1; N.J.A.C. 4A:2-1.4(a). Atkinson v. Parsekian, 37 N.J. 143 (1962); In Re Polk, 90 N.J. 550 (1982).

In this matter Gray is charged with a violation of N.J.A.C. 4A: 2-2.3(a)(8) which states that an employee may be subject to discipline for "misuse of public property, including motor vehicles". Gloucester argues that the charge encompasses the unsafe use of an ambulance by a public employee. See, e.g. IMO Christopher Edmondson, Township of North Bergen, CSV 08909-2011, 2011 WL 7068330 (N.J. Admin. Dec. 23, 2011). A review of decisions on that issue however, shows that the greater weight falls on the opposite conclusion. The decision by Administrative Law Judge Strauss in IMO Shirley Shea, OAL Dkt. No. CSV 11284-07 (Initial Decision June 13, 2008) (Final Decision upholding him issued July 23, 2008) is instructive on that point. Concluding that Shea's involvement in a motor vehicle accident did not constitute a "misuse" of a public vehicle, ALJ Strauss wrote:

"Misuse" is defined as "to use incorrectly." Merriam-Webster's Online Dictionary <http://www.merriam-webster.com>. The definition suggests deliberate conduct. See also Ladner v. Mercedes-Benz of N.

Am., Inc., 266 N.J. Super. 481, 498 (App. Div. 1993) (misuse indicates use of the product for other than its intended or reasonable foreseeable purpose, or, in a manner that is not objectively foreseeable). Here, Shea's unfortunate contact with the pedestrians has no element of deliberate conduct on her part, even though she may not have exercised an adequate amount of care.

As noted by appellant, such a holding is consistent with the regulatory history of the specific charge at issue here, N.J.A.C. 4A:2-2.3(a)8. As noted by the Merit System Board's rule proposal, the amendment of that regulation in 1990 was "prompted by the recently issued Executive Order No. 4 (1990)." That order provided for closer regulation of state car use by state employees. 22 N.J.R. 1015 (1990). Construing the scope of the charge consistent with its regulatory history therefore leads to a conclusion that it deals with conduct where public property is used for improper purpose, usually for the gain of the employee, rather than an act of negligence.

In this matter appellant faces only one charge, that of misuse of public property. N.J.A.C. 4A:2.2.3(a)8. Gloucester did not charge him with any other offense that arguably may have been appropriate to the facts of this case. Nor did respondent move at any time to amend the charge. As such respondent's case against appellant is limited to that one specific charge. West New York v. Bock, 38 N.J. 500, 522 (1962) and Hammond v. Monmouth County Sheriff's Dept., 317 N.J. Super. 199, 206 (App. Div. 1999).

While appellant's operation of the ambulance may have been negligent, his conduct does not fit the charge filed against him. He was not using the ambulance for an improper purpose, nor for his own private gain. As such the charge against him must be **DISMISSED**.

ORDER

Respondent's suspension of appellant for ninety-one shifts or six months is **REVERSED** and the charge against him is **DISMISSED**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

5/27/14
DATE

Patricia Kerins
PATRICIA KERINS, ALJ

Date Received at Agency:

5/27/14

Date Mailed to Parties:

May 29, 2014

/lam

WITNESSES

For appellant:

Ryan J. Gray

For respondent:

Andrew Lovell

EXHIBITS

For appellant:

- P-1 Citation N.J.S.A. 39:4-125
- P-2 Notice of Accident/Injury Form
- P-3 Letter to Christopher Mellish from James Cannon, Director, Human Resources, dated March 18, 2009
- P-4 Employee Infraction Sheet
- P-5 Employee Request for Discipline
- P-6 Photograph
- P-7 Photograph
- P-8 Photograph

For respondent:

- R-1 State of New Jersey Job Description for Emergency Medical Technician
- R-2 Gloucester County Emergency Medical Service Policy and Procedure Manual
- R-3 Ryan Gray's Certificate of Completion for CEVO-3 - Ambulance
- R-4 Aerial Photograph
- R-5 Aerial Photograph
- R-6 Photograph
- R-7 Photograph

- R-8 DVD of Gray v. Gloucester County
- R-9 New Jersey Police Crash Investigation Report, dated January 3, 2013
- R-10 Gloucester County Disciplinary Action of Ryan Gray
- R-11 Preliminary Notice of Disciplinary Action of Ryan Gray, dated March 18, 2010
- R-12 Final Disciplinary Action of Ryan Gray, dated April 8, 2013
- R-13 Call Detail Report, dated January 3, 2013
- R-14 8:40-4.4 Vehicle Safety
- R-15 County of Gloucester Human Resources Manual – Notice of Accident/Injury Form, dated January 3, 2013