

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining Elvis Lugardo was justified. The Commission therefore modifies Elvis Lugardo's 60 working day suspension to a 30 working day suspension. The Commission further orders that Elvis Lugardo be granted 30 days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of Lugardo 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.

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 AUGUST, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
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 08254-16

AGENCY DKT. NO. 2016-4142

**IN THE MATTER OF ELVIS LUGARDO,
CITY OF NEWARK POLICE DEPARTMENT.**

Anthony J. Fusco, Esq., for appellant (Fusco & Macaluso, attorneys)

**Joyce Clayborne, Esq., for respondent, Assistant Corporation Counsel (Kenyatta
Stewart, Esq. Acting Corporation Counsel, City of Newark)**

Record Closed: June 18, 2018

Decided: July 12, 2018

BEFORE JUDE-ANTHONY TISCORNIA, ALJ:

STATEMENT OF THE CASE

Elvis Lugardo (Lugardo/appellant) appeals sixty-day suspension due to conduct unbecoming a public employee and related charges stemming from the alleged misuse of a City of Newark Police Department form for personal business.

ISSUE

Does appellant's act of drafting an agreement on a Newark Police Department form, known as a "1001 Form," constitute a misuse of Department property? Does appellant's act of

presenting said agreement to a Bellville Board of Education employee in order to establish residency for a minor child constitute an abuse of power? Does aforementioned conduct support a sixty-day suspension?

PROCEDURAL HISTORY

Appellant was served With a Preliminary Notice of Disciplinary Action (PNDA) seeking removal on February 18, 2016.

Appellant was served with a Final Notice of Disciplinary Action seeking a sixty-day suspension on May 3, 2016. (R-1.) Included in the Sustained Charges were the following:

Charge I: Violation of Newark Police Department Rules and Regulations, Chapter 3:1.1; Conduct in Public and Private;

Charge I-B: Violation of Civil Service Rules 4A:2-2.3(a)(6): Conduct unbecoming a public employee;

Charge III: Neglect of Duty;

Charge IV: Violation of Newark Police Department Rules and Regulations, Chapter 17:1.18 – Division Stationary Restriction – Police officers shall not use Division Stationary for their private correspondence.

FINDINGS OF FACT

Having had an opportunity to consider all the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

Appellant is a sixteen-year veteran of the Newark Police Department (department). In 2016, appellant was in his office at a Newark Police precinct. He was

notified by the desk sergeant that Mrs. Caban (Caban) had come into the precinct seeking help and guidance regarding her teenaged daughter. Lugardo was asked to come down to assist. Appellant met with the mother who informed Lugardo that her daughter was a chronic runaway and may be engaging in prostitution. As the conversation progressed, the mother asked Lugardo if he and his wife would take the daughter in to live with them at their home in Belleville and enroll her in high school there. After discussing the issue with his wife, Lugardo agreed to taking in the daughter.

On February 9, 2016, Lugardo used a City of Newark Police Department Administrative Submission Form, commonly referred to as a "1001 form" to draft what purports to be some sort of a contractual agreement between himself, his wife, and the mother of the child. (R-2.) The purpose of the agreement was for Lugardo to establish some sort of guardianship over the child. Lugardo had this agreement notarized at a local bank. Lugardo signs the agreement as "Legal Guardian."

Lugardo traveled in uniform to the administrative office of Bellville High School and presented this letter/agreement to David Rubin, Director of Safety Services for ~~Belleville Public Schools~~. ~~David Rubin, a former law enforcement officer, testified that~~ he recognized the document as an official City of Newark Police Department administrative form.

Rubin testified that the body of the document was a notarized agreement purporting to hand custody and guardianship rights of the child over to Lugardo.

Lugardo asked Rubin if this document would be sufficient to enroll the child in school. Rubin informed Lugardo that he could not accept a letter written on an official Newark police report form as a means by which to establish residency for the child and further informed Lugardo that legal custody of a child could only be accomplished through the court system. Lugardo explained that the youth in question was a member of his Newark Explorers group and that he was approached by Caban and asked to take custody of the child. Rubin advised Lugardo to consult with the Legal Affairs office at the Newark Police Department for guidance.

Lugo then proceeded to his precinct and presented the document to the legal affairs office. The document was reviewed by Detective Eusnelys Tellez who retained the document for further review and advised Lugardo he would be contacted regarding the document. The following disciplinary proceeding resulted.

I **FIND** appellant drafted a personal agreement on a Newark Police Department 1001 form and attempted to use that document to enroll a minor in Belleville High School without having the authority or permission of the Department to do so. I **CONCLUDE** appellant's acts constitute a misuse of Department property.

Respondent City of Newark argues that when Lugardo showed up at Belleville high school in uniform with what appeared to be an official police document in hand, he gave the impression that he was acting in some sort of official capacity. I **FIND** Lugardo's display of a purportedly official police document while in uniform constitutes a misuse of official authority as Lugardo's actions may be wrongfully perceived by a layman as being performed under color of law.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, "burden of proof," N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958.) Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Perrone, 5 N.J. 514, 522 (1950).

The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him/her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Bock, 38 N.J. 500.

This case is particularly sensitive because it involves law enforcement officials.

[A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public .

[Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).]

Conduct Unbecoming a Public Employee

“Unbecoming conduct” is broadly defined as “any conduct which adversely affects the morale or efficiency of the [governmental unit] [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citations omitted); In re Nicosia, A-5285-04T5 (App. Div. May 17, 2007), <<http://njlaw.rutgers.edu/collections/courts/>>. The conduct need not be “predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, “conduct unbecoming” has been described as that “which adversely affects the morale or efficiency” of the public entity or tends “to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.” Emmons, 63 N.J. Super. at 140 (citation omitted); see Karins, 152 N.J. 532.

In the case at bar, it is undisputed that appellant improperly utilized a Newark Police Department 1001 form by drafting a custody agreement on it. While this alone is certainly improper conduct worthy of an admonishment I **CONCLUDE** appellant’s attempt to use this document to enroll a minor in a high school, presumably under color of law, falls far below the standard of conduct expected from a public employee, especially a law enforcement officer. I further **CONCLUDE** that appellant exhibited conduct unbecoming a public employee.

Neglect of Duty

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(7). Although not defined by the regulation, it generally means that a person is not performing his or her job. The person may have failed to

perform an act that the job requires or may have been negligent in the discharge of a duty. The duty may arise by specific statute or from the very nature of the job itself.

In the case at bar, appellant neglected to properly notify his superiors of his intent to temporarily house a minor child who he came to know through his involvement with the Explorer's program. Lugardo testified that he filled out the 1001 form in order to apprise the department of his intended actions. He bolsters this position by stating that he actually did submit the form to the legal affairs department at his precinct. This testimony is rebutted by the undisputed fact that he presented the form to Bellville Highschool in an attempt to enroll a minor in the school and only submitted the form to legal affairs after being advised to do so by an official at Belleville High School. Further, the legal affairs office at the precinct is not appellant's supervisor, so I therefore **CONCLUDE** that appellant's act of submitting the form to the legal affairs office does not constitute adequate notice to his superiors. I **CONCLUDE** appellant neglected his duty as a police officer.

Use of Division Stationary for Private Correspondence

In the case at bar, it is undisputed that appellant misused a Newark Police 1001 form and did so for personal reasons. While the 1001 form may be considered more of an internal document than stationary, the name of the office (Newark Police Department) is clearly visible on the form and any laymen presented with the form may be under the impression that they are being presented with some sort of official Newark Police Department document. I **FIND** appellant's misuse of the 1001 form violates the spirit of the above-referenced regulation prohibiting the use of Division Stationary for private use.

Appropriateness of Penalty

It is well-established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See Bock, 38 N.J. 500. The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial

Decision (October 10, 2003), <http://njlaw.rutgers.edu/collections/oal/>; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 49 N.J.A.R.2d (CSV) 463, 465.

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), <http://njlaw.rutgers.edu/collections/oal/>; see Henry, 81 N.J. at 571. Counseling, warnings, meetings, etc., do not constitute discipline under merit system rules. See N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-3.1. Here, as the charges resulted from offenses occurring from August to September of 2010, "it was incumbent upon [respondent] to follow the concept of progressive discipline" and advise appellant that "failure to change [her] behavior could result in termination from employment." Glenn, CSV 5051-03.

Appellant has a history of mostly minor disciplinary infractions and one major infraction, which resulted in a five-month suspension in 2007. The case at bar is to be the second major disciplinary action against him. Nonetheless, it is undisputed that appellant's actions at the heart of this disciplinary proceeding were entirely altruistic in nature as appellant had no prospect of pecuniary gain of any kind. Appellant believed he was acting in the best interest of the minor child and the community at large, though his actions were misguided and uninformed.

Based on the forgoing, I **CONCLUDE** the penalty should be reduced from sixty days to thirty days.

ORDER

It is **ORDERED** that appellant, Elvis Lugardo, be given a suspension of thirty days.

I hereby FILE my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

July 12, 2018

DATE



JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Elvis Lugardo
Danielle Caban
Julia Lugardo

For Respondent:

David Rubin
Detective Eusnelys Tellez
Sergeant Jack Clarkin
Lieutenant Wilbur Cole
Captain Derek Glenn

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 FNDA
R-2 Form 1001