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STATE OF NEW JERSEY

In the Matter of Andrew Biscieglia,
City of Atlantic City

CSC Docket No. 2015-554
OAL Docket No. CSR-11850-14

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 07 2015 (DASV)

The appeal of Andrew Biscieglia, a Fire Fighter with the City of Atlantic City of his removal, effective August 19, 2014, on charges, was heard by Administrative Law Judge Bruce M. Gorman (ALJ), who rendered his initial decision on February 19, 2015. Exceptions were filed on behalf of the appointing authority, and cross exceptions were filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 15, 2015, did not adopt the ALJ's recommendation to modify the appellant's removal to a five working day suspension. Rather, the Commission modified the penalty to a 45 working day suspension.

DISCUSSION

The appellant was removed, effective August 19, 2014, on charges of conduct unbecoming a public employee, neglect of duty, other sufficient cause, and violations of the Atlantic City Fire Department's rules and regulations regarding neglect of duty, the failure to uphold the office of the Atlantic City Fire Department, and the procedures for sick leave. Specifically, the appointing authority asserted that in a letter, dated August 19, 2012, addressed to Fire Chief Dennis Brooks, the appellant "forged/signed" the name of Nicholas Capille, Jr., a Senior Master Sergeant with the Air National Guard, requesting permission for the appellant to be approved for a

"minimum rest period" prior to reporting for his military duties with the Air National Guard. Additionally, it was alleged that the appellant worked at the Air National Guard on August 21, 2012, while out on sick leave from his Fire Fighter position with the City of Atlantic City. Upon the appellant's appeal to the Commission, the matter was transmitted to the OAL for a hearing as a contested case.

In his initial decision, the ALJ set forth that the appellant had requested military leave for his Air National Guard duties from August 20, 2012 to August 22, 2012 and from August 28, 2012 to August 30, 2012. He was required to report for duty on August 21, 2012 and August 29, 2012, respectively, but requested additional leave from his Fire Fighter position "so that he would have at least eight hours 'rest period' before going on National Guard duty." Moreover, the ALJ set forth the testimony of the various witnesses. In particular, Fire Chief Dennis Brooks testified that by memorandum dated June 5, 2012, the appellant was advised that his rest period leave requests for August 20, 2012 and August 28, 2012 were denied, but that he had other options. For instance, he could "trade time" with another Fire Fighter to be off on the days in question. The appellant was also informed that he could not use sick leave for those dates. Brooks indicated that he understood that the appellant was entitled to an eight-hour rest period. However, since the appellant's military duties did not begin until 8:00 a.m., his rest period would run from midnight to 8:00 a.m. on the day he was to report. On August 20, 2012, the appellant presented a letter to Brooks, purportedly authored and signed by Capille, the appellant's Air National Guard supervisor, which cited federal law and advised Brooks that he was required to afford the appellant with the rest period. Being offended by the tone of the letter, Brooks contacted Raynaldo Morales, a Chief Master Sergeant with the Air National Guard, to complain. Brooks sent Morales a copy of the letter, and Morales responded that Capille denied signing the letter. At a meeting on September 12, 2012 with Brooks, an Assistant City Solicitor, and various personnel of the Air National Guard, Capille reiterated that he did sign the letter.

In the meantime, the appellant had been on sick leave commencing on August 9, 2012, for an injury to his thumb. The appellant submitted a doctor's note, indicating that he had been under the doctor's care since August 9, 2012 and would be able to return to work on August 25, 2012. However, the appellant reported for military duty on August 21, 2012, which Brooks testified was a violation of the policy that an employee could not work another job while on sick leave. Further, another witness testified that charges in that regard were brought against the appellant because he was required to be home while on sick leave.

Moreover, an investigation was conducted by the Air National Guard, which found that the letter to Brooks had been drafted with the assistance of a Judge Advocate General (JAG) and signed by the appellant. Brooks stated that the

appellant also wrote a letter to the City's Affirmative Action Officer, admitting that he signed Capille's name, but that he believed he had the authority to do so. Capille testified at OAL that although he was reluctant to draft a letter with regard to the appellant's leave request for a rest period, he prepared an initial letter and "guessed it was more than likely that he handed it to" the appellant to have the JAG review it. Capille further indicated that he would not have signed the letter that was actually given to Brooks because of the attitude expressed in it. Capille could not recall whether the appellant asked him if he could sign his name. However, he remembered telling the appellant he wanted to see the letter before it was sent. According to Capille, the letter was signed without his authorization.

The appellant testified that Capille e-mailed him the initial draft of the letter and hollered across the room that he just sent it. The appellant then forwarded it to the JAG. The appellant waited all day for it to be returned to him. Near the end of the day, the appellant asked Capille, who was about to leave, whether it would be "ok" if he signed his name. According to the appellant, Capille shrugged his shoulders, which the appellant interpreted as a "yes." The appellant also testified that Capille never said that the appellant did not have authority to sign the letter or that Capille wanted to see the letter before it was sent. Furthermore, the appellant reported for his military duties on August 21, 2012. Although he was unable to perform his duties as a Fire Fighter due to his injured thumb, the appellant stated that he could perform his military duties which consisted mainly of computer-based deskwork. However, he was aware that he could not work another job while on sick leave and attempted "not to be out on sick leave." The appellant called the duty officer at the Fire Department and advised that he was reporting back for duty. Thereafter, a Battalion Fire Chief contacted the appellant and informed him that he "could not call back in from sick leave without a doctor's note." The appellant acknowledged that he was paid by the Air National Guard on August 21, 2012 and received sick leave pay from the Fire Department. He also understood that he was supposed to be at home while on sick leave. However, he thought "that his Military Orders trumped the Fire Department Guidelines."

Furthermore, the ALJ indicated that Charles Zingrone, Jr., a Staff Sergeant with the Air National Guard, testified that when he heard that the appellant was under suspicion for signing Capille's name on the letter to Brooks, he spoke with his superior officer and John Fogarty, III, a Lieutenant Colonel. Fogarty had determined that disciplinary action should be imposed on the appellant given the alleged circumstances.[1] Zingrone advised Fogarty that the appellant told Capille that he intended to sign the letter on Capille's behalf, and Capille only shrugged in response. However, Fogarty did not view the shrug as Capille's acquiescence. Zingrone's desk was located near the desks of the appellant and Capille, and Zingrone witnessed their conversation regarding the letter. Zingrone stated that Capille never said not to sign his name on the letter, and that Capille's shoulder

[1] The appellant voluntarily separated from the Air National Guard on April 12, 2014.

shrug meant a "yes." Regarding his testimony, Zingrone noted that he had nothing to gain by testifying on the appellant's behalf, but had "everything to lose."

Based on the testimony of the witnesses, the ALJ found that the appointing authority did not sustain its burden of proving the alleged unauthorized signing of Capille's name. The ALJ determined that Capille's testimony was "incredible and unbelievable," and his only goal was to avoid being blamed. Specifically, the ALJ noted that Capille had been called by the Assistant City Solicitor and was provided a copy of the letter to Brooks. However, Capille did not take any action regarding the letter at that time, which would be a contrary behavior if he were "truly outraged" that someone else signed his name. Further, when he was contacted by Morales, Capille immediately reported that he did not sign the letter, thereby diverting attention to the real issue that he authorized the appellant to sign his name. The ALJ emphasized that there was no dispute that Capille did not sign the letter. Capille was also not forthright about drafting the initial letter, nor did he recall how the appellant obtained the initial letter. He "guessed" that he handed the initial letter to the appellant. It was not until Capille was shown an e-mail at the OAL that he acknowledged drafting the initial letter and e-mailing it to the appellant. Furthermore, the ALJ indicated that at no time did Capille feel obligated to tell anyone that the appellant asked him if he could sign his name. Capille was supposedly unaware that he could be disciplined for allowing the appellant to sign the letter. The ALJ did not find that credible since Capille has served with the military for 20 years, and other Air National Guard witnesses were explicit that Capille could be subject to discipline. Moreover, the ALJ found that Capille's lack of credibility was buttressed by the credible testimony of Zingrone, who was at "great personal risk" for testifying. Zingrone corroborated the appellant's version of what occurred. Thus, the ALJ concluded that the appellant believed that he had authorization to sign the letter on Capille's behalf and had no intention of misrepresenting the authenticity of the letter. The ALJ recommended dismissing the charges associated with the letter.

Regarding the appellant's alleged violation of the sick leave procedures, the ALJ found that the appellant did not remain at home or in a confined place, as required by the procedures. The appellant was also aware of this policy since he attempted to be removed from the sick leave list by calling his work on August 21, 2012, the day he reported for military duty. The ALJ noted that the appellant had the option of advising the Air National Guard of his injury and his doctor's orders. His assignment could have been cancelled because of his injury, which it was on August 28, 2012. Therefore, the ALJ concluded that the appellant knowingly violated the sick leave procedures, and the ALJ sustained that charge, as well as the charge of neglect of duty. Accordingly, given the appellant's lack of a prior disciplinary history[2] and that, in the ALJ's view, the other more serious charges

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[2] The appellant was previously issued a written warning, which is not considered discipline. *N.J.A.C.* 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, or a

were not sustained, the ALJ recommended modifying the appellant's removal to a five working day suspension.

It is noted that the ALJ indicated that the appointing authority offered testimony suggesting that the appellant was manipulating his military leave to have the dates fall on the days he was scheduled to work at the Fire Department. However, the ALJ disregarded this testimony since the appellant was not charged regarding the improper usage of military leave.

In its exceptions, the appointing authority identifies the ALJ's findings of facts to which it takes exception. It claims that the facts "are either in error or incomplete" and cites the actual testimony from the record. Further, it emphasizes that Exhibit A-11 is not the letter that Capille drafted, as there were clear differences from the original letter. Additionally, the appointing authority contests the credibility findings of the ALJ. It contends that the ALJ drew an improper inference that Capille did not act when the Assistant City Solicitor called him. On the contrary, the appointing authority submits that after the call and receipt of the letter in question, Capille realized it was not his letter and he obtained the original draft of the letter. He was then summoned to Morales' office. The appointing authority maintains that all of these events occurred in a single day within a matter of hours. Moreover, it states that Capille not only denied signing the letter when he spoke with Morales, he also denied drafting it. The second letter was not the letter he drafted or authorized. Additionally, the appointing authority indicates that there was no testimony that Capille had initially been asked as to whether he gave the letter to the appellant or if he authorized the appellant to sign it. Further, it submits that there was no testimony that Capille was "clairvoyant" and could have known of the appellant and Zingrone's "alleged theory of consent." In addition, the appointing authority argues that the ALJ failed to make a specific finding of credibility with respect to the appellant and Zingrone. It alleges that the appellant failed to explain in the Air National Guard investigation that there may have been a misunderstanding or that he was authorized to sign the letter. However, he only made such claims when the appointing authority issued him disciplinary action. The appointing authority emphasizes that the appellant was "not the most credible of witnesses, being found guilty of other charges to which he has denied." Furthermore, it asserts that the appellant and Zingrone were "more than mutual acquaintances," as they socialized outside of their military duties. The appointing authority also notes that no other person came forward although the room where the shoulder shrug allegedly occurred was crowded. Additionally, the appointing authority argues that, even if the appellant interpreted Capille's shrug as an affirmation to sign the letter, the letter that was provided to Brooks did not have

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suspension or fine for more than five working days at any one time. Minor discipline includes a formal written reprimand or a suspension or fine of five working days or less. *See N.J.A.C.* 4A:2-3.1(a).

the same content as Capille's draft nor did it have the "legal jargon" that Capille expected the JAG to add.

The appointing authority also contends that the ALJ incorrectly relied on hearsay evidence with respect to the alleged shoulder shrug of Capille. It states that Capille was never asked at the OAL hearing whether he shrugged his shoulders in reply to the appellant's statement of signing Capille's name. The appointing authority argues that the only relevant exception to the hearsay rule in the present case would be if a statement was presented by a witness to establish that the testimony of another witness was inconsistent. The foregoing did not occur in the instant matter. Rather, the appellant and Zingrone testified regarding the alleged occurrence of Capille's non-verbal assertion, which the appointing authority argues was purely hearsay. Moreover, the appointing authority indicates that regardless of how the appellant interpreted the shoulder shrug, he should not have relied on a non-verbal response. It also notes that a shrug is not defined by the dictionary as an affirmative response. Rather, it means that the individual who raises and lowers his or her shoulders does not know or care about something. Finally, the appointing authority takes exception to the ALJ's recommended penalty of a five working day suspension. For reasons set forth above with respect to the letter, it asserts that the appellant should be removed from employment. Additionally, the appointing authority notes that the ALJ failed to recognize that the appellant received military and sick leave pay for the same day, which "effectively amounts to a theft of paid time." Further, it states that the appellant's misdeed conflicts with the standard of conduct of a Fire Fighter, who is entrusted to protect the health, safety, and welfare of the public. Lastly, the appointing authority asserts that the ALJ failed to consider the evidence that the appellant also reported to the Air National Guard base on August 18, 2012 and August 19, 2012, while he was on sick leave, and was paid by the military and the appointing authority on those days. This "additional misconduct" was not discovered until the appellant's testimony at the OAL hearing. Thus, the appointing authority requests that the Commission evaluate this evidence for penalty purposes in the interest of justice and "the after-acquired evidence doctrine." Alternatively, it asks that the matter be remanded to the OAL for a determination as to the appropriate penalty for those infractions and their impact on the appellant's claim for back pay.

In his cross exceptions, the appellant responds that the appointing authority only "cherry-picked" portions of the testimony and disregarded the information that served to exonerate him. For example, Capille admitted that paragraphs two through four of the original letter he drafted were substantially similar to paragraphs seven, three, and eight of the letter sent to Brooks. Moreover, although the appellant's complaint to the Affirmative Action Officer did not indicate the word "shrug," he expressly indicates on two occasions that he had Capille's consent to sign the letter. Further, as to Zingrone, the appellant was not aware that he was going to testify until only a week before he did. The ALJ allowed Zingrone's

testimony. He also cured the error that the appointing authority was not copied on Zingrone's subpoena to testify by allowing the appointing authority to present a rebuttal witness. Additionally, the appellant maintains that he attempted to explain that he received prior authorization from Capille, but he was told not to speak for his own protection. Moreover, the appellant indicates that the ALJ's credibility findings are supported in the record and are neither arbitrary nor capricious. He argues the points that the ALJ made as to Capille's lack of credibility. The appellant also contends that the ALJ made specific findings as to his credibility, as well as Zingrone's credibility. He emphasizes that Zingrone advised several individuals of Capille's shrug within a week and a half of the incident. Moreover, Zingrone stated under oath that his personal friendship with the appellant would not affect his testimony and he had "nothing to gain here and everything to lose." The appellant also maintains that, despite the appointing authority's disagreement, his testimony was consistent and his interpretation of Capille's shoulder shrug was not inconsistent with the definition of the term, as presented by the appointing authority. It was the appellant's understanding that once he received the letter from the JAG, he could sign Capille's name and send it. As for the hearsay argument, the appellant states that Capille's shoulder shrug was just one piece of the evidence which demonstrated that he had authorization from Capille to sign and send the letter. Nonetheless, the appellant argues that Capille's testimony was inconsistent. Capille was asked on two occasions at the OAL hearing as to whether he ever gave the appellant permission to sign the letter. Capille first answered that he did not recall the appellant asking him for permission and the second time he provided a "non-response." Therefore, the appellant contends that, even if his and Zingrone's testimony was considered hearsay, it is admissible to rebut the inconsistent testimony of Capille. Finally, the appellant claims that he did not exhibit a pattern of sick leave abuse, nor did he steal any time. He notes that the appointing authority possessed the relevant information as to his military leave usage for over a year and cannot now allege that this is "new information" that should be considered. Accordingly, the appellant urges the Commission to adopt the ALJ's recommendation.

Upon its *de novo* review of the record, including the testimony before the OAL, the Commission agrees with the ALJ's findings of fact and his credibility determinations in that regard. However, it does not agree with the ALJ's assessment of the penalty. The Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The

Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). The Commission finds that in this case, this strict standard has **not** been met.

As noted, the Commission reviewed all of the testimony before the OAL, and although the appointing authority disagrees with the findings, the ALJ's credibility findings are amply supported in the record. Capille, the appellant, and Zingrone provided the most significant testimony. The ALJ sets forth specific reasons in his initial decision why Capille's testimony lacked credibility, and in doing so, found the testimony of the appellant and Zingrone to be credible. The appointing authority's exceptions to the contrary are not persuasive. While the appointing authority attempts to impeach the credibility of Zingrone based on his friendship with the appellant, the issue was specifically addressed at the OAL hearing. Zingrone testified credibly under oath that his friendship would not affect his testimony. Further, Zingrone's testimony corroborated the appellant's testimony that Capille gave the appellant authorization in the form of a shoulder shrug. However, Capille's shrug was not the only act which led to the appellant's belief that he could sign Capille's name. Capille drafted an initial letter, e-mailed it to the appellant which he conveniently could not recall until his memory was refreshed, and instructed the appellant to give it to the JAG for additional language. Under these circumstances, the ALJ's assessment of the witnesses' credibility cannot be overturned, as there is sufficient, competent, and credible evidence in the record.

Additionally, the appointing authority argues that the ALJ incorrectly relied on hearsay evidence with respect to Capille's shoulder shrug. It is well established that hearsay evidence is admissible before the OAL as long as some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. *See N.J.A.C.* 1:1-15.5(b) (also known as the Residuum Rule). *See also, e.g., Matter of Tenure Hearing of Cowan,* 224 *N.J. Super* 737 (App. Div. 1988). Nonetheless, in this case, the Residuum Rule need not be applied since the testimony regarding the shrug was not hearsay. The appellant and Zingrone were

eyewitnesses to the act, and the ALJ found their testimony in that regard to be credible.

Therefore, the Commission finds that the appellant reasonably believed that he had authorization to sign Capille's name. Accordingly, the charges with respect to the appellant having "forged/signed" Capille's name cannot be sustained. However, the Commission notes its concerns over the appellant's action. Even though the appellant believed that he had authorization, he should have had Capille review the final version of the letter, and nonetheless, require that Capille sign the request. After all, Capille would be the individual to answer any inquiry. The appellant also knew as of the June 5, 2012 memorandum that he was denied the rest period leave and he should have responded earlier. Such diligence would likely not have resulted in the issue over Capille's signature.

Regarding the sick leave procedures, there is no dispute that the appellant reported for military duty on August 21, 2012 while he was on sick leave. His attempt to "call back in" from sick leave confirms that he was aware of the policy. He was also obviously not home or in a confined place due to his injury. Under these circumstances, it is clear that the appellant knowingly violated the appointing authority's sick leave procedures, and in that regard, he neglected his duty as a Fire Fighter. Accordingly, those charges are sustained.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). 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 present case, the Commission finds that the appellant's violation of the sick leave procedures and his neglect of duty warrant major discipline. In this regard, the Commission disagrees with the ALJ, who appears to have substantially minimized this conduct. As set forth above, the appellant knowingly violated the policy. He also acknowledged that he was paid by the Air National Guard on August 21, 2012 and received sick leave pay from the Fire Department. As indicated by the ALJ, the appellant could have avoided this issue by advising the Air National Guard of his injury and his doctor's orders. This "double-dipping" of government funds cannot be tolerated. The Commission is ever mindful of the high standard placed on a Fire Fighter. The New Jersey Supreme Court in *Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998) stated:

> Firefighters are not only entrusted with the duty to fight fire; they must also be able to work with the general public and other municipal employees, especially police officers, because the police department responds to every emergency fire call. Any conduct jeopardizing an excellent working relationship places at risk the citizens of the municipality as well as the men and women of those departments who place their lives on the line on a daily basis. An almost symbiotic relationship exists between the fire and police departments at a fire.

See also, In the Matter of Steven Winters (CSC, decided September 10, 2008), Docket No. 15-081T (App. Div. September 28, 2010) (Commission upheld removal of Fire Fighter who worked at two different jobs while on extended sick leave, despite his argument that it was therapeutic in nature, finding such actions constituted conduct unbecoming a public employee). Nevertheless, removal is too harsh a penalty given that the appellant does not have a prior disciplinary history and certain charges were dismissed. The appellant also attempted to rectify the matter of his sick leave by contacting the appointing authority, albeit too late. Accordingly, the foregoing circumstances provide a sufficient basis to modify the appellant's removal to a 45 working day suspension. *See N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d).

As a final comment regarding the charges and penalty, the Commission notes that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing. *See Hammond v. Monmouth County Sheriff's Department*, 317 *N.J. Super.* 199 (App. Div. 1999); *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). Thus, it was proper for the ALJ to disregard the testimony regarding the alleged improper usage or manipulation of military leave. For the same reasons, the Commission cannot review the issue regarding the appellant's alleged work on August 18, 2012 and August 19, 2012 at the Air National Guard while he was on sick leave from his Fire Fighter position. Therefore, as no charges were sustained in that regard, it is not necessary to remand the matter to the OAL for further proceedings.[3]

Since the penalty has been modified, the appellant is entitled to back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10, for the period of 45 working days following the last date he was paid. In this regard, although the effective date of the appellant's removal was August 19, 2012, he indicated that he was paid sick leave on August 21, 2012. Thus, the 45 working day suspension shall not begin

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[3] It is noted that the appointing authority would not have been precluded from serving the appellant with another notice of discipline regarding these alleged infractions upon discovery. However, since the appellant is a Fire Fighter, disciplinary charges are subject to the "45-day rule" set forth in *N.J.S.A.* 40A:14-28.1.

until after the last date the appellant received paid sick leave. In other words, the appellant is not eligible to be reimbursed back pay for the days he was already paid sick leave.

Moreover, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld charges and modified the penalty to a major discipline. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

The Commission finds that the appointing authority's action in removing Andrew Biscieglia was not justified. Therefore, the Commission modifies the removal to a 45 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period of 45 working days following the last date he was paid to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF APRIL, 2015

Robert M. Czech
Chairperson
Civil Service Commission

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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 11850-14
AGENCY DKT. NO. NA

IN THE MATTER OF ANDREW J. BISCIEGLIA,
CITY OF ATLANTIC CITY FIRE DEPARTMENT.

Kevin Jarvis, Esq., for appellant (O'Brien, Belland & Bushinsky, attorneys)

William G. Blaney, Esq., for respondent (Blaney & Donohue, P.A., attorneys)

Record Closed: February 2, 2015 Decided: February 19, 2015

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Appellant appeals his removal from his position as firefighter with the Atlantic City Fire Department.

PROCEDURAL HISTORY

The appellant requested a fair hearing and the matter was transmitted to the Office of Administrative Law on September 16, 2014, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on December 22, 2014, December 23, 2014 and February 2, 2015. The hearing proceeded on those dates and the record closed on February 2, 2015.

FACTS

On August 11, 2014 a Final Notice of Disciplinary Action (A-15) was issued sustaining charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause resulting in the removal of appellant from his position as firefighter with the Atlantic City Fire Department. The charge of other sufficient cause included violations of the Atlantic City Fire Department rules and regulations, including failure to uphold the Office of Atlantic City Fire Department and violation of the sick/injured procedure. Appellant appealed.

Dennis Chief Brooks (Chief Brooks) testified for the City. Chief Brooks serves as Chief of the Atlantic City Fire Department. He has been employed by the Fire Department for over thirty-five years. He has overall administrative control of the department.

Chief Brooks explained that appellant's removal centered around two issues. First, appellant stands accused of forging his sergeant's name to an Air National Guard document. Second, he is accused of reporting for National Guard Duty while on sick leave with the Atlantic City Fire Department. All of the charges against him center on those two issues.

Chief Brooks testified that as a result of the veteran's preference requirements in the Civil Service Law, that Fire Department has been hiring a substantial number of veterans in recent years. Many of those veterans have remained members of the National Guard. Each National Guard member is required to serve a certain amount of time each year with his Guard unit. The Department is required by law to afford each Guard member time off with pay when the Guard member is engaged in active service. The absence of the Guard members places strain upon the Department.

Chief Brooks explained the process whereby a firefighter would request leave to perform his National Guard service. The firefighter would prepare a Form 56, a request

for relief. He would attach the Form 56 and a copy of his Air National Guard Order. In the Form 56, he would specify the dates and times during which he sought to be absent from duty with the Fire Department. He would then sign the form 56 and submit the packet. The form would be reviewed by the Battalion Chief and the Fire Chief and, if deemed appropriate, approved by those personnel. Chief Brooks offered into evidence four separate sets of Form 56 submitted by appellant during the year 2012 (R-2 through R-5).

For purposes of this case, the relevant document is (R-4). That Form 56 sought leave commencing at 18:00 hours (6:00 pm) on August 20, 2012 and ending at 08:00 hours (8:00 am) on August 22, 2012 with pay. Simultaneously, appellant submitted a request for leave commencing 18:00 hours on August 28, 2012 and returning to duty on 08:00 hours on August 30, 2012 with pay (R-5). His orders attached to the Form 56 (R-4) for August through August 22, 2012 specified that he was to report to duty on August 21, 2012. Similarly, the Orders attached for his request for leave commencing on August 28, 2012 specified that he was to report for duty on August 29, 2012. Appellant sought to commence his leave at 6:00 pm on the day before so that he would have at least eight hours "rest period" before going on National Guard duty.

Chief Brooks testified that in the past, such "rest periods" had been routinely granted. However, the absence of the National Guard members from duty had become an increasing issue for the Fire Department. At this juncture, the City's Personnel Office advised Chief Brooks that a problem had arisen regarding the request for the "rest period" time. Chief Brooks consulted with the solicitor's office, and ultimately a determination was made that the "rest period" was to be denied. Chief Brooks then wrote a memorandum, dated June 5, 2012 (R-6) wherein he advised appellant that his request for leave on August 20 and August 28, 2012 was denied. The memorandum advised appellant that he could only use the time if another firefighter would "trade time" with him on those dates. Additionally, he advised appellant that he could not use sick time on those dates. Chief Brooks testified that he understood appellant was entitled to an eight hour "rest period" prior to going on duty, but since appellant was commencing

his duty at 8:00 am, his "rest period" would run from midnight to 8:00 am on August 21, 2012.

Thereafter, on August 20, 2012 appellant submitted to Chief Brooks a letter purportedly authored by appellant's supervisor with the 177th Fighter Wing, Sergeant Nicholas Capille, Jr., (Capille) (A-11). The letter contained a signature which purported to be that of Sergeant Capille. The letter cited federal law and advised Chief Brooks that he was required to afford appellant the appropriate "rest period". Chief Brooks reviewed the letter and was offended by its tone. He believed that the letter questioned his patriotism. Chief Brooks is a veteran who served his country in the Vietnam War, and he took grave exception to having his patriotism impugned.

Dealing with the issues caused by the presence of National Guard members in his department had caused Chief Brooks to develop a relationship with the highest enlisted person at the 177th Fighter Unit, Master Sergeant Raynaldo Morales (Morales). After he received the Capille letter (A-11), Chief Brooks called Sergeant Morales to complain. Morales asked for a copy of the letter and Chief Brooks had it faxed to him. Ultimately, Morales called back and advised that he did not like to tone of the letter either. He also advised Chief Brooks that Sergeant Capille denied signing the letter.

On September 12, 2012, Chief Brooks attended a meeting with Air National Guard personnel. Present were Deputy Chief Granese, Colonel Anthony DeVito, Assistant Solicitor Anthony Swan, Sergeant Morales, and Sergeant Capille. At that time, the Air National Guard Personnel promised to investigate the situation. Sergeant Capille stated that he did not author the letter. The Air National Guard personnel asked Chief Brooks to take no action until they concluded their investigation. Chief Brooks then wrote a memo memorializing his recollection of the meeting (A-13).

On August 9, 2012 appellant went out on sick leave. He submitted an excuse slip from Dr. Carrie Kern, dated August 16, 2012 specifying that he had been under her care from August 9 through August 24, 2012 and that he would be able to return to work on August 25, 2012 (A-9). Notwithstanding the fact that appellant was out on sick

leave, he reported to military duty to the Air National Guard on August 21, 2012. Chief Brooks stated that it was a violation of policy to work at another job while out on sick leave.

Chief Brooks caused charges to be brought against the appellant for forging Sergeant Capille' s name and for working at another job while out on sick leave.

On cross-examination, Chief Brooks explained that firefighters work one of two shifts: 8:00 am to 6:00 pm, or 6:00 pm to 8:00 am. He agreed that on August 20, 2012, appellant was assigned the 6:00 pm to 8:00 am shift. Accordingly, appellant would have been required to leave during the middle of his shift. However, the Chief Brooks noted that firefighters working the night shift are permitted to sleep during the shift.

Chief Brooks acknowledged that at the September 12 meeting with the military, he did not discuss whether the contents of the Capille letter (A-11) was accurate. Chief Brooks had no direct contact with Sergeant Capille other than at that meeting when Capille stated that he did not author the letter. He had no opportunity to personally interview Capille. It was Morales who told Chief Brooks that Capille claimed to know nothing about the letter and did not sign it. At the September 12 meeting, Capille did not say whether he had spoken to appellant about the letter. Nor did he say whether he had authored an initial draft of the letter. He simply denied all knowledge of the letter.

Chief Brooks acknowledged that on April 25, 2013, Sergeant Morales contacted Deputy Chief Granese and advised that the Air National Guard investigation had determined that the Capille letter (a-11) had been drafted by the Air National Guard JAG Department. However, Morales also reported the investigation found that appellant had signed Capille's name. Chief Brooks also acknowledged that on May 3, 2013 appellant wrote a letter to a City Affirmative Action Officer Barbara Camper wherein he readily acknowledged that he had signed Capille's name to the letter but that he believed that he had authority to do so (A-22:3). Sergeant Chief Brooks conceded that he had never interviewed appellant about what happened.

On redirect examination, Chief Brooks reiterated that he never heard Sergeant Capille's version of what happened first hand. All he heard Capille say was that he did not sign the letter.

Thomas Joseph Culleny testified for the City. Culleny is a Battalion Chief and has been employed by the Fire Department for nearly fourteen years. In 2012, Chief Brooks asked Culleny to conduct research into military personnel employed by the Fire Department. Specifically, the Chief was interested in determining what type of leave military personnel were taking. At the time, the City was operating ten companies. The Chief's concern was that that City lacked sufficient manpower to fill the ten companies. Culleny conducted that research and determined that military leave was not creating a coverage problem.

In late May and early June of 2012, Culleny was asked to review appellant's request for military leave. Initially, his five requests were approved, but then they were flagged by Human Resources and the requests for the rest were disapproved. Appellant was told that he would have to obtain coverage or use vacation time in order to utilize the time that he requested on August 20 and August 28 between 6:00 p.m. and midnight.

Appellant submitted federal statutes to Culleny in support of his contention that he was entitled to the rest time. Culleny reviewed the statutes with the City's legal department and received a determination that the additional rest time was not compensable.

Culleny participated in the second telephone conference between Chief Brook and Sergeant Morales. At that time, Morales stated that Sergeant Capille was in the room. On cross-examination, Culleny stated that during the telephone conference with Morales, Morales told them that Capille said he did not write the contents of the letter. Capille himself did not speak during the telephone conference. Culleny did not attend the September 12 meeting.

Thereafter, Culleny checked with Morales on the progress if the military investigation three or four times per month between September of 2012 and April of 2013. On April 25, 2013, Morales advised him that the Air National Guard had determined its JAG unit had drafted the letter, but appellant had signed it with Capille's name. Morales told Culleny that the JAG officer had been misled by the appellant. The appellant had told him that the Fire Department was not working with him about military issues.

After receiving Morales's calls, Culleny participated in the preparation of the departmental charges. According to Culleny, the charge of unbecoming conduct was brought because appellant forged the document in an effort to persuade the Department to give him time to which he was not entitled. The charge of neglect of duty was brought because he worked at another job while out on sick leave. The charge other sufficient cause in violation of Rule VIIDc was because he forged Capille's signature. The violation of Operational Guideline 110 was brought because he was required to be at home when on sick leave.

On cross-examination, Culleny denied that Chief Brooks was angered by the Capille letter (A-11), but stated that the Chief was confused by it. Chief Brooks did not like the tone of the letter, which made him appear to be unpatriotic.

On cross-examination, Culleny had no recollection of received the call from Battalion Chief Johnson asking if someone on sick leave could be taken off sick leave. However, he acknowledged that such a call could have occurred.

Culleny stated he was never told that appellant acknowledged he had signed Capille's name but claimed he had authority to do so. Culleny stated that in order to return from sick leave an officer must have a doctor's note stating he is eligible to return.

Raynaldo Morales testified for the City. Morales is a Chief Master Sergeant with the Air National Guard and is the Chief Superintend for maintenance. In 2012 he was

the highest enlisted person at the 177th Fighter Unit. He has served in the Air National Guard for twenty-eight years and considers himself to be the eyes and ears for the commander of the base. In civilian life, he was a New Jersey State Trooper for twenty years.

Around the time of the Atlantic City Air Show in 2012, Morales received a call from Chief Brooks. Chief Brooks sounded upset. He told Morales that he had received a letter that suggested the Fire Department was not taking proper care of National Guard members. Chief Brooks faxed Morales the letter and Morales reviewed it. When he saw the letter was signed by Capille, he called Capille to his office. When Capille came into his office, he said, "Is this why I am here?" He then threw down a draft of the letter (A-10:4) and said, "I did not sign it and this letter is not from me."

Capille told Morales that appellant had come to him the previous week and advised him that the Fire Department was giving him a hard time about his rest period. Capille had instructed the appellant to go to the JAG officer.

After the conversation with Chief Brooks, Morales reported the conversation, and Colonel DeVito was assigned to handle the matter. The September 12, 2012 meeting followed. After that meeting, Morales advised Chief Brooks that appellant could be charged under the Uniform Code of Military Justice. Colonel DeVito asked Chief Brooks to forestall any departmental action until the Air National Guard completed its investigation. According to Morales, the Air National Guard investigation ultimately determined that Lieutenant Colonel Mitola, the unit JAG officer sat with the appellant and assisted him in drafting the Capille letter (A-11). Lieutenant Colonel Fogarty, the unit's commander, eventually determined that Capille's signature was forged. Capille contended that he wanted to review the letter before anything was done and said he never reviewed or signed the letter. On April 12, 2014, appellant voluntarily separated from the military.

On cross-examination, Morales admitted that if Capille had given appellant authority to sign the letter, he could have been subject to discipline. He also

acknowledged that Capille was aware of the letter and had in fact drafted a different version of the letter (A-10:4). Morales saw the second letter during the course of the investigation. According to Morales, after Capille drafted the letter (A-10:4), he told appellant to have it reviewed by the JAG officer. It was this first draft (A-10:4) that Capille threw down on the desk when initially confronted by Morales. Morales conceded he never told Chief Brooks Capille had written an initial draft of the letter.

Nicholas Capille, Jr., testified for the City. Capille is a Senior Master Sergeant with the 177th Fighter Wing. He is a full-time employee of the Air National Guard and superintendent of the fuel section. He is familiar with the appellant, who in the past served as a part-time guardsman.

According to Capille, in 2012 appellant came to him and said he had an issue about his rest time prior his scheduled shift. Appellant requested a letter with an explanation of why he needed his rest time.

Capille was reluctant to draft a letter; he wanted the JAG officer to draft it. Eventually, he prepared a letter (A-10:4), and gave it to appellant with the proviso that he should have the JAG officer review it. Capille emphasized that he is not an expert in time off. Capille stated that he never saw the letter again.

Subsequently, he received a call from Atlantic City Assistant Solicitor Anthony Swan asking him why he wrote the letter. Swan then sent him over a copy of a different letter (A-11). Capille had never seen this letter before. It contained a signature purporting to be his own, but he had never signed the letter. After the telephone conversation with Anthony Swan, Capille could not remember doing anything about the letter. Instead of proactively going to his superior to advise him about the complaint, he did nothing until Morales called him in. At that point, he gave Morales the initial draft of the letter (A-10:4) and denied having written the revised version (A-11).

Shortly thereafter, Sergeant Morales called Capille in and asked him about the letter. He told Morales that the signature was not his. He could not recall if he brought either letter with him.

Capille stated that he would not have signed the letter sent to Chief Brooks (A-11) because the attitude expressed in it. He would have expected the JAG office to sign the letter. He said the letter should have come from the person who actually wrote it.

Capille did not remember if the appellant asked if he could sign his name to the letter. Capille knew nothing about an investigation.

On September 12, 2012, Capille attended the meeting with Chief Brooks. At that time, he denied signing the letter. He offered no other information to Chief Brooks.

On cross-examination, Capille stated that he did not know if he could be disciplined for permitting appellant signing the letter. He could not remember if he told the participants of the September 12 meeting that he had written the initial draft (A-10:4). He could not remember if he told them he had discussed the letter with appellant.

Capille remembered telling appellant he wanted to see the letter before it went out. He remembered that the conversation was in an open common area, he could not remember if Airman Charles Zingrone was in the area when they had the conversation.

After he spoke with Sergeant Morales about the letter, he admitted to having a conversation with the appellant. He thought the conversation was about signing of the letter. He was concerned that it sounded like it could start a big legal thing. Capille did not remember a conversation where appellant said, "I thought you told me I could sign this." Capille did not remember asking appellant why he signed his name to the letter.

The only thing that Capille knew was that what transpired was not right. The letter was signed without his authorization. He wanted the JAG officer to review it before it went out.

Capille identified the initial draft of the letter (A-10:4). Capille was not certain how appellant had obtained a copy of this letter. He guessed it was more than likely that he had handed it to appellant. Capille was then shown a copy of an email from himself to the appellant wherein he transmitted the letter (A-10:3). At that point, Capille admitted that he emailed the letter to appellant. Capille then admitted that nothing in the mail said that the letter was a draft, nor did it state that he wanted to see it before he signed it. However, he claimed that appellant should have known what the proper procedures were "when if comes to this kind of stuff".

Capille admitted that appellant forwarded the draft of the letter (A-10:4) to Colonel Mitola two minutes after he received it (A-10:3). Capille claimed he never asked appellant what happened to the letter.

Capille admitted Morales was irritated when he called him in about the letter, although he claimed Morales was not angry. Morales was not his supervisor but was his commander in chief. Capille asserted he was not worried about discipline for himself.

Capille compared his draft letter (A-10:4) to the final version (A-11) and admitted that many sections of the two letters were the same.

Capille has had no meeting with the Atlantic City Fire Department since September of 2012. He was never officially interviewed by the Air National Guard. No Air National Guard investigator came to his section. Colonel Fogarty met with Capille and the appellant together, probably in November of 2012.

Capille had no recollection of anyone asking him if he authorized appellant to sign the letter (A-11).

Capille remembered that late in the day on Sunday, he told the appellant he would look at the letter later in the week. Appellant was scheduled to be on duty on Tuesday. Capille did not remember appellant needed to submit the letter on Monday.

On redirect, Capille noted that paragraphs five and six of the revised letter (A-11) were not contained in his original letter.

Capille remembered that appellant had stitches in his thumb on August 21, 2012. Capille did not order appellant to go home, nor did he receive an order telling him to go home. He could not remember if he sent appellant home, although he knew that appellant went home early that day. He could not remember if Morales called over and directed that he be sent home.

I observed Capille carefully as he testified. In the end, his testimony can be summarized as follows: He did not remember anything, but what he did remember was that he was responsible for nothing. Whatever happened, he was totally blameless.

Capille repeatedly contradicted himself. He equivocated and he prevaricated. His recollections came and went and were selective in nature. His sole purpose on the stand was to engage in self-protection. In over a decade on the bench, I have rarely encountered a less credible witness.

Both Chief Brooks and Culleny offered testimony that suggested appellant was manipulating his use of military leave to have it fall on days when he would be scheduled to work at the Fire Department. However, when interrogated about the nature of the charges, both Chief Brooks and Culleny specified that appellant was charged with two actual violations: forging Capille's name and working at second job while on sick leave. Accordingly, the testimony regarding his use of military leave is irrelevant.

Appellant testified on his own behalf. Appellant has served as a firefighter with the Atlantic City Fire Department since March of 2008. He occasionally serves as an Acting Captain. He was a member of the Air National Guard commencing in August of 200 until his separation in April of 2014.

As part of his service in the Air National Guard, appellant was required to seek time off from his duties as a fire fighter so that he could fulfill his service obligation. On May 30, 2012 he provided the Department with a memorandum delineating the dates during the summer of 2012 when he expected to be on active duty (A-1). Simultaneously, he submitted five Form 56s seeking time off together with an accompanying order (A 2 through A-5). All the form 56s were in conformance with those he had submitted in previous years. In the past his commander, John E. Johnston had instructed him to take off his entire shift when he was scheduled for the night shift prior to commencing active duty with the Guard.

Initially, his five form 56s were approved. However, on June 5, 2012, he received a memorandum from Chief Brooks (A-6) denying him leave on August 20 from 18:00 to 24:00, and on August 28 from 18:00 to 24:00.

When his request for time off on August 20 and August 28 was rejected, appellant contacted the Department of Military Affairs, where he spoke to John Dillie, a retired Colonel and Police Chief. In response to his inquiry, he received correspondence from Dillie (A-20) containing statutes together with Dillie's opinion that appellant believed supported his position. Appellant forwarded Dillie's opinion to Culleny by email (A-21), and Culleny promised to review the matter. Ultimately, the City maintained its position and continued to deny him leave on the evenings prior to commencement of duty on August 21 and 28.

When he received no satisfaction from the City, appellant consulted with his Sergeant, Nicholas Capille. Capille had no idea what to do. At that juncture, appellant consulted with his JAG Office, Lieutenant Colonel Mitola. According to appellant, he explained the situation to Colonel Mitola and Mitola seemed disgusted. Colonel Mitola

advised him to have his supervisor write a letter to his employer explaining why he was entitled to rest period leave. Before sending the letter, appellant was to submit it to Mitola for the infusion of legal jargon.

Appellant returned to his office and advised Capille what was required. The next day, Sunday, August 19, 2012, Capille emailed the letter to appellant (A-10:3). At the time, both men were in the same room, and Capille hollered across the room, "Hey Joe, I just send you that letter." Appellant then forwarded the letter to Lieutenant Colonel Mitola. He waited all day for the letter to come back with the proper legal jargon inserted. As the workday came to a close, Mitola still had not returned the letter. At that juncture, Capille began to get ready to depart for the day. Appellant said, "Nicky, hold on a minute, I haven't gotten that letter back." It was Sunday night, and appellant knew that Capille did not work on Monday. Monday was August 20, the date when appellant was seeking time off commencing at 18:00 hours. Consequently, appellant said, is it ok if I sign your name? Capille shrugged his shoulders, and appellant took the shrug of the shoulder as a yes. Appellant stated he had worked with Capille for years and knew his mannerisms. The shrug of the shoulders meant yes. Capille never said No you do not have that authority. He never said he wanted to see the letter before it went out. At the time, the two men were ten feet apart. Several other persons were present and within hearing distance of the two men.

Later that evening, appellant received the email from Lieutenant Colonel Mitola containing the revised letter (A-10:1). He signed Capille's name to the letter, drove to Station 4, filled out the form 20, and sent it with the letter to Chief Brooks. He did so believing he had Capille's consent to do so. He never thought he was doing something wrong.

Appellant reported for duty on August 21. He worked the entire day and completed his tour of duty. He was never ordered to go home that day.

Appellant then addressed the issue of his working while on sick leave. He initially reported off sick on August 9, 2012. He had dropped a knife, caught it, and

sliced open his thumb. The resulting injury required six stitches and rendered him incapable of performing his duties as a firefighter. However, he could perform his military duties, which primarily consisted of computer-based deskwork.

Appellant stated he was aware that he was not supposed to work at another job while on sick leave, so on the morning of August 21, he called into the Fire Department and spoke with Captain Abel Figueroa the duty officer. He advised Captain Figueroa that he was reporting back for duty. Captain Figueroa said, OK, noted the time, and handed in the paperwork to the Chief. At lunchtime, while appellant was on duty at the Air National Guard, Chief Johnson called and advised that appellant he could not call back in from sick leave without a doctor's note. Appellant explained that he was under military orders to be on duty at the Air National Guard. Johnson stated he did not know the affect of the military orders, but again said that appellant could not call back in without his doctor's permission. Appellant stated that up until that moment, he did not know that he could not call back in without a doctor's note. Appellant testified that it was not true that he was sent home on August 21. He worked the entire day. His orders to report to work at the Air National Guard on August 28 were subsequently cancelled.

After appellant sent the Form 20 to Chief Brooks with the letter finalized by Lieutenant Colonel Mitola (A-11), he heard nothing more about the situation until April of 2013 when he received a Preliminary Notice of Disciplinary Action. He heard a rumor at the Air National Guard that Chief Brooks found the letter insulting, by the heard nothing from the Fire Department. After he was served with disciplinary action, he filed a discrimination complaint with the City's Affirmative Action Officer (A-22), wherein he specifically stated he had signed Capille's name to the letter. He did so in order to, in his words, try to get his story out.

At the end of August 2012 Capille came to appellant and asked him what was going on with the letter. Appellant explained to Capille what had happened, and Capille said, "OK". In late September of early October, Capille again inquired about the letter. Once again, appellant explained to him what had happened. This time, Capille claimed

he had never given him permission to sign is name. At that point, Capille told appellant that he might be put upon charges by the military.

After the military brought charges against the appellant had an additional conversation with Capille. Sometime between January and March of 2013, appellant told Capille, "I have known you for twelve years, when have I ever lied to you?" At that point, Capille stopped saying it never happened and said it "might have happened".

On cross-examination, the City's counsel asked a series of questions about appellant's past schedule which intended to demonstrate that appellant had previously scheduled his military leave on dates when he was supposed to be working at the Fire Department.

Appellant explained that if he did not appear for military duty on August 21, he would have been considered absent without leave. Despite the injury to his thumb, he was still capable of performing his military duty and wanted to fulfill his obligation. He did not attempt to call back at the Fire Department on the prior date because then he would have been required to come to work on that date, and the injury to his thumb prevented him from performing his firefighter duties effectively. He acknowledged that he was paid by the Air National Guard on August 21 and that he was paid sick leave pay be the Fire Department on that date as well.

Appellant was shown the Atlantic City Fire Department Operational Guideline concerning working while on sick leave (A-16). He acknowledged that he was supposed to be at home while out on sick leave. He stated that he believed that his Military Orders trumped the Fire Department Guidelines. However, he stated that he called in and attempted to be reinstated and not be out on sick leave and work another job.

Appellant acknowledged that in one of his emails, Lieutenant Colonel Mitola stated that the rest time issue required flexibility (A-10:1). Similarly, appellant acknowledged that John Dillie was not an attorney and had no enforcement power.

On cross-examination, appellant acknowledged that in his email transmitting the final version of the letter to Chief Brooks (A-11), Lieutenant Colonel Mitola indicated that the spelling contained in that draft was "a little rough" (A-10). Mitola also suggested that appellant be "a little flexible with the full eight hours of rest time if your civilian shift does not overlap on the day in which you are performing military duty . . .".

Appellant testified that when the letter was returned to him from Lieutenant Colonel Mitola, it was already on New Jersey National Guard stationary.

Appellant then discussed his meeting with Colonel Fogarty on November 3, 2012. Present in the room were Sergeant Capille and First Sergeant Smith. At that time, Fogarty served him with a Notice of Discipline. Appellant attempted to tell Fogarty that he had signed Capille's name with prior authorization, but Fogarty told him for his own protection not to speak.

John J. Fogarty, III testified in rebuttal. Fogarty is a Lieutenant Colonel in the Air National Guard and Commander of the Logistics Readiness Squad for the 177th Fighter Wing. He has served in that position since May of 2011.

In August of 2012, Fogarty was advised by Lieutenant Colonel Devito that an issue had arisen regarding a letter that had been sent to Chief Brooks. Fogarty reviewed the situation and then contacted Capille. Capille told Fogarty the signature on the letter was not his. Fogarty did not speak with the appellant about the incident prior to November 3, 2012.

Fogarty determined to issue a Notice of Action to the appellant recommending involuntary separation from the Air Guard for other than honorable conditions. On November 3, 2012 Fogarty met with the appellant in the presence of Capille and First Sergeant Smith. At that time, he presented the letter containing the Notice of Action to the appellant. Appellant then admitted that he had signed Capille's name to the letter (A-11). Capille then jumped up and said, I never said you could sign anything, you

were supposed to bring it back. Fogarty stated he believed appellant had misrepresented the letter by signing Capille's signature. Appellant never indicated that he had permission to sign the letter. Appellant attempted to make legal argument, citing a statute in support of his action.

Fogarty stated that appellant was entitled to request what he termed a "Board", which was an avenue of appeal from the disciplinary action. One hour after he was served with the Notice of Action, appellant requested a Board.

Several weeks after Fogarty made the decision to impose disciplinary action on appellant, Zingrone approached him. According to Fogarty, Zingrone stated appellant had told Capille he intended to sign the letter on his behalf, and Capille only shrugged. Fogarty told Zingrone he had already made his decision to discipline appellant. Fogarty stated that in his view, a shoulder shrug did not constitute acceptance by Capille.

On cross-examination, Fogarty acknowledged that the Air National Guard takes serious a complaint from an outside employer. Employee relations are extremely important to the Guard because so many of its men are employed elsewhere.

Fogarty was then asked about his interview with Capille. According to Fogarty, he asked Capille if he had written the letter (A-11). Capille denied he had generated the letter. Fogarty did not ask Capille if Mitola had authored it. Capille did admit producing an initial draft of the letter. Capille told Fogarty it was "being worked on". He also told Fogarty that the letter had gone through JAG Officer Mitola.

Capille told Fogarty that he instructed appellant that he needed to see the letter before it was sent out. This statement by Capille to Fogarty contradicted the testimony of both appellant and Zingrone.

Fogarty stated he has known Capille for a long time, perhaps as long as twenty years. He has commanded him in the past. He knows Capille "pretty well". Capille's inspections receive the highest marks. Fogarty stated that he put his faith in Capille.

Fogarty then interviewed Lieutenant Colonel Mitola. The JAG Officer led Fogarty to conclude that he had not written the entire letter. Fogarty drew the conclusion that the letter had been altered after it left Mitola's hands. Lieutenant Colonel Mitola was not disciplined for his action in the case.

Fogarty admitted that he had a second meeting with the appellant. Appellant appeared in his office, and told Fogarty he was concerned about the forthcoming Board. Fogarty could not recall the appellant stating he had Capille's authority to sign the letter. He did not remember appellant stating he wanted to clear the air. Fogarty's recollection was he instructed appellant that they should not be discussing the matter. That statement was the end of the meeting.

Fogarty testified that DeVito made him aware of the situation on or about August 23, 2012. He stated that he and DeVito might have had one subsequent conversation about the case. Fogarty was specific that he made the decision to charge the appellant on November 3, 2012, and that he did not discuss that decision with DeVito. Fogarty was not present at the September 12, 2012 meeting, and he could not explain why at that meeting DeVito told Chief Brooks that appellant would be dismissed from the Air National Guard (R-13).

Appellant retook the stand following Fogarty's testimony. According to appellant, Colonel Fogarty confused the events of the two meetings between them.

Appellant testified that Fogarty commenced the November 2, 2012 meeting by sliding the Notice of Disciplinary action across the desk to him. Appellant asked if it was a joke, but Fogarty stated that it was serious. Appellant told Fogarty that Capille had given him permission to sign his name to the Brook's letter (A-11), but Fogarty stopped him and said don't incriminate yourself. Capille was present but remained silent. Appellant denied citing any criminal statutes in support of his position. Appellant stated that he was blindsided by Fogarty's action and had not even contemplated researching any possible criminal exposure.

Appellant stated that at the second meeting with Fogarty, he attempted to "clear the air". He told Fogarty that he had not been lying, but Fogarty told him, "It doesn't matter if you are lying, you signed the letter." It was at the second meeting that appellant attempted to explain that legally what he did could not be considered forgery. He stated that after he was charged, he was assigned a military lawyer, it was his lawyer who explained the law to him, the law which he attempted to cite to Fogarty at the second meeting.

Charles Anthony Zingrone, Jr. testified for appellant. Zingrone is a Staff Sergeant with the Air National Guard. He has known both the appellant and Sergeant Capille for eight years. He was a part of Capille's unit in August of 2011.

Zingrone testified that he overheard Capille write the initial draft of the letter to the Fire Department (A-10:4). He stated Capille was not happy about writing the letter and was worried that if would affect him. Appellant and Capille had been talking about the letter for three or four days before Capille finally agreed to write it. When Capille finally wrote the letter, appellant immediately send it to the JAG department.

Zingrone was present during the conversation between Capille and appellant on August 19, 2012. At the time, he was sitting at his desk, which was located near Capille and appellant's desks. He overheard the two discussing the letter that was to be finalized with the legal department. He then heard Capille say, "I am going to go home for the day." Appellant then said, "I am just going to sign it for you." At that juncture, Capille gave a shrug, leaned back and held up his hands. The he left the building.

At the time these events occurred, Zingrone was situated two desks over from Capille, approximately five to seven feet away. The configuration of the office was u-shaped, and there were no dividers. Zingrone stated that Capille's shoulder shrug was a standard gesture for him; it was one that he utilized regularly. Zingrone also confirmed that Capille never said, "No don't sign my name." Zingrone took Capille's shrugged shoulder to mean a "yes". He stated that this was standard action by Capille.

Zingrone immediately left the building before Capille and did not know what happened thereafter.

On cross-examination, Zingrone stated that he works full-time for the Air National Guard, and Capille is his commander. He is familiar with the appellant through work and formerly socialized with him. He considers appellant to be a friend. There were other persons in the area, specifically Sergeant Paolo Imberti, but he is not aware if anyone else heard the conversation. Most people were preparing to go home at the time.

Zingrone worked on the night shift in the summer and did not find out about what happened afterward until the following Thursday. When he learned that appellant was under suspicion for signing Capille's name, he informed both his superior officer and Colonel Fogarty about what he had seen.

Zingrone told what he had overheard to his Sergeant, his Colonel, the base JAG officer, and the Army major who came in to investigate the situation. When he told the investigating army major, the major said," I don't know why we are here".

Zingrone has not spoken with appellant since appellant separated with the Air National Guard. He found out from Sergeant Imberti that appellant had lost his job. When he heard this occurred, he called appellant and offered to testify. Zingrone noted that people who talk at the base, "Don't get a nice career." He stated that he has nothing to gain and everything to lose by testifying on appellant's behalf.

LEGAL DISCUSSION

Appellant is charged with the following: Conduct unbecoming a public employee; neglect of duty; and other sufficient cause. The other sufficient cause consists of violation of Atlantic City Fire Department Rules and Regulations Article VII Section 2-D,

Neglect of Duty (c), failure to uphold the Atlantic City Fire Department; and violation of the Atlantic City Fire Department Operational Guideline 010, sick/injured procedure V accountability, subsection a. Both Chief Brooks and Battalion Chief Culleny specified that these charges addressed two factual offences. First, it is alleged that the appellant signed Sergeant Capille's name to the letter, dated August 19, 2012 (A-11) without the Sergeant's permission. Second, the appellant is charged with working at the Air National Guard while out on sick leave when he was required to remain in his residence under the terms of the Department Rules and Regulations (R-1).

The alleged forging of Sergeant Capille's name is the far more serious charge. That charge turns on a question of credibility. The City's case turns on the testimony of Sergeant Capille.

As stated above, Capille's testimony was rife with contradictions and equivocations. Throughout his testimony, he stated he did not sign the letter. He made the same statement in his initial meeting with Sergeant Morales, and in the September meeting with Chief Brooks, and Colonel Fogarty's recollection is to be believed, in the November 3 meeting with the Colonel and the appellant. That statement is true: everyone agrees Capille did not sign the letter. The problem is, no one, including appellant, has contended that he did so.

The balance of Capille's testimony demonstrated that throughout the process, he had one goal: to avoid being blamed for what happened.

Capille's statements and conduct raise significant issues. First, when he was initially called by Assistant City Solicitor Swan and provided with a copy of the Chief Brooks letter (A-11), he did not immediately proceed to his superior officer and report the problem. To the contrary, he took no action of any kind. Had he been truly outraged that someone else had signed his name, he would have taken immediate action to locate the perpetrator. His failure to do so buttresses the conclusion that he knew all along he had authorized appellant to sign the letter for him.

Yet when called to Sergeant Morales's office, he took a copy of his draft of the letter (A-10:4) with him, apparently surmising in advance that Sergeant Morales had found out about the Chief Brooks letter (A-11). According to Sergeant Morales, when Capille entered the room, he immediately denied signing the letter. Again, the issue was not whether he signed it, but whether he authorized his signature to be placed on the letter. By quickly denying signing the letter, he was able to avoid making an outright falsehood, while diverting Morale's attention from the real issue.

Capille repeated his duplicity at the September 12 meeting. His only statement was that he did not sign the letter. Again, whether he signed the letter was not the issue. He made no mention of the fact that he prepared the initial draft of the letter (A-10:4), nor did he address the question as to whether he authorized appellant to sign the letter.

Capille could not recall how appellant obtained a copy of his initial draft of the letter (A-10:4). He "guessed" that he must have handed it to the appellant. Only after being confronted with his email transmitting the letter (A-10:3) did he admit that he had not only created the initial draft of the letter, but had emailed it to the appellant. He was also forced to concede that his email provided no instructions to appellant as to how the letter was to be used.

Capille claimed to have no recollection of anyone asking him if he had authorized appellant to sign the letter (A-11). Apparently if no one had asked the question, at no time did Capille feel any obligation to tell anyone that appellant had asked if he could sign Capille's name.

Capille stated he was not aware he could be disciplined for authorizing appellant to sign his name. Such a statement by a man with twenty years of military active service is difficult to credit. Sergeant Morales and Colonel Fogarty were explicit that had Capille authorized appellant to sign the letter, he would have been subject to discipline. Capille's stated ignorance of his personal jeopardy is incredible and unbelievable.

On direct examination, Capille could not remember if he authorized appellant to sign his name to the Chief Brooks letter (A-11). Nor could he remember if he told those present at the September 12 meeting that he had even discussed the letter with the appellant.

Despite the fact that Lieutenant Colonel Mitola said it was his responsibility, Capille stated that he did not want to sign the letter. Capille wanted the JAG Officer to sign the letter, thereby removing himself from the process. Capille's statement only buttresses the inevitable conclusion that his goal from the outset was to avoid taking any responsibility for anything that happened or could have happened.

In summation, Capille's testimony consisted of a series of memory lapses and contradictions, all of which were designed for one purpose: to insure that he was not blamed for anything that happened. During his summation, counsel for the City stated that this case turns on a credibility determination. I **FIND** that Capille's testimony was incredible and unbelievable.

It is clear from the testimony that neither Chief Brooks nor any other member of the Fire Department had the opportunity to interrogate Sergeant Capille in detail. Had fire department officials been afforded that opportunity, they no doubt would have immediately seen the unreliability of his testimony. Unfortunately, they were not afforded that opportunity, but instead relied upon the representations of the military authorities that his statements were credible. Clearly, they were not credible.

Sergeant Capille's lack of credibility was buttressed by the testimony of Sergeant Zingrone. Sergeant Zingrone supported the testimony of the appellant that Capille gave appellant tacit permission to sign his name to the letter of August 19, 2012 (A-11). Zingrone had nothing to gain by testifying for appellant. To the contrary, he testified that Capille is his immediate superior and Colonel Fogarty is his commanding officer. He also noted "people who talk at base don't get a nice career." Sergeant Zingrone testified at great personal risk and I am satisfied that he told the truth. His testimony

confirms appellant's story and discredits Capille's version of the facts. I am satisfied that appellant signed the letter of August 19, 2012 in the belief that he had Capille's permission to do so and that he had no intent to misrepresent the authenticity of the letter. Accordingly, the charges of conduct unbecoming an employee and violation of Atlantic City Fire Department Rules and Regulations Article VII 2D (c) failure to uphold the oath of office of the Atlantic City Fire Department must be **DISMISSED**.

The second charge presents a knottier problem. Appellant violated the Atlantic City Fire Department Operational Guideline sick/injured procedure accountability. That guideline (A-16) states as follows: All personnel while on sick/injured leave are required to be at home or a places of confined during the hours of their scheduled shift.

In this case, it is undisputed that appellant did not remain at home or in a confined place during the hours of his scheduled shift; instead, he reported for duty with the Air National Guard and worked a full day. Appellant was clearly aware of the policy, since he called at the last minute and attempted to have himself removed from the sick leave list. The unanswered question is, why did he wait until the last minute to make that request? He was initially put out on sick leave on August 9, 2012. He knew as early as May that he was scheduled for active duty with the Air National Guard on August 21, 2012. Therefore, he had twelve days to effectuate his removal from the sick leave list.

He failed to do so, and when he finally took action on the morning of August 21, 2012, he discovered that he could not be removed from the sick leave list. Ignoring the policy, he then reported for duty at the Air National Guard anyway. In doing so, he clearly violated the policy.

Appellant argued that he had no choice but to report; he was under orders from the National Guard. The National Guard is under the direct control of the Governor, and therefore his order to report for duty came from the Governor. Obviously, any order from the Governor supersedes a directive from a local municipality.

The problem with appellant's argument is that he had another option. The testimony established that had appellant advised his superiors at the Air National Guard that he was injured and out on sick leave by doctor's orders, his duty assignment for August 21, 2012 could have been negated. That is precisely what happened the following weekend; his obligation to report for duty on August 28 was canceled because of his injury. But instead, appellant chose to go forward with his National Guard obligation on August 21, 2012. His excuse was that the injury to his thumb would not forestall his National Guard activities, which primarily consisted of computer work. But in making that decision, he confirmed his violation of Fire Department Policy. Accordingly, the charges of neglect of duty and a violation of the sick leave policy must be **SUSTAINED**.

There remains the issue of penalty. Progressive discipline is the law in the State of New Jersey. See West New York v. Bock, 38 N.J. 500, 522 (1962). Progressive discipline can be avoided only if the offense is egregious. See In Re Hermann, 192 N.J. 19 (2007). In this case, had the charge of unbecoming conduct been sustained, there might be a reasonable argument that the offense was egregious and warranted appellant's termination. But the only charge sustained here is a violation of the sick leave policy. That offense does not rise to the level of egregious; consequently, progressive discipline must be applied. The parties stipulated that appellant's disciplinary record conations only one blemish, failure to maintain his driver's license for which he received a written warning. The next step in the progressive discipline chain would necessarily be a short suspension. Given that the appellant could have avoided his offense through prompt action but instead willfully and knowingly violated that policy, I am satisfied that the penalty of a five-day suspension is appropriate in this case.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee and violation of Atlantic City Fire Department Rules and Regulations Article VII 2D9(c) be **DISMISSED.**

I **ORDER** that the charges of neglect of duty and violation of Atlantic City Fire Department Operational Guidelines 010, Sick/Injured Procedure V Accountability, Subsection (a) be **SUSTAINED.**

I **ORDER** that the penalty be **MODIFIED** to a five (5)-day suspension.

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. 40A:14-204.

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.

2/19/15
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 2/19/15

Date Mailed to Parties: 2-24-15

/jb/lam

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Appellant:

Andrew J. Biscieglia
Charles Anthony Zingrone Jr.

For Respondent:

Chief Dennis Brooks
Thomas Joseph Culleny
Chief Master Sergeant Raynaldo Morales
Nicholas Capille, Jr.
Lieutenant Colonel John J. Fogarty, III

EXHIBITS

For Appellant:

A-1 Form 20 Requesting Leave for Military Duty, dated May 30, 2012
A-2 Form 56 Requesting Permission for Military Leave, dated May 30, 2012 (Dates requested June 7, 2012 – June 11, 2012)
A-3 Form 56 Requesting Permission for Military Leave, dated May 30, 2012 (Dates requested July 25, 2012 – July 28, 2012)
A-4 Form 56 Requesting Permission for Military Leave, dated May 30, 2012 (Dates requested August 20, 2012 – August 22, 2012)
A-5 Form 56 Requesting Permission for Military Leave, dated May 30, 2012 (Dates requested August 28, 2012 – August 30, 2012)

A-6 Memo from Chief Brooks to Appellant, dated June 5, 2012

A-7 Atlantic City Fire Department Sick Slip, dated August 9, 2012

A-8 Form 56 Requesting Permission for Military Leave, dated August 15, 2012 (Dates requested August 21, 2012 – August 22, 2012)

A-9 Letter from Carrie Kern, D.O. Atlantic Offshore Medical Associates, dated August 16, 2012

A-10 Email exchange, dated August 19, 2012

A-11 Form 20, dated August 20, 2012 Attaching August 19, 2012 letter from Nicholas Capille, Jr. to Fire Chief Brooks Minimum Rest Period

A-12 Not admitted

A-13 Atlantic City Fire Department Internal Memo, dated September 12, 2012 RE: Meeting at Air National Guard

A-14 Preliminary Notice of Disciplinary Action, dated April 30, 2013

A-15 Final Notice of Disciplinary Action, dated August 14, 2014

A-16 Atlantic City Fire Department Operational Guidelines O#110 Sick /Injured Procedure

A-17 Andrew J. Biscieglia Attendance calendar for 2012

A-18 Not admitted

A-19 Summary of events

A-20 Email exchange between John C. Dillie and Andrew J. Biscieglia, dated June 11, 2012

A-21 Email exchange between Andrew J. Biscieglia and Thomas Culleny, dated June 11, 2012

A-22 Letter from appellant to Barbara Camper, dated May 3, 2013

A-23 Not admitted

A-24 Disciplinary History

A-25 Memo to Fogarty, dated November 3, 2012

For Respondent:

R-1 Fire Department Rules and Regulations

R-2 Request for Voluntary Separation, dated April 12, 2014