



STATE OF NEW JERSEY

In the Matter of Raylor Adames,
Newark, Department of Public Safety

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2021-1600
OAL Docket No. CSV 04426-21

ISSUED: MAY 3, 2022

The appeal of Raylor Adames, Fire Fighter, Newark, Department of Public Safety, 10 working day suspension, on charges was heard by Administrative Law Judge Julio C. Morejon (ALJ), who rendered his initial decision on March 31, 2023. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 3, 2022, adopted the ALJ's Findings of Fact and Conclusions and his recommendation to modify the 10 working day suspension to a five working day suspension.

The Commission makes the following comments. The appellant argued that his suspension should have been no greater than two other individuals involved in the incident. However, the Commission notes that those individuals' matters were not decided by the Commission and it was not a party to any agreements regarding the penalties imposed on those individuals. Moreover, upon the Commission's *de novo* review of the penalty, it agrees with the ALJ that the modification of the 10 working day suspension to a five working day suspension, a minor discipline, is appropriate given the appellant's infractions and the fact that he was ultimately in charge of the watch on the night in question.

Since the suspension has been modified, the appellant is entitled to be five working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees 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 the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121,128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at N.J.A.C. 4A:2-2.12, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore modifies the 10 working day suspension to a five working day suspension. The Commission further orders that the appellant be granted five working days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced as provided for in N.J.A.C. 4A:2-2.10(d)3. 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.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF MAY, 2023



Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04426-21

AGENCY DKT. NO. 2021-1600

RAYLOR ADAMES,

Appellant,

v.

**CITY OF NEWARK, DEPARTMENT
OF PUBLIC SAFETY,**

Respondent.

Brian Matousek, Esq., for appellant (Grayson and Associates, L.L.C., attorneys)

Hugh A. Thompson, Assistant Corporation Counsel, for respondent (City of Newark, Department of Law, attorneys)

Record Closed: March 21, 2023

Decided: March 31, 2023

BEFORE **JULIO C. MOREJON, ALJ:**

STATEMENT OF THE CASE

In this matter, appellant Raylor Adames (Adames), a firefighter for the City of Newark Fire Department (NFD), appeals a ten-day suspension by the respondent, City of Newark, Department of Public Safety (the Department or Newark) for violations of Civil Service Commission regulations, and departmental regulations.

PROCEDURAL HISTORY

On January 12, 2021, Newark issued a Preliminary Notice of Disciplinary Action (PNDA) against Adames (J-1). Specifically, Newark alleged in the PNDA that on December 2, 2020, Adames failed to fulfill his "housewatch duties", which resulted in unauthorized civilians entering the Engine 9 Firehouse without temperature checks or proper personal protective equipment (P.P.E.). The PNDA charges Adames with violating the following Civils Service regulations: N.J.A.C.: 4A:2-2.3(a)(6) Neglect of Duty¹, NJAC: 4A:2-2.3(a)(12) Other Sufficient Causes. Adames is also charged with violating the following Newark Fire Department Rules and Regulations: Newark Fire Division Memorandum 2018-130 (J-7); Newark Fire Division Notice No. 2017-128 (J-5), and Newark Fire division Notice No. 2020-064(J-8).

Adames requested a hearing pertaining to this matter, which was held on March 24, 2021. All charges were upheld resulting in the issuance of a ten (10) day suspension (equal to 80 hours)² which was reflected on the Final Notice of Disciplinary Action (FNDA) dated April 1, 2021 (J-2).

Adames filed a timely notice of appeal of his suspension on April 21, 2021, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law (OAL), where it was received and filed on May 19, 2021.

On July 8, 2021, Adames filed a Motion for Summary Decision concerning the Fire Department's failure to issue a PNDA within thirty-days. On February 1, 2022, an Order denying the motion was entered for the reasons stated therein.

On February 23, 2022, a prehearing order was entered.

¹ "Neglect of Duty" is found at N.J.A.C. 4A:2-2.3(a)(7), and not as cited in the PNDA, as N.J.A.C.: 4A:2-2.3(a)(6). I will consider a charge that Adames violated N.J.A.C. 4A:2-2.3(a)(7), as the facts presented herein have to do with alleged violations of neglect of duty by Adames.

² Adames has not served the ten-day suspension.

On June 30, 2022, Adames filed a motion to exclude discovery of the Department pursuant to N.J.A.C. 1:1-10.4, for failure to provide discovery. On or about July 21, 2022, an Order was entered denying Adames' motion for the reasons stated therein.

A hearing was scheduled for September 12 and 13, 2021. During the hearing on September 12, 2021, Newark sought to introduce a recording of a livestream video, which allegedly depicted the events that resulted in the underlying suspension. Adames opposed the introduction of the livestream video, and a ruling was entered by the undersigned denying Newark's motion for the reasons stated on the record. The hearing was then adjourned to allow the parties an opportunity to settle this matter.

On October 19, 2022, the parties reported that they could not reach a settlement and requested to resume the hearing. A hearing was then scheduled for January 18 and 19, 2023.

The hearing resumed on January 18, 2023, at which time, the Department renewed its motion to admit the livestream evidence on the grounds that they could identify but not produce the individual who posted the livestream video. A bench order was entered denying the Department's motion for the reasons stated on the record.

Thereafter, the hearing proceeded on January 18 and 19, 2023. At the conclusion of the hearing, the parties requested time to file respective written summations. On March 21, 2023, the written summations were filed herein, at which time the record was closed.

DISCUSSION AND FINDINGS

I **FIND** the stipulation of documentary exhibits as **FACT** herein. In addition, I **FIND** the testimony of the witnesses named below who testified in the hearing to be truthful and convincing, under the standards set forth in Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958), and State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted), as such, I **FIND** the same as **FACT** herein:

Fire Chief Rufus Jackson:

Fire Chief Rufus Jackson (Chief Jackson) testified that on December 2, 2020, he received a telephone call from Assistant Director of Newark Public Safety, Raul Malave (Assistant Director Malave), that a livestream event was occurring on Facebook that depicted unauthorized individuals at the Newark Fire Station Number 9, located at 197 Summer Avenue, Newark (Fire Station). The Fire Chief then viewed the Facebook live stream on his wife's Facebook account and with his cellphone made a video copy of the same. As a result of what he saw, Chief Jackson then contacted Deputy Chief Michael Witte (Deputy Chief Witte) and requested that he immediately go to the Fire Station to assess the situation.

Chief Jackson testified that on December 2, 2020, Deputy Chief Witte visited the Fire Station, and met with Battalion Chief Manual Gonzalez, Captain Joseph Kostnicka, Firefighters Raylor Adames and Angelo Rizzolo. Chief Jackson testified that upon arriving at the Fire Station, Deputy Witte confirmed to him that there were unauthorized visitors. Chief Jackson stated the Deputy Witte ordered everyone at the Fire Station to "line up" in the kitchen and requested to see the visitor sign in journal (Journal), and that after reviewing the Journal, Deputy Witte confirmed to him that the visitors were not logged in the Journal and their temperatures were not taken pursuant to Department rules.

Chief Jackson stated that upon Deputy Witte's update to him, he "ordered" Deputy Witte to take a photograph of the Journal and to get statements from everyone pertaining to what had occurred. Chief Jackson testified that he was upset that unauthorized visitors had been allowed into the Fire Station because the same was in violation of the Department implemented Rules and Policies pertaining to visitors in the fire houses. He testified as to several examples of the Rules and Policies that had been violated as Notice No. 2017-128 pertaining to Newark's fire house and facilities visitation; the February 27, 2018 memo from Public Safety Director Anthony Ambrose, pertaining to unauthorized visitors in Fire Division facilities ; and Notice No. 2020-064 pertaining to Temperature Checks/Reminder of Personal Protection Covid-19. Chief Jackson testified that due to

the COVID-19 pandemic, the Rules and Policies implemented by the Department required strict adherence.

Chief Jackson testified that at the time the incident occurred, it was the responsibility of the firefighter on the House Watch duties (House Watch) to ensure that no visitors enter the Fire Station; make entries into the Journal as required by Department guidelines and as directed by the Company Officer; be held strictly responsible for all entries made into the Journal during their tour of the House Watch, except those entries made by authorized members, and whenever visitors present themselves at company quarters, politely inquire their business and summon the Company Officer. Chief Jackson stated that visitors are not to be permitted beyond the House Watch desk area until the Company Officer is present.

Chief Jackson stated further that the person assigned to the House Watch duties is responsible for the above duties along with answering calls from dispatch pertaining to runs-no matter the time, notifying everyone in the fire house when there is an assignment, and anything that happens in and around the Fire Station.

Captain Joseph Kostnicka

Captain Joseph Kostnicka (Captain Kostnicka) testified that he was on duty on December 2, 2020, and reported that he was not aware of the unauthorized visitors as he was upstairs in his office. Captain Kostnicka stated that Adames was the designated "down watch" person, responsible for monitoring all visitors in and out of the fire station as well as attending to all requirements of the Fire Station during his down watch. Captain Kostnicka testified that Adames was away from his down watch station and showering when the visitors entered the Fire Station through the back door. Captain Kostnicka stated that Rizzolo admitted to him that he was covering for Adames as the down watch person while Adames stepped away to work out and shower, when the individuals arrived to see Rizzolo. Captain Kostnicka testified that Rizzolo also admitted that the visitor to the Fire Station were not in compliance with Covid protocol at the time, which required wearing P.P.E. at all times, temperature check protocols, and were livestreaming from the fire station.

Captain Kostnicka could not recall or did not know if he had the Journal when Deputy Chief Whitte arrived, but he said it should have been at the desk where the down watch person sat but he believed it was in the kitchen. Captain Kostnicka stated that he did not know where Adames was in relation to the when the unauthorized visitors were in the Fire Station, but relied on what Rizzolo told him

The Captain also testified that it was common for the down watch firefighter to have another firefighter cover his down watch duties when he or she stepped away from the down watch area. However, Captain Kostnicka acknowledged that although there is one designated down watch person, everyone in the Fire Station is responsible, and has a general responsibility for overseeing the workings of the Fire Station, and that in essence, "everyone has house watch duties" at the Fire Station. Captain Kostnicka stated that the rules required that be notified of a switch in down watch person and that Adames was still the responsible down watch firefighter even though he may have switched with Rizzolo. Captain Kostnicka testified that Rizzolo was "more at fault" than Adames for bringing in unauthorized persons into the fire station, and that both Adames and Rizzolo should have been disciplined.

Captain Kostnicka testified as a result of this incident he was suspended "eight hours in abeyance", which meant that if he had no further disciplinary charges after a period of time, the eight (8) hour suspension would be removed from his personnel file. Captain Kostnicka stated that he had no further disciplinary action and the eight (8) hour suspension was removed.

Captain Jeray Walker:

Captain Jeray Walker (Captain Walker) is in charge of the Fire Division, Professional Standards section, and is responsible for investigating internal affairs complaints of members of the Newark Fire Department. Captain Walker testified that on December 2, 2020, he received a call from Deputy Chief Whitte informing him of the incident on said date concerning the Facebook live stream video at the fire station.

Captain Walker confirmed the results of his investigation that are contained in his report dated December 14, 2020 (J3), which included the following: review of a copy of the Facebook stream video; review of the fire station log book for visitors to the fire station; review of narrative reports submitted by the Deputy Chief, Battalion Chief, Captain Kostnicka, Adames, Rizzolo, Firefighter Tim Walczak (Walczak), and firefighter Braulio Rodriguez (Rodriguez); statements of from the Battalion Chief, Captain Kostnicka, Adames and Rizzolo.

Captain Walker concluded that the facts discovered during his investigation concerning the alleged incident resulted in his finding that the allegations did occur, and that violations of Newark Fire Department Rules and Regulations were sustained, and the incident was referred for a Fire Division hearing (Id.).

In his testimony, Captain Walker confirmed the results of his investigation, which found that the following rules and regulations were violated:

- Newark Fire Division Article 1-Compliance with Rules and Regulations, General Orders, Executive Orders and Directives;
- Newark Fire Division Article 6- Neglect of Duty;
- Newark Fire Division Article 11-Personal Example;
- Newark Fire Division Article 15-Time While on Duty;
- Newark Fire Division General Order 6, concerning house watch duties, and
- Newark Fire Division Notice No. 2017-128, concerning firehouse facility visitations.

[J-3, J-4, and J-5]

Raylor Adames:

Adames testified that he has been employed with the Department since July 2012, and during that time he had never been the subject of a major discipline. Adames started that he had one minor matter in 2018, and a counseling session prior to the ten-day suspension in question (J-12).

Adames testified that on December 2, 2020, he was working the twenty-four shift that commenced at 8AM, and that he took over the down watch duties from Walczak, who had originally been assigned the house watch duties. Adames testified that in the early evening on December 2, he spoke with Rizzolo to cover for his down watch, as Adames wanted to work out and then shower. Adames testified that he contracted Covid prior to December 2020, and he developed a "Covid rash" which required that he shower frequently. Adames stated that after two hours of working out and showering, he returned downstairs to find that Rizzolo had three visitors. Adames stated he went to the kitchen to eat dinner while the visitors were there with Rizzolo.

Adames stated that one of the visitors asked him to take a cellphone video of them in the fire station and handed him their cellphone. Adames admitted to video recording the visitors, but he stated he did not know it was being live streamed on Facebook. Adames stated that after about "three-minutes" Rizzolo asked him to return to down watch duties, which he did.

Adames testified that sometime after the visitors left the fire station, the gates opened and Deputy Chief Witte arrived. Adames "hit the gong" to announce the Deputy Chief. Adames testified that the entire Fire Station personnel was downstairs and at attention after the Deputy Chief was announced. Adames testified that Deputy Chief Witte asked for the Journal/log book, which Adames said was in Captain Kostnicka's hand. Adames testified that the Deputy Chief took a photo of the same and was on his cellphone talking to the Fire Chief and he overheard him say to Chief Jackson "no one signed the book."

Adames stated that Rizzolo told Captain Kostnicka that it was "his fault" and not Adames for letting the unauthorized visitors into the fire station and that Adames was not the down watch person when the visitors had arrived. Adames said Deputy Chief Witte told all to prepare written statements as to what had occurred that day, which they all did and submitted to Deputy Chief Witte. (J-3).

Adames stated the next day he was informed that he would be placed on "twenty-four hour suspension," which he "served" with a personal day. Adames stated that he

returned to work the next day and received his PNDA more than thirty-days from the initial suspension. He testified that he was not issued a written reprimand, oral reprimand, and no corrective discipline was made other than the ten-day suspension. He testified further that when he attended the departmental hearing, he was not offered a settlement.

Adames acknowledged that he was aware of the regulations concerning his housewatch duties (J-6); unauthorized visitors in the fire station not allowed (J-7), although he disputed his signature on the sign-in sheet (Id.);

Firefighter Angelo Rizzolo:

Firefighter Angelo Rizzolo (Rizzolo) testified that on December 2, 2020, he was working the same shift as Adames, and that Adames was the designated down watch person. Rizzolo stated that on December 2, Adames had asked him to cover the down watch duties while Adames went to work out upstairs in the Fire Station. Rizzolo testified that it is very common for fire fighters to switch down watch duties during a shift. Rizzolo also testified that he was aware of the Covid Fire Department protocol requiring a temperature check of visitors, social distancing, mask wearing and to log in all visitors. He also affirmed that he knew unauthorized visitors were not allowed in the fire station.

As to why he allowed the visitors into the Fire Station, Rizzolo testified that he has a business involving paint/customizing sneakers and that a customer had called him prior to commencing his shift on December 2nd seeking an appointment to pick up three pair of sneakers. Rizzolo stated that he and the customer agreed to meet at the fire station on December 2 for the customer to pick up the sneakers. Rizzolo testified that Adames was not aware that the customer would be coming by the Fire Station to pick up the sneakers. Rizzolo testified that after Adames passed the down watch duties to him and Adames had gone upstairs the customer and two additional individuals arrived to pick up the sneakers.

Rizzolo stated he was expecting one person. Rizzolo testified that he took them into the kitchen and made coffee for them. Rizzolo stated that he took a temperature check of the three visitors but did not log them in the book, they were not wearing masks

and the did not maintain social distancing. Rizzolo testified that the visitors were taking videos with him holding the sneakers in the Fire Station “showing off” the sneakers.

Rizzolo stated that when Adames came down stairs, he introduced the visitors and Adames then went into the kitchen to eat dinner. He testified that a few minutes later the visitors left the fire station, and then Deputy Chief Whitte arrived 10-15 minutes after the visitors left. Rizzolo stated that he apologized to the Deputy Chief, Battalion Chief Gonzalez, Captain Kostnicka and Adames for allowing the visitors in the fire station without following Covid protocol, as well as not having them sign the Journal/log in book. Rizzolo testified that he told the Deputy Chief that he was covering the down watch for Adames when the visitors arrived, and that Adames did not know they were all coming to the fire station.

Rizzolo then testified that the next day they were all suspended for twenty-four (24) hours, and that when they all appeared for the Departmental hearing before Public Safety Director Anthony Ambrose (Director Ambrose), the Director spoke to all of them about the seriousness of the violations. Rizzolo stated that their union representative spoke to Director Ambrose prior to commencing the departmental hearing and a “deal” was worked out. He stated he was offered an eight-hour (8) suspension to serve immediately and an eleven-hour (11) suspension to be held in abeyance for six-months (6), and if no further disciplinary action was taken during said time, the eleven-hours (11) would be removed. Rizzolo stated that he accepted the offer.

LEGAL ANALYSIS

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). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a “fair preponderance of the believable evidence.” Polk, 90 N.J. at 560 (citation omitted); N.J.A.C. 4A:2-1.4(a); Atkinson, 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). The greater weight of credible evidence in the case—the preponderance—depends not only on the number of witnesses, but “the 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 Estate of Perrone, 5 N.J. 514, 522 (1950).

Adames is charged with violating the following Civil Service regulations: N.J.A.C.: 4A:2-2.3(a)(6), Neglect of Duty ³, NJAC: 4A:2-2.3(a)(12), Other Sufficient Causes. Adames is also charged with violating the following Newark Fire Department Rules and Regulations: Newark Fire Division Memorandum 2018-130 (J-7); Newark Fire Division Notice No. 2017-128 (J-5), and Newark Fire division Notice No. 2020-064(J-8).

After having heard the testimony herein and considering the documents in evidence, it is evident that Adames does not dispute the factual allegations contained in the FNDA, as to what occurred on December 2, 2020. Instead, Adames contests the imposition of a major discipline of ten-days, when the other responsible individuals were assessed minor suspensions, which some did not serve as they were held in abeyance pending good behavior. Adames argues that it was the past custom in the Department for house watch fire fighters to pass along coverage to a fellow fire fighter when the house watch person needed coverage, and that the breach of the Departmental regulations did not occur while he was attending to his house watch duties.

³ “Neglect of Duty” is found at N.J.A.C. 4A:2-2.3(a)(7), and not as cited in the PNDA, as N.J.A.C.: 4A:2-2.3(a)(6). I will consider a charge that Adames violated N.J.A.C. 4A:2-2.3(a)(7), as the facts presented herein have to do with alleged violations of neglect of duty by Adames.

While it is true that Rizzolo took responsibility for allowing the visitors into the Fire Station and admitted to not following the Covid protocols contained in the Departmental regulations violated herein, Adames was the designated house watch person on December 2, 2020, and is ultimately responsible for compliance with the obligations therein.

I **CONCLUDE** that the record herein establishes that Adames was aware of the duties of the down watch person, and that during December 2, 2020, because of the COVID-19 pandemic which required the implementation of the Newark Fire Department Rules and Regulations cited herein, he was also cognizant of the same. I **CONCLUDE** further that it was the common practice within the Fire Station where this incident occurred, as well as throughout the Department, that the down watch firefighter on duty could pass his down watch duties to an accepting firefighter during a shift. Having **CONCLUDED** that Adames is in violation of the stated charges contained in the FNDA, I now must turn to the appropriate penalty.

Based upon the documents admitted in evidence and the testimony of the witnesses who appeared in this matter, I **CONCLUDE** that the Department has established by a preponderance of the competent, relevant, and credible evidence that Adames' conduct on December 2, 2020, was in violation of the cited Civil Service rules and Departmental regulations contained in the FNDA, and I **AFFIRM** the same, but disagree with the penalty imposed.

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and penalty on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record, and the gravity of the misconduct. In West New York v. Bock, 38 N.J. 500, 522 (1962), our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct."

In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that “consideration of past record is inherently relevant” in a disciplinary proceeding and held that an employee’s “past record” includes “an employee’s reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee.” Bock, 38 N.J. 523–24.

Pursuant to N.J.A.C. 4A:2-2.2(a)3, a major discipline of a Civil Service employee, “shall include” a “[s]uspension or fine for more than five working days at any one time.”

The Department adheres to the City of Newark Division of Personnel Department of Administration Operating Policies and Procedures for all Disciplinary Actions of employee. (J-10) (PDP-19). Under PDP-19, the City of Newark “shall follow a remedial system of progressive discipline in an attempt to bring the employee’s work performance and/or conduct up to a satisfactory level.” (J-10, page 2). Part of remedial or progressive discipline system includes a corrective conference, then a written reprimand prior to any major disciplinary actions being instituted by the Department. Id.

The Department can only bypass the remedial or progressive discipline system if the Director believes that the employee’s conduct justifies said divergence. Id.

However, if the Department bypasses the remedial or progressive discipline system under PDP-19, the Director is obligated to supply “[e]vidence of compliance with the progressive discipline system including copies of the documentation of the oral warning and written reprimand, or a statement outlining the reasons why progressive discipline system should be bypassed. (J-10, at page 6). The record is devoid of any evidence that the Department bypassed the remedial or progressive discipline system requirements, as it sought a major discipline charge and a ten-day major suspension against Adames (J-1 and J-2).⁴ As Adames testified too, and the Department did not

⁴ Coincidentally, Adames’ disciplinary history (J-12) provided by the Department, contains two disciplinary matters that occurred after this incident, which provides for the remedial or progressive discipline system under PDP-19.

rebut, there was no record of an oral conference, a written reprimand, or even a memo stating what reasons or factors the Department relied upon in bypassing the remedial or progressive discipline system.

The record herein reflects that Rizzolo took full responsibility for not complying with Newark Fire Department Regulations in allowing the unauthorized guests into the Fire Station without Adames' knowledge. Further, Captain Kostnicka corroborated Rizzolo's testimony, stating that while Adames was strictly liable, Rizzolo took full responsibility for this incident, as he was the one who created it. Captain Kostnicka additionally testified that, since he was the Captain on duty, he was strictly liable for the unauthorized guests. For their actions, however, neither Captain Kostnicka nor Rizzolo received a major discipline.

While it appears unjust that only Adames received a ten-day (10) major suspension herein, he acknowledged that he was aware of the regulations concerning his housewatch duties (J-6); unauthorized visitors in the fire station not allowed (J-7), and as such, his discipline should be greater than Rizzolo and Captain Kostnicka. However, I do not agree that it should be a major discipline, because of the mitigating circumstance that Adames was not aware the visitors had entered the Fire Station in violation of the Newark Fire Department Regulations, until they were there as admitted too by Rizzolo. It was at this juncture, however, that Adames should have taken steps to remediate the situation and confirm that the visitors had signed the Journal, asked them to leave and report the same to Captain Kostnicka. Adames did not take such actions, and for that he should be disciplined accordingly.

For the reasons stated herein, I **CONCLUDE** that the Department did not comply with its own progressive discipline system set forth in PDP-19, when it chose to charge Adames with a major discipline. I further **CONCLUDE** that Adames, as the housewatch person at the Fire Station on December 2, 2020, was responsible to follow the Newark Fire Division Memorandum 2018-130 (J-7): Newark Fire Division Notice No. 2017-128 (J-5), and Newark Fire division Notice No. 2020-064(J-8).

However, notwithstanding my conclusion herein, I **CONCLUDE** that the appropriate penalty for Adames should be a minor discipline suspension of five-days (5), because he was the designated house watch person; his lack of a prior major discipline at the time; the Department's failure to adhere to the progressive discipline procedure set forth in PDP-19, and Rizzolo's principal conduct, as the mitigating factor in creating the incident.

I therefore **CONCLUDE** that the Department's penalty of a ten-day suspension is **REVERSED**, and the appropriate penalty is a minor discipline suspension of five-days.

ORDER

It is **ORDERED** that the Department's decision contained in the FNDA dated April 1, 2021, that Adames violated the cited Civil Services Rules and Department regulations is **AFFIRMED** but that the appropriate penalty is a minor discipline suspension of five-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, 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.

March 31, 2023
DATE

Julio Morejon
JULIO C. MOREJON, ALJ

Date Received at Agency: March 31, 2023

Date E-Mailed to Parties: March 31, 2023
lr

APPENDIX

Witnesses

For Appellant:

Firefighter Raylor Adames

Firefighter Angelo Rizzolo

For Respondent:

Fire Chief Rufus Jackson

Captain Joseph Kostnicka

Captain Jeray Walker

Exhibits

Joint:

J-1 PNDA

J-2 FNDA

J-3 Investigation of Personnel

J-4 City of Newark Fire Department Rules and Regulations

J-5 Notice No 2017-128

J-6 General Order D-6 and A-3

J-7 Unauthorized Visitors in Fire Division Facilities 2018-130

J-8 Notice No. 2020-064

J-9 Notice No. 2020-065

J-10 City of Newark Operating Rules (PDP-19)

J-11 Collective Bargaining Agreement

J-12 Adames Disciplinary history