

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003501-23**

DALE W. EGGERT,

Petitioner-Appellant,

v.

**NEW JERSEY DEPARTMENT
OF COMMUNITY AFFAIRS
DIVISION OF FIRE SAFETY,**

Respondent-Respondent.

CIVIL ACTION

ON APPEAL FROM

**STATE OF NEW JERSEY,
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. CAF 08930-22
Agency Docket No. DFSID 174710
Honorable Jacob Gertsman, A.L.J.
Sat below**

**BRIEF FOR
APPELLANT DALE W. EGGERT**

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PRELIMINARY STATEMENT

Appellant Chief Dale W. Eggert (Chief Eggert) challenges the May 30, 2024 final agency decision of the Department of Community Affairs (DCA) upholding revocation of seven firefighting certifications that enable him to serve as a volunteer and paid firefighter in the State of New Jersey. The revocation by the Division of Fire Safety (DFS or Division) of Chief Eggert's certifications was not tied to safety concerns relating to his skills or performance as a firefighter or alleged misconduct while fighting fires, the only grounds for revocation permitted by N.J.A.C. 5:73-1.9. Instead, Chief Eggert was stripped of his firefighting certifications because, in the opinion of one DFS employee, Donald Nelsen, Chief Eggert failed to adequately attend to administrative tasks while serving as Chief of the Tuckerton Volunteer Fire Company (TVFC). Because the Division lacked a statutory basis to revoke Chief Eggert's certifications, its action was punitive and ultra vires: the Division exceeded the authority granted it by the Legislature, which is to protect public safety and welfare.

As an additional basis for the revocation, the Division cited Chief Eggert's use of a radio to call for police assistance when he encountered a defective traffic light at a busy intersection. Contrary to Nelsen's misrepresentation that Chief Eggert interfered with police activity by using the radio, Chief Eggert's actions were viewed as aiding the situation. It shocks one's sense of fairness that the Division could find

fault with an off-duty firefighter using an authorized portable radio and authorized call sign to report a dangerous condition and then directing traffic until the police arrived. This volunteer first responder chose to use the tools he had on hand to call dispatch and assist at a hazardous traffic site to protect the public from imminent harm, rather than turn a blind eye to the danger. The result of this conscientious decision? Swift condemnation by the Division, initiated by Nelsen's mischaracterization of the situation. The chilling effect of the Division's action cannot be overstated.

There is scant judicial guidance concerning the issues raised by this appeal, which challenges the DFS's use of the New Jersey Administrative Code as a disciplinary tool to remove a volunteer firefighter from service for reasons unrelated to his skills as a firefighter and public safety in general. In a time of waning volunteerism, it is important that this case be scrutinized closely for the sake of firefighters throughout the State who might also be targets of the DFS's asserted intolerance for perceived administrative shortcomings.

The record lacks substantial evidence to support the DCA's findings to support its decision. Further, in applying the legislative policies to the facts the DCA erred by reaching its conclusion, which could not reasonably have been made based upon the record evidence. N.J. Soc. for Prevention of Cruelty to Animals v. N.J.

Dep't of Agric., 196 N.J. 366 (2008). Accordingly, the DCA's decision must be overturned.

PROCEDURAL HISTORY

By letter dated August 15, 2022 (the Revocation Letter), the DFS, a division of the DCA, revoked all seven of Eggert's firefighter certifications, alleging he violated administrative provisions of the Uniform Fire Safety Act, specifically: he engaged in "gross negligence or misconduct in the performance of his duties," N.J.A.C. 5.73-1.9(a)3; failed over a period of time to maintain a minimally acceptable level of competence, N.J.A.C. 5.73-1.9(a)4; made a false or misleading written statement or made a material omission in a submission to the Department, N.J.A.C. 5.73-1.9(a)6; and engaged in other unstated violations of the code, N.J.A.C. 5.73-1.9(a)7. (Pa1 – Pa5).¹ On August 29, 2022, Chief Eggert requested a hearing, challenging the revocation of his certifications. (Pa6 – Pa11).

An administrative hearing was held before A.L.J. Jacob Gertsman on April 10, 11 and 13, 2023. (1T², 2T³, 3T⁴). On March 1, 2024, the A.L.J. issued an Initial Decision, finding the Division met its burden to show Chief Eggert violated the cited administrative regulations. (Pa12 – Pa59).

¹ Pa = Plaintiff/Appellant's Appendix.

² 1T = Transcript of April 10, 2023.

³ 2T = Transcript of April 11, 2023.

⁴ 3T = Transcript of April 13, 2023.

On March 14, 2024, Chief Eggert filed exceptions to the A.L.J.'s Initial Decision. (Pa60 – Pa90). On May 30, 2024, the DCA adopted the A.L.J.'s findings and conclusions⁵, deciding to permanently revoke Chief Eggert's firefighting certifications. (Pa91 – Pa93). This timely appeal followed.

STATEMENT OF FACTS

An Exemplary Volunteer Firefighter

Chief Eggert displayed skills and diligence as a firefighter with no history of negligence, wrongdoing, or lack of competence. (3T54:6-55:14). He comes from a family devoted to public service, as his father and brother are also firefighters. (1T32:5-8; 3T84:5-16). At the time of the administrative hearing, Chief Eggert had been a firefighter for thirteen years, having earned his Firefighter 1 certification when he was eighteen years old. (3T49:5-11).

Chief Eggert underwent extensive training in firefighting and fire-related subjects, including Basic Vehicle Extrication, Advanced Vehicle Extrication, Heavy Vehicle Extrication, Basic Pump Operations, SCBA Competency, Rapid Intervention Teams (RIT), Hazmat Awareness/Operations, CBRNE Awareness/Operations, Do No Harm/Autism Awareness, Incident Command System 100, Incident Command System 200, Incident Command System 300,

⁵ Throughout this Brief, Petitioner/Appellant's focuses on the Initial Decision of A.L.J. Gertsman because the DCA adopted the Initial Decision in full (Pa140-Pa142).

Incident Command System 400, Incident Command System 700, NJ EMT (583017), EVOC, CEVO-3 Fire, CEVO-3 Ambulance, PHTLS, Flashover Simulator, Calling the Mayday, Strategy & Tactics for Initial Company Ops, Truck Company Ops, Fire Instructor 1, Fire Officer 1, Dealing with Modern Fire Loads, New Fire Chief: Challenging Issues, NJ Highway Incident Safety Guideline, Development-Local Delivery, NJ Division of Fire Safety Solar Power: Strategy and Tactics, NFA Leadership 2 for Fire & EMS, NFA Leadership 3 for Fire & EMS, Confined Space Awareness, Elevator Emergencies, Emergency Vehicle Technician F1&F3. (Pa103-Pa116).

In or about 2013, Chief Eggert was also awarded a Valor Award from the Borough of Tuckerton for rescuing a trapped victim from a structure fire. (3T55:10-56:11). In short, Chief Eggert was a highly trained and skilled volunteer firefighter.

Administrative Submissions

Chief Eggert was appointed Chief of the TVFC in 2017. (3T138:6-8). During his tenure, the TVFC's By-Laws confirm Chief Eggert was tasked with the firematic operations of the TVFC, not administrative functions. (2T103:6 – 105:14; 3T87:22-88:16). The Borough of Tuckerton ("Borough") appointed a Public Employees Occupational Safety and Health ("PEOSH") Act Compliance position, filled not by Chief Eggert, but by Borough Administrator Jenny Gleghorn or the Public Works Superintendent. (1T126:1-10).

In 2018, the Borough of Tuckerton was fined because the PEOSH Compliance Officer was late in obtaining fit testing for TVFC's members. (1T at 109-111). Additionally, the Respiratory Protection Plan ("RPP") drafted in part by Gleghorn was deemed insufficient. (1T127:25-128:5; Pa142). Chief Eggert helped to revise the RPP in order to bring the TVFC into compliance. (2T23:5-25:6; 3T12614-23). In 2019 and 2020, necessary fit testing was timely completed. (3T92:9-93:21). In 2021 the fit testing was delayed because companies authorized to perform testing had long waiting lists caused by the COVID pandemic. (1T111:16- 112:23). When the Department of Labor ("DOL") inspected in 2021, a "repeat violation" assessment was imposed. (1T153:5-16). The Borough Administrator appealed the fine, advising the DOL that TVFC had "made every effort to have the necessary fit testing of volunteers occur within 2021, but unfortunately with everything else during this time frame there were delays due to the COVID pandemic." (1T131:3-9). Consequently, the fine was significantly reduced. (1T132:8-10).

As Nelsen admitted during the administrative hearing, several New Jersey fire companies had PEOSH violations over the years. (1T162:24 -163:2). To Nelsen's knowledge, none of the Chiefs of those fire companies had their certifications revoked. (1T163:3-5). Although PEOSH compliance was not Chief Eggert's responsibility, he took the lead to rectify the situation and bring the TVFC into compliance for 2021. (3T92:7-93:21).

In 2022, an anonymous caller to the Division complained about TVFC's response to a carbon monoxide call. (1T22:2-16; 1T24:15-25). The allegation was that the sole firefighter responding to the call was ill-equipped and ill-prepared to handle the matter. (1T22:2-16). A Division investigation commenced on March 7, 2022. (1T20:24-21:6).

As part of the investigation, the DFS requested the identities of the TVFC firefighters. Chief Eggert submitted a roster of active TVFC firefighters, which listed twelve names. (1T37:1-38:2). Nelsen found the minimum National Fire Protection Association (NFPA) requirement for the Borough was fifteen firefighters, making the TVFC out of compliance. (1T41:16-20). However, through valid and longstanding mutual aid agreements with neighboring municipalities, the Borough met fire safety standards in that the NFPA permits fire companies to meet the standards by contracting with other towns. (Pa128; 2T97:15-23).

On April 22, 2022, the Division emailed Chief Eggert asking him to appear at a June 1, 2022 meeting to supply the following documentation concerning certifications held by TVFC members: proof of NJ DFS FF1, HazMat Awareness & Operations for six members of the TVFC, proof of NJ DFS HazMat Awareness and Operations for six members of the TVFC, proof of Incident Safety Officer training for one member of the TVFC, and NJ DFS Incident Management System Level 1 certifications for three members of the TVFC. The Division also requested

copies of signed Memoranda of Agreement with at least two contiguous fire services, written explanation as to the disposition of each of the TVFC members that remained on the TVFC roster but were no longer members, and copies of Tuckerton FD Standard Operating Guidelines/Procedures relevant to Respiratory Protection Programs. (Pa126-Pa128). Eggert attended the June 1, 2022 meeting with Nelsen and provided the information containing the requested applications and certifications. (3T117:18-119-6). Nelsen paged through the information and stated it looked adequate. (3T117:18-119:6).

However, five days later, on June 6, 2022, Nelsen sent Chief Eggert an email listing deficiencies in the firefighter applications, to be cured “as soon as humanly possible” and no later than June 10, 2022. (Pa129-Pa133). In part, the listed deficiencies included the need to submit birth certificates and/or drivers licenses for the firefighters, even though those documents were not initially requested. (Pa126-Pa128; 1T54:14-18).

The same day, Nelsen sent an email to Tuckerton Borough Administrator Gleghorn contending “[Eggert] squandered the opportunity to make necessary corrections in a timely fashion.” (Pa117-Pa119.) The content and tone of the communication demonstrated Nelsen had no intention of allowing Chief Eggert to supply the supplemental documents Nelsen sought. (Pa117-Pa119.) Moreover, Nelsen’s email exaggerated the situation, stating residents of Tuckerton were not

“adequately protected in their current Volunteer Company operations.” (Pa117-Pa119.) Although the Borough had not had safety concerns regarding the performance or operations of the TVFC, its solicitor advised Council that Nelsen’s letter exposed the Borough to liability through “lawsuits.” Consequently, the Borough suspended the TVFC, taking it out of service. (1T103:8-106:13; 2T88:18-89:3).

TVFC had mutual aid agreements with other fire departments. Chief Wetmore of the New Gretna Fire Company noted his municipality and TVFC had a “mutual aid agreement” whereby the two fire companies each dispatched firefighters to one another’s town to fight structure fires. (2T98:4-100:25). Thus, while a mutual aid agreement is not a formal Memorandum of Agreement (MOA), it is a commitment from another firefighting force to provide manpower to fight fires. This agreement satisfied NFPA requirements. (Pa126-Pa128). Nevertheless, for the first time on April 22, 2022, (Pa126-Pa128), Nelsen stated the Division required Chief Eggert to provide formal, written MOAs. (Pa126-Pa128). Chief Eggert secured written signed agreements with the West Tuckerton and Parkertown Fire Departments, which he gave Nelsen during the June 1, 2022 meeting. (3T114:23-115:23). Nelsen reviewed the agreements but found the wording unacceptable. (3T115:3-23). Accordingly, Chief Eggert revised the documents, had them fully executed, and presented them to Nelsen. (1T68:14-69:12). Nelsen acknowledged

“the verbiage looked adequate.” (3T127:25 – 128:7; Pa129-Pa133). However, he then changed his mind, sending a June 6, 2022 email insisting the documents be modified. (Pa129-Pa133). On June 7, 2022, Chief Eggert supplied modified signed MOAs, which Nelsen later admitted were acceptable, (1T178:16-177:2), but he never told Chief Eggert. (1T180:23-181:1). Indeed, in a memo dated June 15, 2022, he falsely said he had not received acceptable versions of the MOAs. (Pa121). Additionally, in response to a question from Eggert on June 22, 2022, he said “the Memorandums of Agreement need to simply state what I have advised you in writing to state twice including covenant wording; no more, no less.” (Pa124-Pa125; 1T179:17-180:3). When asked why he did not inform Chief Eggert he had provided acceptable versions, Nelsen said, “(h)e asked about the wording. And I told him I had given it to him already. There was no request whether or not that last – latest letter of agreement was sufficient.” (1T180:23-181:1).

On June 9, 2022, Chief Eggert emailed Nelsen informing him he “hand delivered all the certification paperwork to Mr. Greg Kirkham yesterday for review.” (Pa120). As of that date, Chief Eggert believed he corrected all issues raised by Nelsen. (3T124:24-125:8).

Additionally, Nelsen advised Chief Eggert that TVFC had not been reporting their run reports to the National Fire Incident Reporting System (“NFIRS”). (1T161:17-20). Although Nelsen admitted this was not a legal requirement for a fire

company, the NFIRS submissions related to TVFC's ability to obtain grant funding. (1T161:10-16). Once Chief Eggert was notified of the optional submissions and the benefit thereof, he delegated the duty of bringing them current to another member of TVFC, and the submissions were thereafter substantially completed. (3T84:8-16).

Nelsen continued to send emails to others insisting Chief Eggert had not complied with his demands. (Pa121; Pa124-Pa128; Pa129-Pa133). Chief Eggert continued his efforts to meet Nelsen's demands. (Pa121-Pa125). Nelsen sent his last email on June 22, 2022, which was filled with sarcastic and mean-spirited comments, as well as allegations proved to be untrue, including:

- “as far as Mr. Ayotte and Mr. Rochesky not running calls, thank you for stating the obvious since none of your members are running calls at this time”;
- “you have already perjured yourself in your documentation submissions and recorded public comments, no need to make the situation any worse”; and
- “(i)f you have cured the multitude of noted training deficiencies, I will gladly send you an email stating such – as noted to you previously. However, such an occurrence would NOT abate all your violations of the PEOSH standards, all your violations of the Uniform Fire Code, all your violations of the Uniform Construction Code, all your violations of the Uniform Fire Safety Act, nor all your violations of the ‘Deployment’ Act. Thus, even IF the

training certifications deficiencies were all cured, it is not an automatic return of the Tuckerton Volunteer Fire Company to emergency response service. Far from it.” (Pa124-Pa125).

Upon receiving this email, Chief Eggert realized his efforts would not be fairly assessed. (3T133:3-11; Pa124-Pa125). He testified that “it was an uphill battle in a snowstorm,” because Nelsen’s “goal was to, quote, get rid of the Eggerts and take the Fire Company . . .” (3T133:3-11).

Good Samaritan

On July 25, 2022, while driving from his home to another TVFC firefighter’s home, Chief Eggert noticed a nonfunctioning traffic signal at a busy intersection in Tuckerton. (3T56:22 – 57:11). Chief Eggert knew the malfunctioning signal posed a dangerous situation requiring immediate attention. Using a portable radio, he radioed county dispatch using a call signal issued to him by the Southern Ocean County Tanker Task Force (“SOCTTF”) seeking assistance to protect motorists from the imminent hazard presented by the lack of a traffic light. (3T56:22 – 64:13).

Even though Chief Eggert was not an acting firefighter at the time, he remained a member of SOCTTF, and was authorized to use the portable radio and the call sign. (3T51:13-52:12; 3T59:15-61:5; 3T63:4-15).

Nelsen took issue with the safety measures undertaken by Chief Eggert. (Pa1-Pa5). Although he asserted that “mayhem” ensued upon Chief Eggert’s call for

emergency assistance, no evidence supports his statement. (Pa1-Pa5; 3T:36-12:16).

At trial, Nelsen was forced to admit that his depiction of the incident was false. (3T36:12-16).

Revocation Letter

The Division issued the Revocation Letter, stripping Chief Eggert of each of his firefighting certifications, citing as a basis the manner in which he handled paperwork and his use of the radio to call for help at the dangerous intersection. (Pa1-Pa5). Specifically, the Division revoked the following seven certifications Chief Eggert earned as a New Jersey volunteer and paid firefighter: Firefighter 1, Firefighter 2, Hazardous Materials: Awareness, Hazardous Materials: Operations, Incident Management Level 1, Incident Management Level 2 and Incident Management Level 3. Chief Eggert timely filed a Notice of Appeal asserting the DCA's decision was arbitrary and capricious, ultra vires, and unsupported by the evidence presented in the record. (Pa167-Pa170).

ARGUMENT

I. STANDARD OF REVIEW.

Agency decisions are reviewed under an arbitrary and capricious standard. Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). See Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020). "An administrative agency's final quasi-judicial decision will be sustained unless

there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007).

On appeal, the judicial role in reviewing all administrative action is generally limited to three inquiries: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Id. at 28 (quoting Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995)).

Agency factual findings enjoy a presumption of correctness only if they are "supported by substantial credible evidence" in the record. In re Authorization for Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004). "Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review." In re Vey, 124 N.J. 534, 543-44 (1991). "While we must defer to the agency's expertise, we need not surrender to it." N.J. Chapter of Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Envtl. Prot., 241 N.J. Super. 145, 165 (App. Div. 1990), certif. denied, 122 N.J. 374 (1990). As to strictly legal questions, a reviewing court is not bound by an agency's interpretation of a statute or

determination of a legal issue. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 158 (2018); Dep't of Child. & Fam. v. T.B., 207 N.J. 294, 302 (2011). Further, "an administrative agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1993).

Additionally, in reviewing sanctions imposed by agencies, "the test . . . is 'whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" In Re Herrmann, 192 N.J. at 28-29 (citing In re Polk, 90 N.J. 550, 578 (1982)).

Chief Eggert submits the DCA's revocation of his earned firefighting certifications was arbitrary, capricious, and unreasonable and unsupported by substantial credible evidence. Moreover, the sanction of revoking every one of his certifications was disproportionate to the "paperwork" offenses cited, shocking the sense of fairness of any reasonable observer. This court is requested to reverse.

II. THE DCA'S DECISION TO REVOKE CHIEF EGGERT'S FIREFIGHTER CERTIFICATIONS BASED ON NELSEN'S STATEMENTS SHOULD BE OVERTURNED BECAUSE THE DETERMINATION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE, UNSUPPORTED BY SUFFICIENT, COMPETENT, AND CREDIBLE EVIDENCE.

(Raised Below: Pa60-90)

The Revocation Letter contained the basis for the Division's revocation of Chief Eggert's certifications. It warrants close scrutiny because the claims made

therein were incorporated in toto by the Division, yet it raises significant concerns regarding Nelsen's credibility. Indeed, a careful review of the record lays bare Nelsen's misleading and inaccurate statements, the assumptions he made that were not grounded in factual support, and his biases designed to terminate the Borough's volunteer fire company and end the career of its chief. When subject to cross examination, Nelsen repeatedly retracted and corrected his prior inaccuracies, revealed his motivated bias and was exposed as a prevaricator. Inconceivably, the DCA overlooked the multitude of Nelsen's falsehoods in favor of upholding his recommendations to revoke Chief Eggert's certifications.

A. Standard for Revoking Certifications

N.J.S.A. 52:27D-25aa provides, in pertinent part:

The commissioner may refuse to admit a person to examination or may refuse to issue or may suspend or revoke any certificate of certification issued by the commissioner upon proof that the applicant or holder of such certificate:

- (1) Has obtained a certificate or authorization to sit for an examination, as the case may be, through fraud, deception or misrepresentation;
- (2) Has engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense;
- (3) Has engaged in gross negligence, gross malpractice or gross incompetence which damaged or endangered the life, health, welfare, safety or property of any person;
- (4) Has engaged in repeated acts of negligence, malpractice or incompetence;

(5) Has engaged in professional or occupational misconduct as may be determined by the commissioner; . . .

See also N.J. Div. of Fire Safety v. Solimando, CAF 01025-08, initial decision (May 1, 2009). (Pa171-Pa180). (“A firefighter’s certifications may be revoked for reasons including include gross negligence, gross malpractice, or gross incompetence, repeated acts of negligence, professional or occupational misconduct, or violation of any act or regulation administered by the Commissioner.”) The only available case citing N.J.S.A. 52:27D-25aa is N.J. Div. of Fire Safety v. Solimando, CAF 01025-08, initial decision (May 1, 2009). (Pa171-Pa180). Accordingly, this matter is an unprecedented use of the DCA’s purported powers under N.J.S.A. 52:27D-25aa.

The legislative authority set forth in N.J.S.A. 52:27D-25a expresses the requirement that serious failings on the part of a firefighter be proven if revocation is to be sought. Decertification must be based on the high standards of “gross negligence, gross malpractice or gross incompetence,” “repeated acts of negligence or incompetence,” or “professional or occupational misconduct.”

“As is evident by its descriptive name, gross negligence is a higher degree of negligence, and undoubtedly denotes “the upper reaches of negligent conduct,” Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 364 (2016) (quoting Parks v. Pep Boys, 282 N.J. Super. 1, 17 n. 6 (App. Div. 1995)). Gross negligence requires much more than inadvertence or inattention. It requires a demonstrated and extreme

departure from the standard of reasonable diligence. Here, Chief Eggert's compliance with the evolving documentation requests of Nelsen, in a matter of days, falls far short of this standard. The DCA has failed to carry its burden of proof.

B. No Adjudicator Could Reasonably Conclude Chief Eggert Engaged in Gross Negligence or Misconduct in Performance of His Duties, per NJAC 5:73-1.9(a)(3).

To support its claim that Chief Eggert engaged in gross negligence of misconduct, DCA adopted the A.L.J.'s finding that Chief Eggert's actions aiding the community during the traffic signal malfunction were improper because he the TVFC was suspended at the time. In essence, DCA concluded that Chief Eggert should have known his role in the SOCTTF was suspended, precluding him from using the call signal to report the dangerous traffic condition. (Pa48). The evidence presented at trial is directly contradictory to this finding.

Chief Eggert testified Chief D'Andrea told him he could continue to be a member of the SOCTTF. (3T52:21-54:12). No evidence was presented to refute this testimony. Nevertheless, A.L.J. Gertsman rejected Chief Eggert's testimony. (Pa37).

No documents, regulations, policies or other evidence supported the crucial allegation that Chief Eggert should have known that, as a result of the TVFC suspension, he was no longer authorized to use his radio and call signal. Even Ocean County Chief Fire Coordinator Joseph Jubert admitted he had limited knowledge of

the SOCTTF rules when he later instructed Chief Eggert not to use the SOCTTF call sign. (2T77:15-78:22). Absent this proof, the finding is completely unsupported and the conclusion arbitrary. Objectively, Chief Eggert encountered a dangerous situation, radioed to dispatch to alert the authorities, directed traffic until the police arrived, and continued to assist at the police officers' request. (3T56:22 – 66:20).

A.L.J. Gertsman's conclusion was unsupported by the evidence presented. Conversely, the evidence showed that (1) Eggert was not performing any duties as a firefighter at the time but was acting as a concerned citizen who happened to be a member of the SOCTTF (and hence could not have failed to engage in misconduct in his duties as a firefighter); and (2) Eggert reasonably believed he was legally authorized to use the SOT-3 call sign that day based on his conversation with Chief D'Andrea. His actions cannot conceivably show misconduct or support decertification.

Additionally, claims that the reported traffic hazard caused "confusion" at County Dispatch allegedly attributed to Chief Eggert's "unauthorized use of the SOT-3 call sign," (Pa49), find no support in the record. (Pa134-Pa137). Instead, it was only Nelsen's opinion, who theorized that the call caused "mayhem." Confronted with the facts, Nelsen admitted he had no first-hand knowledge. Further, Nelsen's claim he heard this from another individual, who categorically denied making such a statement during the hearing (2T94:13-15), caused Nelsen to

back pedal. (3T36:12-16). Equally Eggert testified that the dispatcher on duty, stated he saw nothing wrong with what Chief Eggert did by calling in the defective traffic light using the radio and the SOT-3 call sign. (3T74:2-2).

The DCA's finding of gross negligence and/or professional misconduct based on Chief Eggert's actions was arbitrary, capricious, and unreasonable. The decision lacks any semblance of evidentiary support. Indeed, Eggert demonstrated faultless behavior for any off-duty first responder. (2T17:6-22; 2T20:12-20; 2T84:19-85:2).

C. The DCA's Decision that Chief Eggert Failed Over a Period of Time to Maintain a Minimally Acceptable Level of Competence is Unreasonable, per NJAC 5:73-1.9(a)(4).

The DCA's claim that Chief Eggert failed over a period of time to maintain a minimally acceptable level of competence is based on alleged "multiple years" of "PEOSH violations, staffing issues, and failure to submit a compliant MOA prior to the suspension of the TVFC," . . . "endangering the firefighters and the community." (Pa52). Even though a PEOSH violation occurred in 2018 and testing was slightly delayed in 2021, the facts show that Chief Eggert was not responsible for maintaining compliance with PEOSH standards. Equally important, the staffing standards for manning the fire company were met by agreements with neighboring towns. It was Chief Eggert who oversaw securing and submitted all documentation reflecting TVFC was compliant.

Concerning the optional NFIRS submissions, Chief Eggert ensured that the submissions were brought up to date after being notified by Nelsen that they were deficient. (1T161:17-20; 3T84:8-16). Although the NFIRS submissions are not a legal requirement for a fire company, Chief Eggert still followed the advice of Nelsen in making certain that the submissions were complete. (1T161:10-16; 3T84:8-16).

With respect to the alleged PEOSH violations, Chief Eggert was not the PEOSH Compliance Officer for the Borough. As confirmed by the TVFC's By-Laws, Administrator Glehorn and Chief Uhl, (Pa50; 2T103:6 – 105:14; 2T126:1-10; 3T151:16-24), the Borough established a distinct PEOSH Compliance Officer, (1T126:1-10) and Chief Eggert's role centered on firematic operations not administrative functions. (2T103:6 – 105:14; 3T87:22- 88:16). Ignoring these unrefuted facts, DCA accepted Nelsen's suggestion that Chief Eggert bore ultimate responsibility, a claim untethered to authority or the record.

Also, the conclusion that TVFC experienced "repeated PEOSH violations," ignores context and circumstances. Admittedly, the Borough was fined in 2018, because the PEOSH Compliance Officer (who was not Eggert) was late in obtaining fit testing for TVFC's members. (1T at 109-11; Pa143). Timely compliance occurred in 2019 and 2020, (3T92:9-93:21) and the delayed testing in 2021 was the direct result of a lack of qualified vendors to perform testing to address the resultant

COVID-caused excessive waiting lists. (1T111:16- 112:23; 1T153:5-16). The 2021 citation was appealed and the agency abated the fine (1T132:8-10), recognizing the Borough “made every effort to have the necessary fit testing of volunteers occur within 2021.” (1T130:16-132:18).

Similar unforeseen circumstances impacted many NJ fire companies. (1T162:24 -163:2). Also significant is Nelsen’s acknowledgement that several fire companies in New Jersey had PEOSH violations over the years. (1T162:24 -163:5). Yet none of their Chiefs faced certification revocation. (1T163:3-5). The arbitrary and unreasonable conclusion regarding Chief Eggert and the Borough’s PEOSH compliance is further highlighted by the facts showing Chief Eggert rectified the situation even though responsibility rested with the Borough officials. (3T92:9-93:21).

As to staffing issues, the DCA’s acceptance of findings that TVFC firefighters did not meet NFPA and Borough standards relied on outright misstatements by Nelsen. (Pa25; 1T167:14-169:17). Indeed, when it was pointed out on cross-examination that his testimony that the TVFC did not meet the standards was inaccurate, Nelsen conceded that his testimony was only “semi-accurate” because he lacked sufficient information to determine whether they met these standards (and thus to testify truthfully concerning same). (1T168:2-169:17). As such, no credible

evidence supports a finding the TVFC firefighters lacked appropriate training or failed to meet minimum standards.

Evidence also refuted the suggestion the TVFC was “undermanned.” Through valid and longstanding mutual aid agreements with neighboring municipalities, the Borough met required fire safety standards. (Pa128; 2T97:15-23). The DCA’s contrary finding improperly ignored critical testimony presented by Chief Thomas Wetmore of the New Gretna Fire Department, who discussed the “mutual aid agreement” New Gretna had with TVFC that required the two fire companies to dispatch firefighters to each other’s town for structure fires. (2T:98-4 – 100:25).

Finally, the finding that Chief Eggert failed to submit satisfactory MOAs to the Division before the TVFC’s suspension was a repeated failure by him to maintain a minimally acceptable level of competence over time is inaccurate and incorrect. A mutual aid agreement sufficient to satisfy NFPA requirements is a commitment and an agreement by another firefighting force to provide manpower to fight fires. TVFC had mutual aid agreements with other Fire Departments, specifically with the fire departments of New Gretna, West Tuckerton, and Parkertown. (2T97:15-18; 3T115:3-5). Nelsen himself admitted the cited NFPA 1720 requirement of fifteen firefighters on scene at a working fire within ten minutes of dispatch would be satisfied by such agreements with other towns. (Pa128).

Nelsen decided formal, written MOAs, drawn as he designated, were to be provided and related that demand to Chief Eggert on April 22, 2022. (Pa128). Chief Eggert presented the MOAs executed with West Tuckerton and Parkertown Fire Departments on June 1, 2022. (3T114:23-115:23). Nelsen objected to certain provisions, demanding that Eggert revise the agreements. (3T115:3-23). Immediately, Chief Eggert complied with Nelsen's new instructions, modified the agreements, had them re-executed and submitted them to the Division. (1T68:14-69:12; 3T115:3-23). Nelsen initially said "the verbiage looked adequate." (3T117:18-119:6), but for unexplained reasons, Nelsen again imposed additional requirements in his June 6, 2022 email. (Pa129-Pa133). The next day, Chief Eggert again supplied signed versions of the MOAs, which Nelsen deemed acceptable. (1T178:16-177:2). Nevertheless, Nelsen never informed the Borough all requirements were met. (1T180:23-181:1). Rather, he prepared a misleading memo, falsely stating he had not received acceptable versions of the MOAs. (Pa121). Nelsen's unhelpful, sarcastic response to Chief Eggert's inquiry on June 22, 2022, seeking affirmation regarding the MOAs ("the Memorandums of Agreement need to simply state what I have advised you in writing to state twice including covenant wording; no more, no less") (Pa124-Pa125; 1T179:17-180:3) fails to advise that the MOAs submitted were acceptable, thus exposing Nelsen's objective to thwart

Eggert's efforts rather than assist in creating strong compliant fire companies. (1T180:23-181:1).

In the light of Nelsen's misleading, inaccurate submission to the Division, the findings adopted by the DCA that Eggert failed to maintain a minimally acceptable level of competence are flawed. The facts surrounding who was responsible for PEOSH compliance and the 2021 delay (also experienced by many fire companies and beyond the Borough's control); that the TVFC had working mutual aid agreements, which became reduced to writing when the required met the intent and purpose of the NFPA standards; and that nothing showed the firefighters in the TVFC were inadequately trained or improperly certified. Contrary findings must be vacated and the conclusion to revoke Chief Eggert's certification must be reversed.

D. The Determination that Eggert Made a Material Omission in a Written Submission to the Division was Arbitrary, Capricious, and Unreasonable.

Next, DCA found Chief Eggert made material omissions to the Division, in violation of N.J.A.C. 5:73-1.9(a)(6). This relates to Nelsen's requests submitted on June 1, 2022. At that time, Chief Eggert provided all requested documentation, including Memoranda of Agreements initially deemed adequate. Nelsen subsequently demanded documents not originally requested. Thereafter, Nelsen continued to move the target on information he was seeking, which Chief Eggert satisfied. Although compliant, Nelsen created ways to find flaws.

The facts of record show the Division's April 22, 2022 email asked Eggert to meet and supply requested documentation on June 1, 2022. As set forth above, the specific documents requested were supplied. (Pa126-Pa128; 3T117:18-119:6). At that time, Nelsen acknowledged the information looked adequate. (3T117:18-119:6). Five days later Nelsen emailed Eggert listing deficiencies to be cured "as soon as humanly possible," and not later than by June 10, 2022. (Pa129-Pa133). One such "deficiency" was "birth certificates and/or drivers licenses for the firefighters"- a request not previously included in the April 22 email. (Pa126-Pa128; 1T54:14-18).

Nelsen's contemporaneous email to Gleghorn reflects that he had no intention of waiting for the requested documents, and instead had decided to rush to condemn Chief Eggert. Further, he knew the effect of his statement would require the Borough to act to deactivate the fire company. Nonetheless, Chief Eggert continued to submit the requested documentation in good faith, which Nelsen disregarded. (3T124:24-125:8; Pa120).

Chief Eggert did not submit false or misleading information to the Division. He made significant efforts to comply with Nelsen's changing demands. Notably, Nelsen's emails to Gleghorn and Chief Eggert on June 22, 2022, expose his intended objectives. As discussed in section E below, Nelsen's statements offered as fact were neither accurate nor true ("(i)f you have cured the multitude of noted training

deficiencies, I will gladly send you an email stating such – as noted to you previously. However, such an occurrence would NOT abate all your violations of the PEOSH standards, all your violations of the Uniform Fire Code, all your violations of the Uniform Construction Code, all your violations of the Uniform Fire Safety Act, nor all your violations of the ‘Deployment’ Act.”). Contrary to his role as a public servant, on behalf of the State, Nelsen had no interest to help TVFC return to service, to cure alleged deficiencies, or even to aid the fire company to understand the Division’s needs. (Pa121-Pa125). Far from it. As Chief Eggert correctly concluded, “it was an uphill battle in a snowstorm,” because Nelsen’s “goal was to, quote, get rid of the Eggerts and take the Fire Company . . .” (3T133:3-11.)

In sum, the evidence does not support the Division’s finding that Chief Eggert made a material omission to the Department. Indeed, the facts show that Eggert made every effort to provide documents sought by Nelsen, despite the ever-evolving requirements Nelsen imposed. Further, it should be noted the “deficiencies” and omissions appear to be documents verifying the existing operations of the TVFC—i.e., the provision of administrative paper-work. Contrary to the expressed statements in the regulation, there were no material misrepresentations regarding the efforts or training of the TVFC. The DCA’s conclusion and imposed sanction was thus arbitrary, capricious and unreasonable.

E. The Revocation Letter Should Have Been Considered.

The DCA affirmed A.L.J. Gertsman's decision to completely disregard the Revocation Letter, which should have been considered, as it formed the basis for the Division's revocation of Chief Eggert's certifications and raises serious concerns regarding Nelsen's credibility. A.L.J. Gertsman should have afforded consideration to Nelsen's inconsistencies and falsehoods in the Revocation Letter when evaluating Nelsen's testimony, as it demonstrated his propensity for hyperbole and disdain for the truth. Nevertheless, A.L.J. Gertsman stated in his Opinion that he afforded "no weight" to the Revocation Letter. (Pa32). It is respectfully submitted that his decision to do so was in error, as the Revocation Letter contains many false statements of fact by Nelsen, which clearly impugn his credibility, as set forth at length below.

F. Conclusion

No unbiased, reasonable legal mind could conclude that Eggert engaged in gross negligence or misconduct in performance of his duties in protecting the public from harm at a faulty traffic light; that Eggert failed to maintain a minimally acceptable level of competence notwithstanding Eggert's efforts to secure mutual aid and remedy PEOSH violations that were not under his purview; that Eggert made a material omission to the Department in light of his sustained efforts to satisfy an ever-moving standard promulgated by Nelsen in writing; or, as set forth below, that

Nelsen was credible in spite of proven, serious misrepresentations; and that Eggert was not credible, despite evidentiary corroboration of Eggert's testimony. Therefore, the DCA's decision must be overturned as wholly arbitrary, capricious, and unreasonable.

III. A.L.J. GERTSMAN'S CREDIBILITY DETERMINATIONS ARE UNSUPPORTED BY THE RECORD.
(Raised Below: Pa60-Pa90)

A factfinder's factual determinations, including credibility findings, are only entitled to deference on appeal where the findings are supported by the record evidence. Accounteks.Net, Inc. v. CKR L., LLP, 475 N.J. Super. 493, 503 (App. Div. 2023). Here, Nelsen lacked credibility, and Chief Eggert's credibility was not fairly assessed. No deference is warranted to A.L.J. Gertsman's credibility determinations because the finding is unsupported by the trial record. Further, there was no fair assessment of the evidence presented, in light of A.L.J. Gertsman's acceptance of Nelsen's misstatements as truth and his failure to give any weight at all to Chief Eggert's proofs.

A. No Unbiased Adjudicator Could Determine Nelsen Was Credible.

Here, there were a multitude of misstatements permeating the initial Revocation Letter and the Nelsen emails that followed resulting in the suspension of the TVFC. In light of the false statements leading to the revocation, his

misrepresentations and misleading statements when dealing with the Borough and Chief Eggert, proof of his inappropriate objectives and his equivocal, dubious hearing testimony, it is impossible to conclude that Nelsen was forthright and credible.

In reviewing what follows, the maxim of “falsus in uno falsus in omnibus” applies. As itemized below, Nelsen intentionally testified falsely to material facts – all of which he needed to retract when confronted on cross examination. Here, application of the inference should be used because the Division’s chief witness repeatedly colored the truth to mislead the factfinder and reach an erroneous result. See Coleman v. Pub. Serv. Coordinated Transp., 120 N.J.L. 384, 386 (Sup. Ct. 1938), aff’d 119 N.J.L. 464 (E. & A. 1938)(“The maxim ‘falsus in uno falsus in omnibus’ is not a mandatory rule of evidence, but is rather a permissible inference that the jury may or may not draw when convinced that an attempt has been made to mislead them in some material respect.”).

First, Nelsen falsely claimed that he did not author the Revocation Letter. (1T144:22; 2T12:12-14). The Revocation Letter was signed by Kent Neiswender, Supervisor of the Division’s Office of Training and Certification. (Pa1-5). On cross, Nelsen was asked “it was my understanding . . . the information Mr. Neiswender got to prepare this letter was from you. Is that not correct?” (1T139:9-11). He responded:

To be honest I'm not sure where he got the information from. It could have been from me. I did have a meeting with Mr. Neiswender after – after I had requested the revocation. But I don't know how much of this came from me, how many is his and how much might be somebody else's.

[(1T139:12-17.)]

Moreover, on two occasions, Nelsen insisted "I didn't write the letter." (1T144:22; 2T12:12-14). Even to the point that the A.L.J. admonished counsel for "questioning . . . [Nelsen] . . . about a letter that he didn't write." (1T155:13-19). Yet Neiswender testified that the only language in the letter that was his was the heading and first sentence of each section, and that all of the remaining language came directly from Nelsen, stating as follows:

A: Yeah. That first sentence I wrote. The rest is from Mr. Nelsen.

Q: Okay. So then just for - to be clear, every single one of these sections has that same first sentence if you want to clarify?

A: That is correct.

Q: And did you interpose that first sentence in each of those sections?

A: I - I did.

Q: Okay. So all the language wasn't Mr. Nelsen's, all the language after that first introductory sentence?

A: All the clarifying language was.

(2T:155:10-22). In light of this testimony, Nelsen was forced to admit that contrary to his earlier testimony, all substantive portions of the Revocation Letter were penned by him. (3T26:11-27:2).

Second, within the Revocation Letter, Nelsen made multiple misrepresentations regarding Eggert's actions involving the use of a radio on July 25, 2022 (Pa1-Pa5). Specifically, Nelsen represented Eggert was required to return the portable radio after June 9, 2022. (1T118:21-119:10). At the hearing, Nelsen admitted this was not true, (3T35:9-20), and Eggert proved that he had authority to use radio. (3T59:15-61:5; 3T63:4-15). Nelsen also stated it was inappropriate for Eggert to use the SOT-3 call sign. (1T77:17-19.) However, Nelsen admitted if Eggert was legally and legitimately on the task force, it would be appropriate for Eggert to use the SOT-3 call sign to call in the defective traffic light. (2T20:12-20; 3T52:2-12.)

Also, Nelsen misrepresented that Eggert utilized the radio "to request police roadblocks and traffic diversion." (Pa1-Pa2; 3T28:9-29:10). In fact, Eggert used the portable radio appropriately to notify dispatch of the faulty traffic light. (3T59:15-61:5; 3T63:4-15). Nelsen stated Eggert called in the defective traffic light after the two contiguous fire companies cleared the scene of the accident only to later admit this was another untrue statement. (3T28:23- 29:10). In fact, the accident

was a mile away from the malfunctioning traffic light, and Chief Eggert never went near the scene of the accident. (3T70:9-15).

This traffic incident formed the basis of the findings under N.J.A.C. 5.73-1.19(a)(3). Nelsen's disingenuous statements, his twisting of the facts and his eventual correction of his comments at the hearing impermissibly tainted the proceedings, leading the A.L.J. to make erroneous conclusions.

We turn to Nelsen's "mayhem" accusation. Nelsen certified under oath, in the Division's answers to interrogatories, "Tuckerton Borough Councilman Frank D'Amore telephoned me and stated Dale Eggert was "creating mayhem" by his action using the portable radio in an unauthorized manner . . ." (Pa155). Nelsen repeated this attribution in his hearing testimony. (1T8:7-24). However, D'Amore himself testified that he never said any such thing. (2T94:13-15). D'Amore unveiled the blatant untruth, which forced Nelsen to retreat, saying "I would not necessarily characterize it as mayhem," directly contradicting his prior statement. (3T36:12-16). No evidence supports Nelsen's purposeful use of the inflammatory characterization of the incident "mayhem" or even the A.L.J.'s finding that "confusion" was caused by Chief Eggert's use of the radio or the SOT-3 call sign. (Pa134-Pa137).

In a related misleading comment, Nelsen claimed Eggert used a radio channel that could have caused issues for police departments, such as Tuckerton and Little

Egg Harbor, but it was shown the channel Eggert used was designed for fire departments and EMS squads, not for police departments. (3T61:20-25). Following Eggert's call, first responders arrived, took control of the scene, and requested that Eggert continue to help. (3T56:22-57:11; 3T71:10-21).

Third, Nelsen's misrepresentations in the Revocation Letter did not end with his misleading portrayal of the emergency response on July 25, 2022. Nelsen also falsely stated specific officials requested corrective action against Eggert, that Eggert lied about fire companies relying on the TVFC, and made certain statements to all fire chiefs in Ocean County. (2T30:8-24). The Revocation Letter further stated that "Tuckerton Councilman, Chairman of their Public Safety Committee, Frank D'Amore and Ocean County Chief Fire Coordinator Joseph Jubert requested the Division of Fire Safety intercede with corrective action against Chief Eggert." (Pa2). Again, this statement was patently untrue.

Councilman Frank D'Amore was Chairman of Tuckerton's Public Safety Committee, and he did not request corrective action against Eggert; instead he contacted Nelsen and asked if there was "something they have to do" to make sure "we have our coverage" from other fire departments. (2T91:12-22). Likewise, Chief Jubert testified he did not request corrective action against Eggert, and indeed, after learning the Division asserted he had, he contacted Nelsen and told him his

letter was incorrect, as he had never made such a request. (2T81-82). Nelsen was forced to admit he manufactured “facts” to discredit Eggert. (2T16:1-9).

Fourth, Nelsen also asserted in the Revocation Letter that Eggert’s “claims [that] other departments rely upon [Tuckerton VFC#1] is unfounded and a deliberate lie”. (Pa2). Hearing testimony proved Nelsen’s assertion was 100% untrue. According to Chief Thomas Wetmore, the New Gretna fire department absolutely relied upon TVFC while it was in service. (2T98:4-9). Wetmore said TVFC was “our automatic aid. If we have a structure fire . . . there’s a term all hands on service . . . our Dispatch dispatches other companies to come and assist. And Tuckerton Borough is one of them.” (2T98:11-16). Facing these facts, Nelsen tried to mitigate his prior false statement, finally admitting his falsehood. He testified “I don’t believe . . . [Eggert] deliberately lied,” (2T22:6-13).

Fifth, Nelsen’s Revocation Letter included false statements attributed to Eggert. Nelsen stated during an Ocean County Fire Chiefs Association bi-monthly meeting, “in front of all the municipal fire chiefs in Ocean County,” Chief Eggert asserted the Division “investigation was a fraud” and that it was “all political” and “all paperwork problems” and that “at no time were any firefighters or residents in danger.” (Pa3). When challenged on cross-examination, Nelsen had to admit he was not present at the meeting and had no first-hand knowledge of what was said.

(1T92:9 – 30:1). Eggert himself denied having made the statements attributed to him by Nelsen. (3T104:3-17).

Sixth, Nelsen deliberately made a materially false statement in his testimony when he sought to convince A.L.J. Gertsman that the TVFC did not meet NFPA and Borough standards for the number of responses by its firefighters relating to their training and requirements. Specifically, Nelsen testified:

Q: [I]f you look at R-6 . . . that was the Borough ordinance . . . and under 29-2 Percentage of duty . . . it says . . . “every active member of Tuckerton Fire Company No. 1 shall in each and every year be required to perform at least 50 percent of duty **to be composed of actual attendance and duty at fires and drills**,” correct?

A: Yes.

Q: So you had this long discussion with Mr. Gleeson about the number of calls that Tuckerton firefighters responded to but that didn’t include any information about how many drills they attended, correct?

A: I don’t remember seeing drills on there, you’re correct.

Q: Ok. So all that testimony about how they only – only four or five met safe standards, only two met the Tuckerton standards that’s not really accurate information, is it?

A: It’s semi accurate, yes, because those figures came from your client.

Q: Well didn’t you ask Mr. Eggert on behalf of Tuckerton Fire company to provide information about the number of calls . . . that the firefighters responded to

A: Yes. We did.

Q: You never asked about the numbers of drills they responded to, did you?

A: No, we did not.

Q: Okay. So your information that you testified to previously is wrong, isn't it?

A: No, it's not wrong. We did not ask for that information. We were still trying to get them up to the certified level to be considered for that certification.

Q: And you told the Judge that – that Tuckerton Fire Company didn't meet the State Firemen's Associations standards and they didn't meet the Borough's standards because you only considered calls and not drills, isn't that correct?

A: I didn't say that. But, yes, based on the numbers that Dale provided us that's – that's what my answer was towards, yes.

Q: So you didn't give the Judge the whole picture, did you?

A: I gave him the picture that we had.

[(1T167:14-169:17)(emphasis added).]

Nelsen testified only four TVFC firefighters met NFPA standards and only two met Borough standards. (1T44:20-45:19). He was fully aware the standards included both the number of calls *and the number of drills* attended by firefighters. Nelsen deliberately contorted the facts, omitting essential information with the obvious intent of misleading the A.L.J. On cross-examination, Nelsen characterized his direct testimony in this regard as “semi accurate.” (1T168:9-14). However, as set forth above, Nelsen’s testimony was not even remotely accurate.

When all of these falsehoods are considered, the picture becomes clear: Nelsen embarked on a campaign of presenting false claims to the Division, highlighting his untrue narrative about Eggert's role as Fire Chief and a disorganized and unfit fire company, to create the wrong conclusion that public safety demanded Eggert's certifications must be revoked. (1T94:2-97-8; 1T147:22-148:25). When Nelsen's incredible statements are stripped away, no support for the revocation exists. Correction of this erroneous result is therefore required.

B. The Determination that Eggert was Not Credible Was Arbitrary, Capricious, And Unreasonable.

A.L.J. Gertsman's finding that Eggert was not credible was also arbitrary, capricious, and unreasonable, as it was unsupported and against the weight of substantial, credible evidence. A.L.J. Gertsman stated that Dale Eggert's testimony was "self-serving" and unsupported. However, substantially all of Eggert's testimony was supported by corroborating evidence presented at the hearing, including his version of the events of July 25, 2022 (verified by Nelsen's testimony and the transcript and recording of the radio transmission), his unimpeachable skill as a firefighter (supported by the testimony of Gleghorn, Uhl, Troiano and Wetmore), his statement that other fire departments relied on TVFC (supported by Wetmore), and his testimony that as Chief of the TVFC he was responsible for activity on fire calls, not administrative functions of the TVFC (supported by the

testimony of Uhl). (3T36:12-37:1; Pa134-Pa137; 1T134:2-4; 2T99:23-25; 2T106:4-9; 3T10:7-16; 2T98:4-16; 2T103:12-105:14).

Additionally, A.L.J. Gertsman did not point to a single statement made by Eggert that he found to be false, with the exception of Eggert's opinion that by advising him to get the TVFC's NFIRS reports up to date so that the fire company's grant funding would not be jeopardized, Division employee Bruce Tynan was giving him "advice" about grant funding. Clearly this is a minor point that constitutes an opinion held by Eggert, not a demonstrably false statement on his part. (3T96:10-16). (Eggert was asked, "one of the things it said is that you – you told the Borough Council that the Division of Fire Safety gave you advice on how to secure grant money, correct? . . . Was that false?" He answered, "In my opinion, no . . . Per the conversation we referred to earlier between myself, Administrator Gleghorn, Mr. Nelsen and Mr. Tynan we did discuss ways to obtain grant money the way I saw it.").

Moreover, A.L.J. Gertsman inexplicably ignored Eggert's testimony that Chief Anthony D'Andrea, the leader of the Southern Ocean County Tanker Task Force, told him that as of July 25, 2022, he was still a member of that organization, finding, instead, that Eggert had an obligation to ask Chief Jubert if he was authorized to use the SOT-3 call sign. A.L.J. Gertsman did not explain why Eggert should have contacted Jubert with this question instead of the leader of the Tanker

Task Force itself. Indeed, Jubert testified that as of July 25, 2022, he was not familiar with the Tanker Task Force’s “whole operation” and did not know who was on the Task Force. (2T75:12 – 76:22). It stands to reason that Eggert contacted D’Andrea and not Jubert to verify his continued service on the Task Force.

A.L.J. Gertsman also took issue with Eggert’s statement to The Beacon newspaper that in his opinion “the problems raised were largely a paperwork issue.” But opinions are not facts. There is no evidence that Eggert’s statement to the newspaper was untruthful.

Finally, A.L.J. Gertsman stated that Eggert “minimized” the suspension of the TVFC, because he testified that “the main reason we’re not responding is because of their decision and the question of insurance.” (Pa34). However, there is nothing inaccurate about Eggert’s statement. Clearly the TVFC was not responding because of the “decision” by the Borough to suspend their service, based on the Division’s letter stating that the “town was unsafe” under the current Fire Department’s protection. (1T105:23-106:13). Eggert’s testimony was not “minimizing” the suspension whatsoever.

Based on the foregoing, A.L.J. Gertsman’s conclusion that Eggert’s testimony was not credible is not supported by the record.

**IV. DCA'S DECISION SHOULD BE REVERSED
DUE TO THE SEVERITY OF THE SANCTIONS IN
CONTRAST TO THE ALLEGED VIOLATIONS.
(Raised Below: Pa63. Pa86 – Pa90.)**

In reviewing sanctions imposed by agencies, “the test ... is ‘whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.’” In Re Herrmann, 192 N.J. at 28-29 (citing In re Polk, 90 N.J. 550, 578 (1982)).

In reviewing these allegations, the Division had the option to revoke any of Eggert's certifications, suspend any of Eggert's certifications, assess a penalty, or issue a letter of warning, reprimand or censure. N.J.AC. 5:73-1.9. The most severe penalty available to the Division would be revoking all of Eggert's certifications.

The case at bar is a classic example of the punishment not fitting the crime. All seven of Eggert's certifications qualifying him to be a volunteer firefighter in New Jersey were revoked by the Division for reasons wholly unrelated to his firefighting skills, which according to the unrefuted evidence presented, are exceptional. (Pa1-Pa5; 2T99:23-25; 2T106:4-9; 3T54:6-55:14; 3T10:7-16). The A.L.J. and DCA upheld that across-the-board revocation by accepting with little or no analysis of the flawed, if not perjured, representations made by Nelsen, as the sole representative the Division called to testify on its behalf. (Pa12-Pa59; Pa91-Pa93).

The Division chose to revoke Eggert's certifications because "he wasn't getting [the job] done," including not immediately sending Nelsen documents on an expedited, arbitrary timeline. (1T96:18-23). The consequence of this muscle flexing? Preventing Chief Eggert from acting as a firefighter or volunteer firefighter in any capacity throughout the State of New Jersey, a vocation he has pursued since he was 18.

As set forth above, Eggert is an excellent firefighter with no history of negligence, wrongdoing, or incompetence. (3T54:6-55:14). Accordingly, the severity of a penalty forgoing lesser sanctions in favor of revoking all of Chief Eggert's firefighter certifications permanently is grossly disproportionate to the administrative failures alleged, so as to shock one's sense of fairness. No allegation by the Division related to Eggert's abilities as a firefighter, yet the punishment was to deprive Eggert of his ability to perform the important public service of providing fire protection to his community. Such a result runs contrary to the Division's authority and purpose, as set forth below.

**V. THE DIVISION ACTED ULTRA VIRES,
OUTSIDE THE BOUNDS OF ITS AUTHORITY, IN
REVOKING EGGERT'S CERTIFICATIONS.
(Not Raised Below⁶)**

Administrative regulations “must be within the fair contemplation of the delegation of the enabling statute.” N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561–62 (1978) (*citing S. Jersey Airways v. Nat. Bk. of Secaucus*, 108 N.J. Super. 369, 383 (App.Div.1970)). In examining the breadth of a regulation, the specific terms of the enabling statute must be reviewed, as well as the implied incidental powers of the enabling statute. Id. at 562.

However, an administrative agency may not unilaterally expand its authority by regulation or otherwise alter the terms of the statute. Cooper Univ. Hosp. v. Jacobs, 191 N.J. 125, 141 (2007); Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, 120 N.J. 18, 25 (1990). “Where there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied.” Matter of Closing of Jamesburg High Sch., Sch. Dist. of Borough of Jamesburg, Middlesex Cnty., 83 N.J. 540, 549 (1980).

⁶ Although not raised below, this issue concerns the jurisdiction of the administrative agency and is a matter of great public interest. Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) (An Appellate Court will decline questions not previously raised before the Trial Court, unless the issues raised on appeal concern the jurisdiction of the Trial Court or implicate matters of great public interest.)

Pursuant to N.J.A.C. 5:73-1.2, the Uniform Fire Safety Act (“UFSA”), N.J.S.A. 52:27D-192, *et seq.*, is the enabling act for the regulations under which the DCA revoked Eggert’s Certifications, N.J.A.C. 5:73-1.1, *et seq.* These regulations are further authorized by P.L. 1993, c. 218 (N.J.S.A. 52:27D-25d), P.L. 1995, c. 266 (N.J.S.A. 52:27D-25i, j, k, and m), and P.L. 2013, c. 32 (N.J.S.A. 52:27D-25kk). Although N.J.A.C. 5:73-1.2 makes general reference to N.J.S.A. 52:27D-25a, *et seq.*, the specific public laws cited are the authorizing provisions.

Discipline of firefighters exceeds the authority granted by the UFSA and the other cited enabling statutes. Under the UFSA, there is no stated violation for a firefighter’s misconduct in performance of duties, failure to maintain a minimally acceptable level of competence, or material omissions to the Division. N.J.S.A. 52:27D-192, *et seq.* No violation of the UFSA allows for the revocation of a firefighter’s certification. N.J.S.A. 52:27D-198.3; N.J.S.A. 52:27D-198.5; N.J.S.A. 52:27D-198.19; N.J.S.A. 52:27D-207; N.J.S.A. 52:27D-208; N.J.S.A. 52:27D-209; N.J.S.A. 52:27D-210. The UFSA contains no provision permitting the Division to discipline firefighters. N.J.S.A. 52:27D-198.3; N.J.S.A. 52:27D-198.5; N.J.S.A. 52:27D-198.19; N.J.S.A. 52:27D-207; N.J.S.A. 52:27D-208; N.J.S.A. 52:27D-209; N.J.S.A. 52:27D-210. The UFSA does not mention firefighter certifications, training, or the revocation of certifications. N.J.S.A. 52:27D-192, *et seq.* Likewise, the other enabling statutes, N.J.S.A. 52:27D-25d, N.J.S.A. 52:27D-25i, N.J.S.A.

52:27D-25j, N.J.S.A. 52:27D-25k, N.J.S.A. 52:27D-25m, and N.J.S.A. 52:27D-25kk, do not concern firefighter discipline.

The UFSA simply does not contemplate a grant of authority to the Division for the discipline of firefighters, and the Division is not permitted greater authority by regulation than is authorized by the enabling statute, N.J.A.C. 5:73-1.2. See Cooper Univ. Hosp. v. Jacobs, 191 N.J. 125, 141 (2007).

Although N.J.S.A. 52:27D-25aa contemplates regulatory power to the Division over the revocation of certifications, N.J.S.A. 52:27D-25aa has not been cited as authority for N.J.A.C. 5:73-1.1, *et seq.* Should the DCA choose to amend its own promulgated regulations to incorporate the correct authority for its powers of revocation, the Division would have the ability to discipline firefighters. However, as the regulations currently read, the Division is not authorized to discipline Chief Eggert as a firefighter.

The Appellate Division is not bound to an agency's statutory interpretation. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 158 (2018). When a statute or regulation is unambiguous, it should be interpreted and applied as written. US Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012). The Division is not authorized to discipline firefighters pursuant to its enabling statutes as written. Consequently, the Division had no authority to discipline Eggert.

**VI. THE DCA MISINTERPRETED THE LAW IN REVOKING EGGERT'S CERTIFICATIONS.
(Raised Below: Pa97 – Pa102)**

The DCA misinterpreted the law in imposing revocations on Eggert for purported administrative shortcomings. Statutes and regulations are interpreted in the same manner. US Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012) (*citing Bedford v. Riello*, 195 N.J. 210, 221–22 (2008)). Specifically, an interpreting Court looks to the intent of the drafter, which is generally gleaned from the language of the statute or regulation itself. US Bank, N.A. v. Hough, 210 N.J. at 199. When engaged in this process, Courts are tasked with interpreting the statute's plain meaning, rather than imposing their own interpretation on the drafter's words in the absence of any ambiguity. Id. (*citing DiProspero v. Penn*, 183 N.J. 477, 481 (2005)). Consequently, when a statute or regulation is unambiguous, it should be interpreted and applied as written. Id.

Therefore, as required, Petitioner begins with the actual language of the Certificate Revocation Statute and Regulation. First, the Certificate Revocation Statute provides in relevant part:

52:27D-25aa. Commissioner may refuse to examine, may suspend or revoke certificate; circumstances

- a. The commissioner may refuse to admit a person to examination or may refuse to issue or may suspend or revoke any certificate of certification issued by the commissioner upon proof that the applicant or holder of such certificate:

· · ·

(3) Has engaged in gross negligence, gross malpractice or gross incompetence which damaged or endangered the life, health, welfare, safety or property of any person;

(4) Has engaged in repeated acts of negligence, malpractice or incompetence;

(5) Has engaged in professional or occupational misconduct as may be determined by the commissioner;

· · ·
N.J.S.A. 52:27D-25aa.

Next, the language of the Certificate Revocation Regulation must be considered and, specifically, the subparts expressly relied upon by the Division in support of its revocation of Mr. Eggert's hard-earned certifications:

5:73-1.9 Revocation of certification or certificate and alternative sanctions

(a) The Division may suspend and/or revoke a certification or certificate if the Department has determined that the holder:

· · ·
3. Has been grossly negligent or has engaged in misconduct in the performance of any of his or her duties;

4. Has failed, over a period of time, to maintain a minimally acceptable level of competence;

· · ·
6. Has made a false or misleading written statement, or has made a material omission in any submission to the Department; or

· · ·
N.J.A.C. 5:73-1.9.

The Certification Revocation Regulation and Statute are unambiguous. The relevant parts of the Regulation and Statute relied upon by the Division allow

revocation for failures concerning the technical skills, abilities and performances of the certificate holder in the context of fire fighting for which the Certificates are awarded in the first place. Nothing in either the Statute or the Regulation permit the revocation of a certificate as a punitive measure for some perceived failure as an administrator. If there is any doubt, one need only consider Section 1.3 of the Regulations that expressly and clearly sets forth the intent and purpose of these laws:

5:73–1.3 Intent and purpose

(a) It is the intent of the Standards to control all matters relating to qualifications for, and the training and certification of all members of the fire service, including firefighters, and officers engaged in, or to be engaged in, fire suppression activities, all fire service instructors, and fire investigators.

...

(b) The Uniform Fire Safety Act and related legislation, specifically N.J.S.A. 52:27D–25a et seq., have been adopted to ensure public safety and welfare. In order for fire suppression activities to be conducted adequately and effectively, members of the fire service will need to have sufficient knowledge and competence. This can best be achieved through the creation of an education and training program and the development of certification requirements.

1. It is the purpose of this chapter to establish standards and procedures for the certification of persons involved in fire suppression activities including but not limited to firefighter recruits, firefighters, fire officers, fire service instructors, and fire investigators.

N.J.A.C. 5:73-1.3 (emphasis added). Nothing in the stated intent and purpose of the law remotely extends to the draconian use of the decertification process as a rebuke for some perceived administrative shortcoming of a fire Chief.

The Division alleges that Chief Eggert's certifications were revoked because he performed poorly in the role of Chief of the Tuckerton Fire Company, a reason inarguably not enumerated in the Certificate Revocation Regulation or Statute, and indeed, not akin to those that are found there. Nor do the Statute or Regulations, by their language, permit revocation as a catch-all punishment for alleged infractions not otherwise enumerated in the Statute or Regulations. As such, the DCA's punitive revocation of Chief Eggert's several certificates lacks any legal foundation. Due to the misinterpretation of the law, the DCA's revocation of chief Eggert's certifications should be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests DCA's decision to revoke Eggert's firefighting certifications be overturned (1) as arbitrary, capricious, and unreasonable, and not based on substantial credible evidence and (2) for DCA's failure to properly interpret and apply the controlling statute.

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Dated: February 20, 2025

DALE W. EGGERT,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF
COMMUNITY AFFAIRS DIVISION
OF FIRE SAFETY,

Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003501-23T2

CIVIL ACTION

ON APPEAL FROM:

A Final Agency Decision of the New
Jersey Department of Community Affairs

State of New Jersey
Office of Administrative Law
OAL Docket No. CAF 08930-22
Agency Docket No. DSFID 174710

Sat Below:
Hon. Jacob S. Gertsman, A.L.J.

AMENDED BRIEF ON BEHALF OF RESPONDENT DEPARTMENT OF
COMMUNITY AFFAIRS, DIVISION OF FIRE SAFETY

Originally Submitted: June 4, 2025

Amended: June 18, 2025

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COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY¹

Between 2017 and August 15, 2022, Appellant Dale Eggert was the chief of the Tuckerton Volunteer Fire Company No. 1 (“TVFC”). (Pa1-5; Pa35).² A fire chief is “more or less like the Chief Executive Officer” of a fire department that is “in charge of everything on the operational side” of the department and is “in command of how the Fire Department responds to fire emergencies or fire calls.” (1T20:5-23). Chiefs are “responsible for providing service. It falls on [their] shoulders as fire chief providing the highest level of service to the community.” (2T15:22-25).

In March 2022, the New Jersey Department of Community Affairs (“the Department”), Division of Fire Safety (“Division”) received an anonymous complaint alleging that it took the TVFC more than thirty minutes to respond to a carbon monoxide alarm. (Pa35; Ra035; 1T22:2-16). When the TVFC did respond, it did so with a single firefighter who did not have the correct Personal Protective Equipment (“PPE”), did not have the correct meter for carbon

¹ Because the Procedural History and Statement of Facts are closely intertwined, they are being combined and summarized to avoid repetition and for the convenience of the court.

² “Pa” refers to Appellant’s appendix. “Ra” refers to Respondent’s appendix. “1T” refers to the April 10, 2023 Transcript of Recorded Proceedings. “2T” refers to April 11, 2023 Transcript of Recorded Proceedings. “3T” refers to the April 13, 2023 Transcript of Recorded Proceedings.

monoxide, did not know how to use the meter that he had, and needed to make multiple phone calls to figure out how to use the meter. Ibid.

The Division opened an investigation into the complaint and on March 7, 2022, met with Eggert and Tuckerton Borough administrator Jenny Gleghorn. (Pa36; 1T25:18-26:5). During the meeting, the Division requested documents from Eggert and the TVFC including standard operating procedures, insurance service organization ratings, training records, and response reports. (Pa36; 1T26:17-25). Eggert was unable to produce the requested documents at the time of the meeting but informed the Division he would provide an active roster and the TVFC's respiratory protection plan ("RPP"). (Pa36; 1T30:25-31:7). Eggert also stated that he was not aware of the TVFC's Insurance Service Organization³ rating but informed the Division that he would acquire the information from his father, Lee Eggert Sr., a long-term firefighter. (Pa36; 1T31:25-32:8).

For each fire company, the Division maintains a list of certifications of persons affiliated with the company. (1T33:5-21). During or shortly after the March 7 meeting, the Division sent Eggert the roster of certifications it had for persons affiliated with the TVFC. (1T35:20-25). As of March 2, 2022, the Division's roster for the TVFC reflected over 80 members of the company,

³ An Insurance Service Organization rating is based on the municipality's available level of fire protection; it impacts fire insurance premiums in the given municipality. (1T31:12-25).

which “raised a ‘red flag’ for the Division” in light of the instigating complaint that only one member of the TVFC responded to the carbon monoxide alarm. (Pa36; 1T34:4-14; 1T35:13-17).

On March 21, 2022, Eggert provided the Division with a roster, current as of February 3, 2022, showing that the TVFC had twelve active firefighters. (Pa36; Ra003; 1T36:1-7). This roster meant that the TVFC was in violation of the National Fire Protection Association’s (“NFPA”) standards for the required number of firefighters available to respond to calls for the Borough of Tuckerton.⁴ (Pa36; 1T39:22-42:4). The Borough of Tuckerton is in an urban demand zone, which requires at least fifteen firefighters to be on scene at a fire incident within nine minutes, 90 percent of the time. (Pa36; 1T41:1-13). The number of active firefighters on the TVFC roster produced by Eggert made it impossible for the TVFC to meet this standard. (Pa36; 1T41:23-42:4).

The Division also determined that eleven of the twelve firefighters on the TVFC roster had certification deficiencies. (Pa37; 1T47:21-25). Six firefighters lacked documentation of Hazardous Materials: Awareness and Operations certifications, including Eggert; one firefighter lacked documentation of his

⁴ The Division relies upon the NFPA standard, which sets the number of required firefighters for an area by taking the square mileage of the municipality, divided by the population, and then using that number to assign the municipality to one of three categories – rural, suburban, or urban – and requiring a certain number of firefighters for each category. (1T40:1-21).

Incident Safety Officer training; and three firefighters lacked documentation of their Incident Management System Level 1 certifications. (Pa37; Pa126; 1T50:13-51:20). The Division notified Eggert of these deficiencies and asked that he submit proof of the validity of the certifications by June 1, 2022. (Pa37; Pa126). Eggert failed to submit the required documentation by the deadline. (Pa37). When he did submit the requested documentation, all eighteen of the submitted certification records were deficient. (Pa37; 1T54:1-10). For example, some records did not have copies of the respective certifications, some did not have the firefighters' signatures, and some lacked necessary supporting documentation, such as driver's licenses and birth certificates. (1T54:14-18). Eggert was advised of the deficiencies and how they could be cured by an email from the Division dated June 6, 2022. (Pa37; Pa129).

Around this time, the Division also informed Eggert that because the TVFC had fewer than the necessary fifteen firefighters, it would be required to enter into Memoranda of Agreement ("MOA") with contiguous municipal fire companies that would provide for those companies' automatic dispatch to all reported or actual structure or building fires in Tuckerton to meet the fifteen-firefighter response requirement. (Pa38; 1T65:5-21). Eggert submitted MOAs, but they did not contain the required language. (Pa38; 1T66:21-67:21). Instead, they stated that, after arriving on scene at an incident, the TVFC would evaluate

whether it needed additional help and, if so, the TVFC would then call the contiguous companies for assistance. Ibid. The Division informed Eggert that the MOAs were unacceptable as they still did not ensure that fifteen firefighters would respond to the scene of an incident within nine minutes at least 90 percent of the time. (Pa38; 1T68:8-16). Eggert submitted revised memoranda, but they were still insufficient, as they stated only that contiguous fire companies would provide ‘manpower’ rather than a full dispatch, including fire apparatuses, engines, and ladders, sufficient to meet the fifteen-firefighter requirement. (Pa38; 1T68:16-25; 1T69:1-12).

Over the course of its investigation, the Division also learned that the TVFC had prior issues with failing to maintain an RPP, perform fit testing, and other New Jersey Office of Public Employees’ Occupational Safety and Health (“OPEOSH”) violations. (Pa38). On June 18, 2018, the OPEOSH cited the TVFC with nine violations of the Public Employees’ Occupational Safety and Health Act (“PEOSH”), issuing corresponding Orders to Comply. (Pa38; Pa138-148). The cited violations included failing to have someone oversee the TVFC’s RPP, provide respirator fit testing in the last twelve months, provide employees with copies of the RPP, provide employees with a current copy of the Exposure Control Plan, annually review the Exposure Control Plan, provide all employees with annual bloodborne pathogen training, maintain employees’ hepatitis B

vaccination status, and provide hazard communication training to first responders. (Pa38-39; Pa138-148). All these violations were deemed serious by OPEOSH. (Pa39; Pa138-148). In May 2019, OPEOSH informed Tuckerton that it had substantiated complaints that firefighters under Eggert's charge had responded to fire calls without the proper personal protective equipment. (Pa39; Ra046). On May 16, 2022, OPEOSH issued repeat citations and a \$4,000 penalty to Tuckerton because the TVFC, overseen by Eggert, had not done fit testing of breathing equipment for firefighters. (Pa39; Ra004). As part of its investigation, the Division asked Eggert to produce the TVFC's RPP, which is required under State and federal law.⁵ (Pa38; Pa128; 1T28:25-29:4). In response, Eggert produced a one-page copy of the self-contained breathing apparatus regulations, comprising only one part of the required plan. (Pa38; 2T22:24-25; 2T23:1-22).

On June 1, 2022, Eggert submitted a written statement in response to the Division's request for an explanation as to the approximately sixty-five firefighters that appeared on the Division's records but did not appear on the

⁵ RPPs are intended to encompass medical evaluation questionnaires of firefighter, mask fit testing, and other items related to firefighters' ability to breath when responding to calls. 1T29:20-30:1. Under N.J.A.C. 12:100-10.10(d), fire departments must establish and maintain a respiratory protection program. Per the regulation, this program must comply with the requirements set forth for respiratory protection programs as prescribed by 29 C.F.R. 1910.134. N.J.A.C. 12:100-10.10(d).

TVFC roster. (Pa39; Ra065; 2T61:6-25). The Division considered sixty-five firefighters leaving the TVFC to be “a pretty substantial problem” and “needed a disposition as to why these people had left.” (2T39:18-21). The Division recommends that fire companies regularly update their rosters so that the Division can have accurate records. (2T145:5-21). However, over the prior three or four months before submitting an explanation for the roster changes, Eggert had not been forthcoming about the circumstances of the departures. (2T39:6-21). When Eggert did submit the written explanations, they consisted largely of vague one or two-word responses such as ‘resigned’ and ‘long gone’. (Pa39; Ra065; 2T61:6-25).

On June 7, 2022, the Borough of Tuckerton suspended the TVFC from operations for its ‘non-compliance with certain rules and standards on fire protection. (Pa39; Ra012). Upon suspension, Borough officials went to Eggert’s place of business and removed the Borough’s fire apparatuses. (1T106:17-24). Two days later, the Borough formally suspended the TVFC indefinitely. (1T107:13-25).

Even after the TVFC was suspended, the Division continued to work with Eggert to address the various issues identified with the TFVC’s operations and records. (1T55:23-56:6). On June 15, 2022, the Division informed Eggert via email of several outstanding requests for information including documentation

related to the deficient firefighter certifications; compliant memoranda of agreement with contiguous fire companies that were still outstanding;⁶ amended written explanations for the sixty-five former members of the TVFC that were no longer included on the TVFC roster; and the outstanding deficiencies with the RPP. (Pa39; Pa121).

While the Division had requested “response reports”⁷ for the TVFC from Eggert at the beginning of March 2022, Eggert did not produce the reports until June 2022, after the company was suspended. (Pa36; 1T42:5-2). The response percentages reported for 2021 showed that only four of the twelve available firefighters met the New Jersey State Firemen’s Association (“SFA”) standard requiring a firefighter to respond to at least 25 percent of incoming calls. (Pa36-37; Ra045). Furthermore, over this same period only two TVFC firefighters met a Tuckerton Borough standard requiring that at least 60 percent of a firefighters’ duty be composed of actual attendance and duty at fires and drills. Ibid. Similarly, the response reports indicated that during the first few months of 2022, only five TVFC firefighters complied with the SFA standard, and only two

⁶ On June 7, 2022, Eggert submitted revised memoranda between the TVFC and the Parkertown Fire and West Tuckerton Fire Companies. (Pa51). But by that time, the TVFC had been suspended from service and the memoranda were no longer of use. (Pa52).

⁷ These reports log each firefighters’ response to incoming calls to the fire department and attendance and duty at fires and drills.

with the Borough's standard. Ibid. On June 22, 2022, the Division informed Eggert by email that the percentages in the response reports were below the SFA standard. (Pa124).

On July 25, 2022, a traffic incident occurred at an intersection in Tuckerton resulting in a power outage that affected a traffic light at the intersection. (Pa40; 3T56:22-25). Eggert reported the incident to the Ocean County Dispatch using a Forked River Fire Department portable radio. (Pa40; Pa134). The TVFC had previously been loaned five portable radios from the Forked River Fire Department, as Tuckerton was awaiting grant money to purchase its own radios. (1T119:12-118:5). However, the Administrator of Forked River was unaware that the radios had been loaned to the TVFC. (1T119:15-17). A member of the TVFC retrieved four of these radios from Tuckerton's fire trucks upon the suspension of the TVFC on June 7, 2022. (1T118:21-119:3). It was later determined that the fifth radio was kept by Eggert and used during the traffic incident on July 25, 2022. (1T119:17-21).

When using the radio on July 25, 2022, Eggert used a Southern Ocean County Tanker (SOT) task force call sign designated as "SOT-3". (Pa40; Pa134). The SOT is a resource used for water supply in the southern part of Ocean County. (Pa40; 2T72:1-4). It helps to "establish adequate water supplies" in an emergency. (3T50:23-25). However, the SOT was not in operation at the time

of the relevant traffic incident, was not deployed in response to the incident, and its service in response to the incident was not otherwise requested by any emergency response entity in the County. (2T18:21-23; 2T72:17-21; 1T74:9-11). Furthermore, Eggert was not authorized to use the portable radio or call sign at the time of the incident as he was no longer associated with an affiliated fire company with the SOT. (2T73:2-7). Eggert was advised by the Chief Fire Coordinator for Ocean County, Joseph Jubert, that he was not authorized to use the SOT-3 call designation and to refrain from doing so. (Pa40; 2T73:2-22).

Eggert's use of the SOT-3 call sign created confusion in the County Communications Center because "the Southern Ocean County Tanker Task Force was not operable, therefore, they weren't expecting a call from one of those portable radios." (2T10:12-18). Subsequently, the County Radio Room received a complaint about Eggert's use of the radio and call sign, which was then relayed to the Chief Fire Coordinator for Ocean County. (2T68:14-69:1). Ocean County Dispatch also contacted Tuckerton Councilman Frank D'Amore, who fulfilled the role of a liaison with the TVFC, to ask if the TVFC had been reinstated because Eggert "had a radio and was transmitting with the radio and it was interfering with the accident or the scene of the accident." (Pa40; 2T89:24-90:2). Councilman D'Amore reiterated that the TVFC was out of service. (Pa40). Councilman D'Amore also became concerned that Eggert's

actions could jeopardize arrangements for fire coverage by other municipal fire companies that the Borough had arranged with the assistance of the Division. (Pa40; 2T90:20-91:7). The Division also received multiple calls from emergency personnel in Tuckerton and Ocean County about Eggert's actions in response to the incident on July 25, 2022. (1T76:16-25).

Between March and June 2022, while the events described above were unfolding, Eggert also made a series of inaccurate statements regarding the Division's work with the TVFC at public meetings that were subsequently reported in local news outlets in Ocean County. (Pa40-41; 1T80:19-81:9). In a report on the March 21, 2022 Tuckerton Borough Council meeting, the April 22, 2022 issue of the Tuckerton/Little Egg Harbor Leader stated that Eggert "thanked the anonymous person who had reported the Tuckerton Fire Company to the state Division of Fire Safety" and stated that, "in addition to being commended by the division for having adequate paperwork (with the exception of one document which [Eggert] claimed to be in the process of submitting), the Division gave the Eggert advice on how to secure grant money to improve their squad and its efforts." (Ra059). The May 2022 issue of the Tuckerton/Little Egg Harbor Leader then stated that "[Eggert] said he has four EMS certified responders and 12 qualified firefighters, according to the Division of Fire Safety." (Ra061). Similarly, the June 16, 2022, issue of the Asbury Park Press

quoted Eggert as stating, “Fire Chief Dale Eggert spoke last at the meeting to explain that the problems raised were largely ‘a paperwork issue’ that he accepts responsibility for.” (Ra063). Following the publication of each of these statements, the Division informed Eggert to cease making false and misleading statements regarding the Division’s work with the TVFC. (Pa126; Pa121; Pa124; 1T83:23-84:8).

Following its investigation, the Department issued a Revocation Order, finding credible evidence to support revoking Eggert’s certifications pursuant to N.J.A.C. 5:73-1.9(a)(3) (gross negligence or misconduct in the performance of duties); N.J.A.C. 5:73-1.9(a)(4) (failure, over a period of time, to maintain a minimally acceptable level of competence); N.J.A.C. 5:73-1.9(a)(6) (false or misleading written statement, or a material omission in any submission to the Department of Community Affairs); and N.J.A.C. 5:73-1.9(a)(7) (violation of any provision of this chapter). (Pa91). Division Senior Planner Donald Nelsen explained that, during the Division’s investigation of Eggert and the TVFC, the Division was “looking for compliance, [] not looking for money. But we need to have the fire departments meeting the standards so that ultimately all the residences are protected, all the businesses are protected, all the visitors are protected. And in this case, it – it wasn’t”. (1T93:15-21). The Division also noted that “[t]he Borough had concerns with their residents not being adequately

protected.” (1T94:14-16). The Division was troubled that Eggert’s company “didn’t meet any of the insurance service organization ratings,” and, with limited staffing of two or five firefighters, could not pass the next insurance service test, which would result in higher fire insurance premiums for residents and business. (1T95:9-11; 1T95:11-17). Ultimately, residents of Tuckerton were “expecting protection” from their Borough’s fire company that was not meeting the necessary standards. 1T95:17-23.

Based on these findings, by letter dated August 15, 2022, the Department permanently revoked Eggert’s Firefighter I, Firefighter II, Hazardous Materials: Awareness, Hazardous Materials: Operations, Incident Management Level 1, Incident Management Level 2, and Incident Management Level 3 certifications. (Pa1). Revocation of a fire chief’s certifications is not something the Division does often, but the Division found that the totality of the circumstances warranted such action. (1T98:4-7; 1T96:14-17).

On August 29, 2022, Eggert requested a hearing to contest the revocation of his various certifications, and the matter was transmitted to the New Jersey Office of Administrative Law (“OAL”). (Pa6). A hearing was held in the OAL on April 10, 11, and 13, 2023, before Administrative Law Judge (ALJ) Jacob S. Gertsman. (Pa14). At the hearing, several individuals who were close to the matter were called to testify. These individuals included Donald Nelsen, Jenny

Gleghorn, Joseph Jubert, Frank D'Amore, Thomas Wetmore, the fire chief of the New Gretna Fire Department, Charles Uhl, the chief of the Department for the Galloway Township Ambulance Squad, Kent Neiswender, a former supervisor of the Division's Office of Training and Certification, Ernie Toriano III, chief of the Wildwood Fire Department, and Dale Eggert. (Pa15-31).

Nelsen provided extensive testimony regarding the Division's investigation into the TVFC following the initiating complaint, including his involvement with the various documents that the TVFC was missing and his communications with Eggert in trying to resolve the outstanding issues. (Pa15-22). Nelsen also testified about the several calls he received regarding the traffic incident in Tuckerton on July 25, 2022, informing him of Eggert's use of the portable radio and SOT-3 callsign. (Pa17). Upon being recalled as a witness by Eggert, Nelsen went on to state that while Eggert's use of the SOT-3 call sign may not have met "the formal definition of mayhem" it was definitely a problem and it could have easily been avoided. (Pa22; 3T37:15-17). On cross-examination, Nelsen conceded that this direct testimony concerning the number of calls that the TVFC firefighters responded to did not include drills, but when directly asked about his testimony that only four or five of the firefighters met

the applicable response standards, he responded that his testimony was ‘semi-accurate’ because the figures came from Eggert himself.⁸ (Pa19; 1T168:13-14).

While the TVFC was not in service at the time of the hearing, Eggert, in his direct testimony, described the fire company as a functioning organization, stating that “[t]he responses have just been suspended by the Borough … that’s the main reason we’re not responding is because of their decision and the question of insurance.” (Pa27; 3T49:23-25; 3T50:1-2). Eggert also stated that he was “appointed as a resource of the Southern Ocean Tanker Task Force” and that after the TVFC was suspended, he notified his supervisor, Anthony D’Andrea, who said that Eggert “can still respond since it’s a county resource and they needed [his] assistance for it.”⁹ (3T53:3-6). Expanding on his involvement in the July 25, 2022 traffic incident, Eggert acknowledged that the radio he used belonged to the Forked River Fire Company, but claimed he was authorized to have it and that no one had asked him to return the radio to Forked River. (3T60:18-61:5). Eggert conceded that the county dispatch did not ask him to direct traffic and that he did not notify dispatch that he was no longer affiliated with an operating fire department. (3T155:4-16). Eggert stated that following the incident, Jubert asked him not to use the call sign again and that

⁸ Nelsen denied that his direct testimony was wrong. (Pa19).

⁹ Anthony D’Andrea did not testify to corroborate Eggert’s testimony. (Pa33).

he returned the radio to Forked River upon their request. (3T155:17-24). However, when asked if Jubert ever told him he was authorized to use the radio or call sign, Eggert stated “[n]obody ever … did or did not. I was placed in the position. That’s all there was.” (3T156:2-3).

On cross examination, Eggert noted that he was elected chief of the TVFC in 2017 by a vote of the membership. (3T138:6-22). He also confirmed that Nelsen informed him of the investigation during their meeting on March 7, 2022, and that following the meeting he received an email with specific requests for information from the Division. (3T138:23-139:23).

As to the other witnesses called at the hearing, Gleghorn provided details as to the TVFC’s OPEOSH investigations, respiratory protection plan, and the actions the Borough took following the suspension of the TVFC on June 7, 2022. (1T105:23-114-19). Chief County Fire Coordinator Jubert testified that while he was not familiar with the structure of the Southern Ocean County Task Force on the date of the July 25, 2022 traffic incident, Eggert could not have been a part of the task force since the TVFC was closed. (2T75:23-76:22; 2T74:6-8). Jubert also explained that he spoke to Eggert the day of incident about what he was using the radio for, and he advised Eggert “that he couldn’t use the SOT-3 call designation because he was not with an affiliated Fire Company with that task force.” (2T73:5-7).

Councilman D'Amore testified to both the suspension of the TVFC and the July 25, 2022 traffic incident. (2T88:18-91:22). When asked why the TVFC was out of service, D'Amore stated that Tuckerton received a letter from the Division about an inspection, and that the letter "was such that our attorney said we should stop service right now because that – if we let [sic] it go if we let them answer calls we would wind up in lawsuits if something actually happened." (2T88:25; 2T89:1-3). D'Amore then went on to recall receiving a phone call from Ocean County Dispatch on July 25, 2022 about any changes in the fire department being out of service, and reiterating to the dispatch that the TVFC was out of service. (2T89:11-21). D'Amore testified that it was explained to him that Eggert "had a radio and was transmitting with the radio ... interfering with the accident[.]" (2T89:25; 2T90:1-4). D'Amore additionally described Tuckerton as being in a precarious situation due to its dependence on others. (2T90:20-91:7).

Kent Neiswender testified that before retiring, he had served as the supervisor of the Division's Office of Training and Certification and that he developed and signed the revocation letter regarding Eggert's certifications. (2T132:21; 2T133:22-135:21). However, Neiswender explained that the revocation was determined by the Director of the Division and the Office of Fire

Department Preparedness, and he himself was not involved in the investigation of the TVFC. (2T136:3-7).

Charles Uhl, called as a witness by Eggert, testified as to his former experience as the president of the TVFC from 2011 to 2013. (2T102:24-105:14). Uhl described the duties of president as overseeing the administrative aspects of the company and added that he did not believe the chief of the TVFC was responsible for the company's buildings or social media presence. (2T103:14-15). However, Uhl noted that he was not a part of any of the meetings between the Division and the TVFC and was working for the Galloway Township Ambulance Squad at the time these events transpired. (2T102:20-103:5; 2T127:23-129:20). Wetmore and Toriano were also called by Eggert at the hearing to testify about his performance as a firefighter, but both noted that they never worked with Eggert in his capacity as a firefighter. (2T101:1-12; Pa27).

Following the hearing, the parties submitted post-hearing briefs and the record was closed on July 24, 2023. Ibid. The record was reopened in September 2023 to allow the parties to submit supplemental briefs addressing the Department's authority to revoke Eggert's certifications. Ibid. The record was then reopened again in November 2023 for the parties to submit a revised list of exhibits. Ibid. The record was closed for a final time on November 29, 2022, and the ALJ issued his Initial Decision on March 1, 2024, sustaining the

Department's determination that Eggert violated N.J.A.C. 5:73-1.9(a)(3) (gross negligence or misconduct in the performance of duties), -1.9(a)(4) (failure over a period of time to maintain a minimally acceptable level of competence), -1.9(a)(6) (making false or misleading written statements or a material omission in submission to the Division), and -1.9(a)(7) (violating any provision of this chapter), and affirmed the revocation of all his certifications. (Pa91).

In the decision, the ALJ found that witnesses Gleghorn, Jubert, D'Amore, Wetmore, Uhl, Neiswender, and Toriano all appeared to be honest, forthright, and credible witnesses. (Pa32). The ALJ also found Nelsen to be a credible witness despite Eggert's argument that "misleading statements" in Nelsen's testimony "established a pervasive lack of credibility on his part." (Pa32). Categorizing Eggert's argument as a misrepresentation of Nelsen's testimony, the ALJ held that the statements at issue were based upon information provided by Eggert himself, and that Nelsen reiterated that his direct examination was not wrong or untruthful. (Pa32-33). The ALJ specifically noted that Nelsen was knowledgeable and professional, an experienced investigator as corroborated by other credible witness testimony, and that there was nothing in Nelsen's tone, expression, or demeanor to lead him to believe that Nelsen was not being truthful. Ibid.

In contrast, the ALJ found Eggert's testimony to be not credible, self-interested, and unsupported by the record. (Pa33). The ALJ noted that Eggert's testimony was not corroborated by the other witnesses and that he sought to minimize the suspension of the TVFC. Also, his testimony was replete with examples of passing blame to others, which demonstrated Eggert's failure to take any responsibility as chief for the actions of the TVFC and included plainly unreasonable assumptions. (Pa33-35). To support this finding, the ALJ pointed to the credible testimony of the other witnesses controverting Eggert's claim that he was authorized to use the SOT-3 call sign on July 25, 2022; his minimization of the suspension of the TVFC; and his testimony that his statement to the local newspaper on June 16, 2022 was not a lie. (Pa34-35). The ALJ also found that Eggert's testimony regarding conversations with the Division over grant funding 'defie[d] logic,' as it was not a reasonable interpretation for Eggert to claim that the Division was simply providing the TVFC with advice on how to secure grant funding when the fire company's National Fire Incident Reporting System reports were out-of-date and the Division was attempting to instruct the TVFC how to prevent grant funding from being jeopardized. (Pa35).

On May 30, 2024, the Department issued its Final Agency Decision adopting the ALJ's Initial Decision in its entirety. (Pa93). The Commissioner noted that the ALJ had previously addressed Eggert's similar post-hearing

credibility arguments, characterizing them as “unfounded and unsupported by the record” and a “gross misrepresentation of Nelsen’s testimony,” in no small part because elements of Nelsen’s testimony were “based upon the information provided by Eggert himself.” (Pa93). The Commissioner went on to explain that the testimony from the OAL proceeding fully supported the ALJ’s conclusions that Eggert was not a credible witness. (Pa93). The Commissioner concluded that, after carefully weighing the evidence presented by the parties, the ALJ correctly determined that the Division met its burden of proof with respect to each charge and that the Division was fully authorized, through its obligation to enforce the Uniform Fire Safety Act, N.J.S.A. 52:27D-192 to -213, and its “comprehensive regulations setting standards for fire service training and certification [N.J.A.C. 5:73-1.1 to -18.9], to revoke Eggert’s certifications. (Pa93). This appeal followed.

ARGUMENT

POINT I

AS THE DEPARTMENT’S DECISION TO REVOKE EGGERT’S CERTIFICATIONS IS REASONABLE AND BASED ON SUBSTANTIAL CREDIBLE EVIDENCE, IT SHOULD BE AFFIRMED

This court should affirm the Department’s May 30, 2024, Final Agency Decision as it is reasonable and supported by substantial credible evidence in the record.

An appellate court’s “review of [an] administrative agency action is limited.” Russo v. Bd. of Trs., Police & Fireman’s Ret. Sys., 206 N.J. 14, 27 (2011). Appellate courts “recognize that agencies have ‘expertise and superior knowledge … in their specialized fields.’” Hemsey v. Bd. of Trs., Police & Firemen’s Ret. Sys., 198 N.J. 215 (2009) (quoting In re License Issued to Zahl, 186 N.J. 341, 353 (2006)). Therefore, an appellate court should not substitute its own judgement for the agency’s, even though the court might have reached a different result.” In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)).

“[A]n appellate court ordinarily should not disturb an administrative agency’s determinations or findings unless there is a clear showing that[:] (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence” in the record as a whole. In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). “The burden of demonstrating that the agency’s action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative action.” In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006) (citations omitted).

“With respect to factual findings, the findings of an ALJ ‘are considered binding on appeal, when supported by adequate, substantial and credible

evidence.”” Oceanside Charter Sch. v. N.J. State Dep’t of Educ., 418 N.J. Super. 1, 9 (App. Div. 2011) (quoting In re Taylor, 158 N.J. 644, 656 (1999)). “[T]he choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal.” Renan Realty Corp. v. State, Dep’t of Cmty. Affs., Bureau of Hous. Inspection, 182 N.J. Super. 415, 421 (App. Div. 1981); see also City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 491 (2010) (explaining the factfinder has the role of assessing the credibility and weight to be given to expert testimony).

Thus, a reviewing court does not substitute its judgment for that of the agency by “engag[ing] in an independent assessment of the evidence as if it were the court of first instance.” State v. Locurto, 157 N.J. 463, 471 (1999). However, the court reviews an agency’s interpretation of the law de novo. Russo, 206 N.J. at 27.

A. The ALJ’s Credibility Determinations Are Fully Supported By The Record.

Eggert’s conduct over several years and over the course of the Division’s investigation demonstrate that he engaged in misconduct, that he failed to maintain a minimum level of competence as fire chief, and that he made false or misleading statements about the TVFC and the Division’s investigation. The nature of this conduct thus warranted the revocation of all of Eggert’s

certifications. On appeal, Eggert contends that no deference is warranted to the ALJ's credibility determinations, which found Nelsen to be a credible witness and Eggert's testimony to be self-supporting and unsubstantiated. However, Eggert fails to meet his burden of establishing that the Department's Final Agency Decision, adopting the Initial Decision of the ALJ in its entirety, was based on an unreasonable interpretation of the totality of the record, and thus the Department's decision should be upheld.

A reviewing body must generally defer to the credibility determinations of an ALJ. Clowes v. Terminix Int'l., 109 N.J. 575, 587 (1988); H.K. v. State, 184 N.J. 367, 384 (2005). For testimony to be believed, it "must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954); Gallo v. Gallo, 66 N.J. Super. 1. (App. Div. 1961). What's more, "[t]he interest, motive, bias, or prejudice of a witness may affect [their] credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in believing [their] testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952); see also Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963) ("Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its

rationality or internal consistency and the manner in which it hangs together with other evidence.”). An agency may reject or modify the findings of fact as to issues of credibility of lay witnesses only if it “first determines 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.” N.J.A.C. 1:1-18.6(d). Thus “the choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal.” Renan Realty Corp., 182 N.J. Super. at 421.

Here, there is nothing in the record to support a rejection of the ALJ’s credibility findings. After review of the evidence and testimony presented, the ALJ deemed Nelsen to be a credible witness. (Pa33). The ALJ specifically noted that Nelsen was knowledgeable and professional, an experienced investigator as corroborated by other credible witness testimony, and that there was nothing in Nelsen’s tone, expression, or demeanor to lead him to believe that Nelsen was not being truthful. (Pa32-33). The ALJ also addressed Eggert’s various attacks against Nelsen, noting that Eggert’s argument in post-hearing submissions that “Nelsen admitted in cross-examination that he provided ‘untruthful’ testimony” was “a gross misrepresentation of Nelsen’s testimony.” (Pa32). The ALJ went on to explain that instead it was “evident that Nelsen’s

testimony was based upon the information provided by [Eggert] himself.” (Pa33).

Conversely, the ALJ found that Eggert’s testimony was largely self-interested and unsupported, was replete with examples of blaming others, demonstrated failure to take responsibility as chief for the actions of the TVFC, included plainly unreasonable assumptions, and was therefore not credible. (Pa35). In his assessment, the ALJ pointed to credible witness testimony that controverted Eggert’s claim that he was authorized to use the SOT-3 call sign on July 25, 2022. (Pa34). Additionally, the ALJ commented that Eggert’s testimony regarding conversations with the Division over grant funding ‘defie[d] logic,’ as it was not a reasonable interpretation for Eggert to claim that the Division was simply providing the TVFC with advice on how to secure grant funding. (Pa35). These credibility findings are supported by the record and should not be disturbed. Plus, this credible testimony, in conjunction with the other evidence presented to the ALJ, support the ALJ’s finding that Eggert engaged in gross negligence and misconduct, failed to maintain a minimally acceptable level of competence as fire chief, and made material omissions in submissions to the Department, all in violation of N.J.A.C. 5:73-1.9(a), thereby warranting the revocation of his firefighting certifications. As such, the Division’s decision to

adopt the ALJ's Initial Decision was neither arbitrary, capricious, nor unreasonable.

B. Eggert Engaged In Gross Negligence And Misconduct In Using A Portable Radio And Emergency Response Call Sign That He Lacked Authorization To Use.

By using a radio and SOT-3 call sign that he was not authorized to use, Eggert sowed confusion and concern among emergency responders in Ocean County and Tuckerton, thus engaging in misconduct under N.J.A.C. 5:73-1.9(a)(3). Eggert claims that no adjudicator could reasonably conclude he engaged in gross negligence or misconduct in the performance of his duties in violation of N.J.S.A. 5:73-1.9(a)(3), because "the evidence presented at trial was directly contradictory to the finding." (Pb18). Specifically, Eggert claims that the ALJ and Division were wrong in concluding that Eggert should have known he was not authorized to use the SOT-3 call sign. (Pb18-19). Not so. Rather, credible evidence supports the conclusion that Eggert was grossly negligent in the performance of his duties. (Pa48).

As of June 7, 2022, the day the TVFC was suspended from operation, Eggert was no longer affiliated with an operating fire company, and thus should not have retained or used the Forked River Radio or SOT-3 call sign. (2T73:2-22). And no tankers were needed for the power outage at the traffic incident on July 25, 2022, as water supply – the entire purpose of the SOT – was not an

issue. (2T74:9-11). Despite not being authorized to use the radio or call sign, Eggert proceeded to use resources reserved solely for active emergency personnel, creating confusion and concern among emergency responders in Ocean County and Tuckerton. That, in turn, resulted in a series of complaints and concern that the confusion would jeopardize the arrangements for fire coverage for Tuckerton that the suspension of the TVFC necessitated. (2T68:14-69:1; 2T90:20-91:7).

After reviewing the credible evidence presented, the ALJ determined that “the record is devoid of any substantiation of [Eggert]’s claim that he was authorized to use the SOT-3 call sign on July 25, 2022” but that it was “evident that had [Eggert] spoken to Jubert prior to that date, he would have known that in fact he was not authorized.” (Pa48). The ALJ went on to state that “[Eggert] surely knew that the TVFC was suspended, and it was incumbent on him to determine if he remained authorized to use the SOT-3 call sign, but that the record demonstrated that Eggert failed to do so.” Ibid.

Based on these findings, the ALJ properly concluded that Eggert was unauthorized to use his prior call sign, and that the confusion caused by his use of it on July 25, 2022, constituted misconduct in the performance of his duties in violation of N.J.A.C. 5:73-1.9(a)(3). Id. at 48-49. The final agency decision then correctly adopted the ALJ’s decision in its entirety as the decision was

based upon credible evidence in the record to find that Eggert engaged in misconduct in the performance of his duties. (Pa93).

C. Eggert Failed To Maintain A Minimally Acceptable Level Of Competence As Fire Chief.

Under Eggert's leadership as fire chief, the TVFC had repeated issues with firefighter safety and requisite staffing. (Pa138-148; Ra003; Ra013; Ra044-46). Specifically, the TVFC's failure to comply with certain workplace standards violated PEOSH, and Eggert failed to submit a compliant MOA prior to the suspension of the TVFC. As a result, the Division adopted the ALJ's conclusion that Eggert's failure in these respects violated N.J.A.C. 5:73-1.9(a)(4). (Pa93). Eggert disputes that finding, claiming that he was not the individual responsible for the PEOSH violations and arguing that the remaining findings were not based on credible evidence. (Pb20-25). He is incorrect, as demonstrated in the ALJ's initial decision adopted by the Department.

Since Eggert became the chief of the TVFC in 2017, the fire company had repeated issues with compliance with firefighter safety, incurring several penalties from PEOSH. In June 2018, PEOSH cited the TVFC for nine serious violations, including not having a respiratory protection plan and not doing fit testing of breathing apparatuses for firefighters. (Pa138-148). In May 2019, PEOSH informed Tuckerton that it had substantiated complaints that firefighters under Eggert's charge had responded to fire calls without the proper personal

protective equipment. (Ra046). Similarly, in May 2022, PEOSH issued repeat citations and a \$4,000 penalty to Tuckerton because the TVFC, overseen by Eggert, had not done fit testing of breathing equipment for firefighters. (Ra004). These well documented incidents of PEOSH violations occurring under Eggert's leadership as fire chief of the TVFC were not simply administrative oversights. Rather, these failures put the safety of the TVFC firefighters and the public at serious risk of harm. As the ALJ noted, “[n]otwithstanding Eggert's efforts to deflect responsibility for the PEOSH violations, as chief, he bore the ultimate responsibility.” (Pa50).

The record also demonstrates that under Eggert's supervision as fire chief, the TVFC's staffing shortage was well documented and put it in violation of the NFPA standards. The TVFC's roster provided by Eggert showed that the TVFC did not have the minimally required fifteen active firefighters capable of being on scene at an incident within nine minutes 90 percent of the time, as required by the NFPA for an urban demand zone. (Ra003; 1T39:22-42:4). “[E]ven if [every TVFC firefighter] showed up a hundred percent of the time,” Eggert still could not staff the required number of firefighters in response to a fire. (1T41:23-42:4). While Eggert asserts that the finding that TFVC firefighters did not meet NFPA and Borough standards relied on misstatements by Nelsen, these staffing issues were well documented. And records of the TVFC's call and

response rates clearly showed that Eggert's firefighters failed to meet the SFA's requirement that each TVFC firefighter respond to at least 25 percent of incoming calls, and Tuckerton Borough's requirement that at least 60 percent of a firefighter's duty be composed of actual attendance and duty at fires and drills. (Ra044-45).

The record also demonstrates that Eggert repeatedly failed to submit MOAs with the fire companies of contiguous municipalities to satisfy the fifteen-firefighter response requirement before the TVFC was suspended from service. (Pa52; Ra 013). To be sufficient, the MOAs would need to mandate automatic deployment of the other fire companies' firefighters and equipment in the event of an emergency call. (1T65:5-21). However, Eggert repeatedly failed to provide MOAs with this required language, instead submitting multiple drafts that offered inadequate protection for Tuckerton. (1T66:21-67:21; 1T68:8-16).

In response, Eggert accuses Nelsen of attempting "to thwart [Eggert]'s efforts" to bring the TVFC into compliance and cites his own testimony in support of his proposed conclusions that 1) he was not responsible for the PEOSH violations, 2) staffing issues had been abated, and 3) TVFC firefighters were adequately trained and certified. (Pb24-25). But, as set forth above, the ALJ's findings that Nelsen was a credible witness and Eggert was not should not be disturbed.

The record establishes that over multiple years, Eggert's fire company had issues and violations relating to PPE and fit tests and was chronically undermanned, thereby endangering the TVFC's firefighters and community. Therefore, the ALJ did not err in finding that there was sufficient evidence present to support the finding that Eggert failed to maintain a minimally acceptable level of confidence in violation of N.J.A.C. 5:73-1.9(a)(4), and the Department's Final Agency Decision adopting the ALJ's Initial Decision in its entirety should be affirmed.

D. Eggert Made Material Omissions In Submissions To The Division.

The record in this matter clearly demonstrates that Eggert repeatedly made material omissions in his submissions to the Division, constituting a violation of N.J.A.C. 5:73-1.9(a)(6). Eggert argues, again based largely on his own testimony, that he made every effort to provide documents sought by the Division, despite 'ever-evolving requirements' imposed by Nelsen. Ibid. But this is simply another attempt to shift responsibility and convolute the record based on Eggert's unsubstantiated testimony.

Multiple submissions from Eggert to the Division were inadequate and missing requested information. In response to the Division's request for the TVFC's RPP, Eggert supplied only a single-page copy of the self-contained breathing apparatus regulations that lacked necessary language. (2T22:24-

23:22). Similarly, Eggert submitted non-compliant MOAs that failed to bring the TVFC into compliance with the requirement to provide fifteen firefighters at the scene of a fire within nine minutes 90 percent of the time. (1T68:16-25). The deficient MOAs also stated that contiguous fire companies would provide “manpower,” rather than a full dispatch, including fire apparatuses, engines, and ladders, as Eggert had been informed was required. (1T69:1-12).

The Division also requested Eggert provide documentation in support of the TVFC’s firefighters’ certifications and provided guidance on specifically what information needed to be included, but Eggert failed, over the course of months, to provide all the documentation requested. (1T47:21-54:18; Pa126-133). Similarly, Eggert failed to provide an adequate response to the Division’s requests for explanations as to how sixty-five firefighters affiliated with the TVFC were no longer there, instead only providing vague and evasive responses consisting of uninformative explanations such as “resigned” or “long gone.” (2T39:14-17; Ra065). These repeated omissions to the requests for information from the Division prevented the Division from conducting its investigation and being able to determine whether the TVFC was adequately providing fire coverage to residents of Tuckerton.

Based on this substantiated, credible evidence in the record, and regardless of Eggert’s own unsupported, self-interested testimony, the ALJ

correctly determined that Eggert made material omissions in submissions to the Division in violation of N.J.A.C. 5:73-1.9(a)(6). (Pa52-54). The Final Agency Decision adopted the ALJ's decision in its entirety. As both decisions are based upon the credible evidence in the record, the Final Agency Decision must be affirmed.

POINT II

THE DEPARTMENT HAS BROAD AUTHORITY TO REVOKE FIREFIGHTER CERTIFICATIONS BASED ON GOOD CAUSE AND APPROPRIATELY ACTED WITHIN THIS AUTHORITY WHEN REVOKING EGGERT'S VARIOUS CERTIFICATIONS.

As a threshold matter, Eggert's contention that the Division is not statutorily authorized to discipline firefighters or revoke their certificates was not raised below and therefore should not be considered for the first time on appeal. Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J. 378, 391 (1997); Soc'y Hill Condo. Ass'n v Soc'y Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002).

Regardless, the Division is granted authority to revoke firefighter certifications pursuant to its obligations to administer and enforce the Uniform Fire Safety Act ("UFSA"), as adopted at N.J.S.A. 52:27D-192 to -213, its duty to implement training and education programs for the fire service and the public under N.J.S.A. 52:27D-25d, and its enabling statutes located at N.J.S.A. 52:27D-25a *et seq.*, specifically N.J.S.A. 52:27D-25aa.

The UFSA is “necessary to protect life and property within this State from the danger of destruction by fire and explosion.” N.J.S.A. 52:27D-193. To achieve these goals, persons who successfully complete an accredited recruit firefighter training program conducted by the Division of Fire Safety shall be eligible to receive a certificate of national certification by the organization that has accredited the training program. N.J.S.A. 52:27D-25kk.

Additionally, N.J.S.A. 52:27D-25d charges the Division with the duty to implement training and education programs for the fire service and the public. To best fulfill this obligation, Chapter 73 of the Division’s governing regulations, entitled Standards for Fire Service Training and Certification, has been adopted to provide the standards for firefighter training, certifications, and revocations. N.J.A.C. 5:73-1.3. Notably, the Division, and more specifically the Division’s Office of Training and Certification, has exclusive authority over firefighter certification standards in New Jersey. N.J.A.C. 5:73-1.5. These programs include certifications in incident management systems,¹⁰ N.J.A.C.

¹⁰ ‘Incident Management System’ means a nationally recognize and organized system of rules, responsibilities and standard operating procedures used to manage emergency operations.” N.J.S.A. 52:27D-25i.

5:73-3.1 to -3.2¹¹; firefighter I and II, N.J.A.C. 5:73-4.1 to -4.6¹²; and hazardous materials, N.J.A.C. 5:73-6.1 to -6.6¹³.

¹¹ Under N.J.A.C. 5:73-3.2, all fire service personnel shall satisfactorily complete the following training programs: “I-100 Introduction to Incident Command System” and “I-700 National Incident Management System, an Introduction”, both of which are administered by the Federal Emergency Management Agency. Additionally, to qualify for the Incident Management Level 1 certification, firefighters must complete Federal Emergency Management Agency’s course titled “I-200 ICS for Single Resources and Initial Action Incidents.” To qualify for the Incident Management Level 2 certification, firefighters must complete the Federal Emergency Management Agency’s course titled “I-300 Intermediate ICS for Expanding Incidents.”

¹² Under N.J.A.C. 5:73-4.2, certification for Firefighter shall be granted to an individual who has submitted an application for certification to the Office of Training and Certification, is at least 18 years of age, has successfully completed the adopted State instructional program for the certification title applied; and successfully passed the State exams that evaluate the Job Performance Requirements and components of requisite knowledge and skills contained in the National Fire Prevention Association 1001, 2013 Edition, Standard for Fire Fighter Professional Qualifications, and National Fire Prevention Association 472, 2018 Edition, Standard for Competence of Responders to Hazardous Materials/Weapons of Mass Destruction Incidents.

¹³ Certification of Hazardous Materials/Weapons of Mass Destruction Incidents responders shall be granted to an individual who: has submitted an application for certification to the Office of Training and Certification, is at least 18 years of age, has been issued a Fire Fighter I certification, has successfully completed the adopted State instructional program for the certification title applied, and successfully passed the State exams that evaluate the Job Performance Requirements, specific competencies, requisite knowledge, and skills contained in the National Fire Prevention Association 472, 2018 Edition, Standard for Competence of Responders to Hazardous Materials/Weapons of Mass Destruction Incidents. N.J.A.C. 5:73-6.2.

To ensure that only qualified individuals may serve as fire service members, the Commissioner of the Department of Community Affairs may suspend or revoke a firefighter's certification for several reasons. N.J.S.A. 52:27D-25aa; see also N.J.A.C. 5:73-1.9; Ainley v. Hackensack Improvement Comm'n, 64 N.J.L. 504, 505 (1900) ("the granting of such a license is necessarily revocable ... whenever the public good requires it..."); New Jersey Division of Fire Safety v. Solimando, 2009 WL 1267210 (N.J. Adm. May 1, 2009)¹⁴ ("Under N.J.S.A. 52:27D-25aa, the Commissioner may suspend a firefighter's certificate for any number of reasons."). This authority has been extended to the Division through N.J.A.C. 5:73-1.9(a) which provides:

The Division may suspend and/or revoke certification or certificate if the Department has determined that the holder:

...

3. Has been grossly negligent or has engaged in misconduct in the performance of any of his or her duties;

4. Has failed, over a period of time, to maintain a minimally acceptable level of competence;

...

6. Has made a false or misleading written statement, or has made a material omission in any submission to the Department; or

¹⁴ In accordance with R. 1:36-3, counsel has enclosed herewith copies of each unpublished decision referenced herein. Counsel is aware of no other case law to the contrary.

7. Has violated any provision of this chapter.

[N.J.A.C. 5:73-1.9(a).]

Eggert's argument that N.J.S.A. 52:27D-25aa is not one of the many statutes authorizing Chapter 73 is unfounded and unsupported. Rather, as stated in N.J.A.C. 5:73-1.2, the standards and regulations promulgated under Chapter 73 are done so pursuant to the authority of the entirety of the act which establishes the Division of Fire Safety in the Department of Community Affairs located at N.J.S.A. 52:27D-25a et seq., including N.J.S.A. 52:27D-25aa. N.J.A.C. 5:73-1.2; see also N.J.S.A. 52:27D-25b. While Chapter 73 also provides a more specific citation to N.J.S.A. 52:27D-25d, as again this statute creates the Division's obligation to implement training and education programs for the fire service, Eggert has provided no authority for his position that N.J.S.A. 52:27D-25aa is not also considered a part of Chapter 73's enabling authority where it is explicitly a part of the statutory scheme cited to by the regulation.

The Division's authority to revoke certifications for fire safety professionals is particularly important as firefighters and fire chiefs play an essential role in public safety and "must ... display a certain level of discipline and an ability to work well within the community." Karins v. City of Atlantic

City, 152 N.J. 532, 552 (1998). This discipline and community engagement are essential because:

“[c]onduct that weakens the public’s trust tends to destroy the public’s confidence in a fire department. Firefighters can perform their duties well only if they merit the trust and confidence of the community they serve. Public trust and confidence are essential to the department’s effective and satisfactory operation. The chief of a fire department has the responsibility of sedulously maintaining the departmental morale and discipline. The promotion of safety or persons and property is at the core of the mission of the fire department.”

[Id. at 562.]

The public safety concerns implicated by the training, certification, and revocation program were also highlighted in the original administrative proposal of the regulations. Chapter 73 was first codified in Title 5 of the New Jersey Administrative Code as Chapter 18C, Standards for Fire Service Training and Certification. When Chapter 18C was proposed, it was noted that the “[e]stablishment of minimum requirements for training programs will help firefighters who take the courses to do their jobs more safely and efficiently, with consequent benefit both to those whom they might have to rescue or assist and to themselves.” 21 N.J.R. 1655(a) (June 19, 1989). This was further reflected in the adopted intent and purpose of the regulations, providing:

“The Uniform Fire Safety Act and related legislation, specifically N.J.S.A. 52:27D-25a et seq., have been adopted to ensure public safety and welfare. In order for fire suppression and fire code enforcement activities to be conducted adequately and effectively, members of the fire service will need to have sufficient knowledge and competence.

This can best be achieved through the creation of an education and training program and the development of certification requirements.”

22 N.J.R. 337(c) (Feb. 5, 1990).

This intent and purpose has been restated in every readoption of the standards for Fire Service Training and Certification. See N.J.A.C. 5:73-1.3; see also 27 N.J.R. 878(b) (March 6, 1995); 28 N.J.R. 1377(b) (March 4, 1996); 29 N.J.R. 3243(a) (July 21, 1997); 50 N.J.R. 775(a) (Feb. 5, 2018).

Moreover “[t]he powers of an administrative agency should be liberally construed to permit the agency to achieve the tasks assigned to it.” In re Heller, 73 N.J. 292, 303 (1977) (quoting In re Comm’r of Banking & Ins. v. Parkwood Co., 98 N.J. Super 263, 271-72 (App. Div. 1967)); see also Merin v. Maglaki, 126 N.J. 430, 437 (1992) (finding that an agency’s interpretation of a statute or regulation “will prevail provided it is not plainly unreasonable”). Courts “accord substantial deference to an agency head’s choice of remedy or sanction, seeing it as a matter of broad discretion, especially where considerations of public policy are implicated.” Div. of State Police v. Jiras, 305 N.J. Super. 476, 482 (App. Div. 1997) (citations omitted). This is especially important where “the task of the regulatory agency is ‘to protect the health and welfare of members of the public’ by assuring that all licensed practitioners are qualified, competent, and honest.” Heller, 73 N.J. at 303-04 (quoting Rite Aid of N.J., Inc. v. Bd. of Pharmacy, 124 N.J. Super. 62, 66-68 (App. Div. 1973)). Given the

Division's statutory obligation to implement training programs for the safety of fire service members and the public, in conjunction with the flexibility and discretion afforded to the agency in fulfilling its legislative aims, it is untenable to suggest that the Division does not have the authority to revoke the certifications it alone issues to New Jersey firefighters when such firefighters are found to be in violation of the laws and regulations enacted to ensure both their own and the public's safety.

Rather, here, after a lengthy investigation and attempts by the Division to help resolve the outstanding issues with the TVFC, Eggert was found to be in violation of several provisions of N.J.A.C. 5:73-1.9(a), with violations spanning several years and including repeated offenses. After careful consideration, the Division determined that the appropriate sanction was revocation of all of Eggert's certifications. This determination was sustained by the reviewing ALJ and adopted by the Commissioner of the Department of Community Affairs, noting that "the Division is fully authorized, through its obligation to enforce the UFSA, N.J.S.A. 52:27D-192 to -213, and its 'comprehensive regulations setting standards for fire service training and certification' to revoke Eggert's certifications. (Pa93). Given that N.J.A.C. 5:73-1.9 is authorized not only by the UFSA but also by N.J.S.A. 52:25Daa, as well as the flexibility and discretion afforded the Division in fulfilling its legislative purposes, the Division properly

acted within its authority in revoking Eggert’s various firefighting certifications for his substantiated violations of the regulations.

POINT III

THE DEPARTMENT’S DECISION TO REVOKE EGGERT’S CERTIFICATIONS IS APPROPRIATE AND SHOULD BE AFFIRMED

The Appellate Division’s “deferential standard applies to the review of disciplinary sanctions as well.” In re Hermann, 192 N.J. 19, 28 (2007). “A reviewing court should alter a sanction imposed by an administrative agency only when necessary to bring the agency’s action into conformity with its delegated authority.” Ibid. When assessing an agency’s disciplinary sanction, the test is “whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness.” Ibid. “The threshold of ‘shocking’ the court’s sense of fairness is a difficult one, not met whenever the court would have reached a different result.” Id. at 29. As the New Jersey Supreme Court has made clear, “so long as the discipline … falls within a continuum of reasonable outcomes, we must defer, for we have no charge to substitute our judgment for that of the statutorily authorized decision maker.” In re Hendrickson, 235 N.J. 145, 161 (2018).

Firefighters and fire chiefs play an essential role in public safety and “must … display a certain level of discipline and an ability to work well within

the community.” Karins, 152 N.J. at 562 (noting “[t]he Chief of a fire department has the responsibility of sedulously maintaining the departmental morale and discipline” and that “[t]he promotion of safety of persons and property is at the core of the mission of a fire department”).

As previously discussed, to ensure that only qualified persons may serve as fire service members, the Commissioner of the Department may “suspend or revoke any certificate or certification issued by the commissioner.” N.J.S.A. 52:27D-25aa; see also N.J.A.C. 5:73-1.9(a) (authorizing the Department to suspend or revoke a certification or certificate). Moreover, “[t]he powers of an administrative agency should be liberally construed to permit the agency to achieve the tasks assigned to it.” Heller, 73 N.J. at 303 (1977) (quoting In re Comm'r of Banking & Ins. v. Parkwood Co., 98 N.J. Super. 263, 271-72 (App. Div. 1967)). This is especially important where “the task of the regulatory agency is ‘to protect the health and welfare of members of the public’ by assuring that all licensed practitioners are qualified, competent and honest.” Id. at 303-304 (quoting Rite Aid of N.J., Inc. v. Bd. of Pharmacy, 124 N.J. Super. 62, 66-68 (App. Div. 1973)).

Here, after a lengthy investigation and many attempts to resolve the ongoing issues, Eggert was found in violation of several provisions of N.J.A.C. 5:73-1.9(a) spanning several years and including repeated violations. Notably,

these violations, including failing to staff enough firefighters on the TFVC roster to adequately respond to fires and to maintain an RPP, endangered the safety of both the public and the firefighters of the TVFC. After careful consideration, the Department determined that the appropriate sanction was revocation of all of Eggert's certifications issued by the Division. In doing so, the Department acted well within its authority to enforce the Uniform Fire Safety Act and protect the people and property of the communities they serve. N.J.S.A. 52:27D-196. Therefore, the Department's Final Agency Decision to revoke all of Eggert's certifications is appropriate and should be upheld.

CONCLUSION

For the foregoing reasons, the Department's final agency decision should be affirmed and the revocation of Eggert's various firefighter certifications upheld.

Respectfully submitted,

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003501-23**

DALE W. EGGERT,

Petitioner-Appellant,

v.

**NEW JERSEY DEPARTMENT
OF COMMUNITY AFFAIRS
DIVISION OF FIRE SAFETY,**

Respondent-Respondent.

CIVIL ACTION

ON APPEAL FROM

**STATE OF NEW JERSEY,
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. CAF 08930-22
Agency Docket No. DFSID 174710
Honorable Jacob Gertsman, A.L.J.
Sat below**

**REPLY BRIEF FOR
APPELLANT DALE W. EGGERT**

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PRELIMINARY STATEMENT

Why should Appellant Chief Dale W. Eggert (Chief Eggert) be barred from serving his community as a firefighter when his firefighting skills are exemplary? Respondent, the Department of Community Affairs (DCA), provides a meager and unpersuasive explanation, based solely on the highly questionable testimony of one witness, Donald Nelsen of the Division of Fire Safety (“DFS”), whose actions were demonstrably infected by personal animus.

As previously explained in detail, Chief Eggert of Tuckerton Volunteer Fire Co. No. 1 (“TVFC”) is an exceptional firefighter with an unblemished record, as affirmed by his contemporaries. Yet, the DCA upheld the revocation of each of the firefighting certifications that enabled Chief Eggert to serve as a volunteer and paid firefighter in the State of New Jersey, not on grounds related to his performance as a firefighter, pursuant to N.J.A.C. 5:73-1.9, but rather on alleged deficiencies in his performance of administrative tasks. For this reason, and those cited below, the DCA’s decision should be reversed.

RESPONSE TO RESPONDENT’S STATEMENT OF FACTS

Chief Eggert’s impeccable firefighting skills were attested to by Thomas Wetmore and Ernie Troiano, Chiefs of local fire departments. Respondent misrepresented the evidence presented at trial when it stated that Wetmore and Troiano did not have first hand knowledge of Eggert’s acumen. (“Wetmore and

Toriano [sic] were also called by Eggert at the hearing to testify about his performance as a firefighter, but both noted that they never worked with Eggert in his capacity as a firefighter.”). (Ra. Brief 18). In fact, Wetmore testified that he has been on fire scenes with Chief Eggert, that Chief Eggert is an “excellent firefighter,” and that he has never seen Chief Eggert do anything improper as a firefighter. (2T99:20-100:8).

Troiano, Chief of the Wildwood Fire Department, attested that he worked with Chief Eggert while Chief Eggert was employed by the Wildwood Fire Department on a part time basis from 2015 to 2021. (3T8:22-10:20). Troiano stated:

His abilities as a firefighter, he's solid. I was very impressed with the way he handled himself. It was actually a pretty good fire, pretty hot conditions, you know, zero visibility, you know. And that was the first time I personally got to work with - with Dale on a fire scene and he conducted himself very well, aggressive, smart decisions.

(3T10:7-16). The DCA’s mischaracterization of the above-quoted testimony is in keeping with its conduct throughout this case, bending the facts to achieve its own self-serving ends.

Another misstatement by Respondent involves the TVFC’s compliance with the standards of the National Fire Protection Association (NFPA) through its use of mutual aid agreements. Although the TVFC had twelve active firefighters¹, the

¹ Throughout Respondent’s Brief, the DCA fails to appreciate the difference between an active roster of firefighters, personnel ready and able to fight fires, and

TVFC used long-standing mutual aid agreements with neighboring communities to meet the NFPA standards. (Pa128; 2T97:15-23; 2T:98-4 –100:25). When Nelsen required that these agreements be reduced to writing in the form of memoranda of agreement (MOAs), Chief Eggert complied by providing agreements signed with West Tuckerton and Parkertown Fire Departments. (3T114:23-115:23). In a familiar cycle, Nelsen objected to certain provisions, Chief Eggert revised the MOAs, Nelsen added additional requirements, and Eggert continued to do his best to meet Nelsen's fluid standards. (1T68:14-69:12; 3T115:3-23; 3T117:18-119:6; Pa129-Pa133). On June 7, 2022, Chief Eggert again supplied signed versions of the MOAs, which Nelsen finally deemed acceptable. (1T178:16-177:2). However, Nelsen never informed the Borough or Chief Eggert that the requirements were met. (1T180:23-181:1). Rather, he prepared a misleading memo, falsely stating he had not received acceptable versions of the MOAs and childishly continued to allow Chief Eggert to propose new versions for his approval. (Pa121; Pa124-Pa125; 1T179:17-180:3). Incredibly, Respondent's Brief still fails to concede that Nelsen deemed the MOAs to be in compliance, despite his testimony. (Ra. Brief 4-5; 1T180:23-181:1).

Further, the DCA punished Chief Eggert for the TVFC's non-compliance with respiratory equipment testing during COVID even though the testing was not Chief

a membership list, a record of firefighters associated with the fire company which include legacy members. Ra. Brief 6-8.

Eggert's responsibility under the TVFC's corporate structure. (2T103:6 – 105:14). This was apparently a novel punishment, as no other Chief had ever been disciplined through the suspension or revocation of certifications in Nelsen's recollection. (1T163:3-5). Tuckerton Borough Administrator Jenny Gleghorn, Tuckerton's PEOSH compliance officer, explained that the TVFC had "made every effort to have the necessary fit testing of volunteers occur within 2021, but unfortunately with everything else during this time frame there were delays due to the COVID pandemic." (1T131:3-9). Notwithstanding these difficulties and despite compliance being another person's responsibility, Chief Eggert diligently worked to bring the TVFC into compliance to mollify Nelsen, to no avail. (2T23:5-25:6; 3T12614-23).

ARGUMENT

I. THE DCA'S DECISION SHOULD BE OVERTURNED AS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

The DCA's decision to uphold the revocation of Chief Eggert's certifications is arbitrary, capricious, and unreasonable, as the determination is not based on substantial, credible evidence presented at trial.

A. No Adjudicator Could Reasonably Conclude Chief Eggert Engaged in Gross Negligence or Misconduct in Performance of His Duties, per NJAC 5:73-1.9(a)(3).

DCA's only claim of gross negligence or misconduct is that Chief Eggert should not have radioed dispatch to alert the authorities to a defective traffic light

that created a serious risk of harm to motorists. Chief Anthony D'Andrea, the leader of the Southern Ocean County Tanker Task Force (SOCTTF), had advised Chief Eggert that he could continue to be a member of SOCTTF, even when the TVFC was out of service, and directed him to continue to use the “SOT-3” call sign assigned to him. (3T52:21-54:12). On July 25, 2022, Chief Eggert calmly radioed dispatch, using the SOT-3 call sign, when he encountered the non-functioning traffic signal, and asked for police assistance at the intersection. (3T56:22-64:13).

These facts are insufficient to show gross negligence or misconduct in performance of duties as a firefighter, as (1) Chief Eggert was not performing any duties as a firefighter at the time; (2) he reasonably believed he was legally authorized to use the SOT-3 call sign that day based on his conversation with Chief D'Andrea; and (3) several witnesses testified at trial that off-duty first responders often call into dispatch when they encounter dangerous situations. (2T17:6-22; 2T20:12-20; 2T84:19-85:2).

B. The DCA’s Decision that Chief Eggert Failed Over a Period of Time to Maintain a Minimally Acceptable Level of Competence is Unreasonable, per NJAC 5:73-1.9(a)(4).

As justification for the conclusion that Chief Eggert failed to maintain minimally an acceptable level of competence, the DCA cites “PEOSH violations,

staffing issues, and failure to submit a compliant MOA prior to the suspension of the TVFC,” . . . “endangering the firefighters and the community.” (Pa52).

As set forth hereinabove, Chief Eggert has addressed the PEOSH violations at length, specifically that he was not responsible for PEOSH compliance yet took it upon himself to bring the TVFC into compliance when the issue was brought to his attention. (Pa50; 2T103:6–105:14; 2T126:1-10; 3T151:16-24; 3T87:22-88:16). Although several fire companies in New Jersey had PEOSH violations over the years, none of their Chiefs’ certifications were revoked. (1T162:24 -163:5). The DCA reached an arbitrary and unreasonable conclusion that the PEOSH violations constituted a failure to maintain a minimally acceptable level of Chief Eggert’s competence *as a firefighter*, which should have been its sole focus.

As to alleged staffing issues, TVFC, under the leadership of Chief Eggert, complied with the standards of the National Fire Protection Association (NFPA) through the TVFC’s use of mutual aid agreements. When Nelsen demanded that these well-established agreements be reduced to writings, Chief Eggert made every effort to comply but was faced with Nelsen’s childish game playing as he continually moved the goalposts concerning the MOAs. (1T68:14-69:12;3T115:3-23; 3T117:18-119:6; Pa129-Pa133). Indeed, Nelsen received MOAs from Chief Eggert that he deemed acceptable on June 7, 2022, but he made the conscious decision to withhold this information from Chief Eggert, presumably to keep him struggling to

comply. (1T178:16-177:2; 1T180:23-181:1). Incredibly, he testified at trial that he did not tell Chief Eggert that the MOAs provided were acceptable because Chief Eggert asked for the correct language rather than asking whether the MOA previously submitted was acceptable. (1T180:4-10).

Even if taken at face value, none of these alleged failings on the part of Chief Eggert involve his level of competence as a firefighter, as the regulations were not designed to address firehouse administration. See N.J.S.A. 52:27D-25aa and N.J.A.C. 5:73-1.9. Moreover, none of these allegations were proven to be true – Chief Eggert assisted in the PEOSH compliance measures and ensured that the Borough of Tuckerton was adequately protected through both longstanding mutual aid agreements and, later, acceptable written MOAs. Further, DCA’s allegation that Chief Eggert failed to maintain a minimally acceptable level of “confidence” is not the standard set forth in N.J.A.C. 5:73-9(a)(4). See Ra. Brief 32. In sum, the DCA’s determination was arbitrary, capricious, and unreasonable.

C. The Determination that Eggert Made a Material Omission in a Written Submission to the Division was Arbitrary, Capricious, and Unreasonable.

The DCA’s claim that Chief Eggert made material omissions to the Division, in violation of N.J.A.C. 5:73-1.9(a)(6), is, likewise, completely unfounded. As previously stated, Chief Eggert continued to comply with each of Nelsen’s requests, despite Nelsen’s changing standards and outright derision. Pa. Brief 20-25. Should

all of Chief Eggert's certifications be revoked for *allegations* that paperwork was missing in the arbitrary opinion of one DFS employee whose propensity for telling the truth is questionable?

II. A.L.J. GERTSMAN'S CREDIBILITY DETERMINATIONS ARE UNSUPPORTED BY THE RECORD.

A factfinder's factual determinations, including credibility findings, are only entitled to deference on appeal where the findings are supported by the record evidence. Accounteks.Net, Inc. v. CKR L., LLP, 475 N.J. Super. 493, 503 (App. Div. 2023). Here, Nelsen lacked credibility (indeed, he admitted that he testified untruthfully), and his many misrepresentations were revealed by and through the testimony presented at trial. Therefore, ALJ Gertsman's credibility determination is not entitled to deference, and the Court should make its own credibility findings concerning Nelsen's conflicting testimony.

A. Uncontested Fabrications

The DCA failed to sufficiently counter the numerous misrepresentations by Nelsen identified in Appellant's Brief. In its Opposition, the DCA relies on a conclusory statement that ALJ Gertsman found Nelsen credible, and that Nelsen affirmed that he did not lie on direct examination, which are both self-serving, uncorroborated, and directly contradicted by evidence presented at trial. The DCA's failure to address Nelsen's falsehoods, including the following:

1. Nelsen represented that Eggert was required to return the portable radio after June 9, 2022. (1T118:21-119:10). At the hearing, Nelsen admitted this was not true (3T35:9-20), and Eggert proved that he had authority to use radio. (3T59:15-61:5; 3T63:4-15).

2. Nelsen stated it was inappropriate for Eggert to use the SOT-3 call sign. (1T77:17-19). However, Nelsen admitted if Eggert was legally and legitimately on the task force, it would be appropriate for Eggert to use the SOT-3 call sign to call in the defective traffic light. (2T20:12-20; 3T52:2-12).

3. Nelsen falsely stated specific officials requested corrective action against Eggert, that Eggert lied about fire companies relying on the TVFC, and made certain statements to all fire chiefs in Ocean County. (2T30:8-24). The Revocation Letter further stated that “Tuckerton Councilman, Chairman of their Public Safety Committee, Frank D’Amore and Ocean County Chief Fire Coordinator Joseph Jubert requested the Division of Fire Safety intercede with corrective action against Chief Eggert.” (Pa2). Both Councilman Frank D’Amore and Joseph Jubert testified that they did not request corrective action against Chief Eggert. (2T81-82; 2T91:12-22). Nelsen was forced to admit he manufactured “facts” to discredit Eggert. (2T16:1-9).

4. Nelsen also asserted in the Revocation Letter that Eggert’s “claims [that] other departments rely upon [TVFC] is unfounded and a deliberate lie.” (Pa2).

Chief Thomas Wetmore testified that the New Gretna Fire Department absolutely relied upon TVFC while it was in service. (2T98:4-9). Facing these facts, Nelsen tried to mitigate his prior false statement, finally admitting his falsehood, testifying, “I don’t believe . . . [Eggert] deliberately lied.”. (2T22:6-13).

5. Nelsen’s Revocation Letter also included false statements attributed to Eggert. Nelsen stated during an Ocean County Fire Chiefs Association bi-monthly meeting, “in front of all the municipal fire chiefs in Ocean County,” Chief Eggert asserted the Division “investigation was a fraud” and that it was “all political” and “all paperwork problems” and that “at no time were any firefighters or residents in danger.” (Pa3). When challenged on cross-examination, Nelsen had to admit that he was not present at the meeting and had no first-hand knowledge of what was said. (1T92:9 –30:1). Eggert himself denied having made the statements attributed to him by Nelsen. (3T104:3-17).

B. Additional Misrepresentations

In the few instances where the DCA chose to address the substance of credibility issues, as opposed to the wholly uncontested fabrications set forth above, the DCA further mischaracterized the substance of Nelsen’s testimony, including (1) Nelsen’s “mayhem” exaggeration, and (2) Nelsen’s admission that his testimony regarding NFPA compliance was only “semi-accurate”.

Nelsen certified under oath, in the Division's answers to interrogatories, that Councilman Frank D'Amore stated Chief Eggert was "creating mayhem" through his use of a portable radio, an attribution that was repeated by Nelsen at Trial. (Pa155; 1T8:7-24). However, D'Amore himself testified that he never said any such thing. (2T94:13-15). D'Amore unveiled the blatant untruth, which forced Nelsen to retreat, saying "I would not necessarily characterize it as mayhem," directly contradicting his prior statement. (3T36:12-16).

Additionally, Nelsen deliberately made a materially false statement in his testimony when he sought to convince A.L.J. Gertsman that the TVFC did not meet Borough standards for the number of responses by its firefighters relating to their training and requirements. The Borough requires every active member of the TVFC to participate in at least fifty percent of responses on a yearly basis, which have two elements: fire calls and training drills. (1T167:14-169:17). Although Nelsen testified definitively that the TVFC members did not meet that standard, no doubt seeking to convince the Court that under Eggert's leadership the TVFC was substandard, under cross-examination, he admitted he was wrong because he only counted fire calls, not drills, when he asserted that TVFC's members did not meet the standard. When asked to admit that his testimony had been untruthful, Nelsen characterized his testimony as "semi accurate," blaming Chief Eggert for supplying incomplete data. (1T167:14-169:17). However, Nelsen admitted at trial that the

reason he received incomplete data was that he did not ask for the correct data – he only requested the number of calls members responded to, but not the drill information. (1T168:22-169:5). Nevertheless, with full knowledge that he did not have all of the necessary information to determine compliance, and with an obvious intent to mislead the Court, Nelsen still testified that the TVFC was largely non-compliant. (1T44:20-45:19). That Nelsen admitted to testifying untruthfully in an effort to mislead the Court is a major red flag that calls into question all of his other testimony. This Court can and should reverse on that basis alone, as Nelsen was the sole catalyst for the revocation of Chief Eggert’s certifications.

**III. DCA’S DECISION SHOULD BE REVERSED
DUE TO THE SEVERITY OF THE
SANCTIONS IN CONTRAST TO THE
ALLEGED VIOLATIONS.**

The severity of the DCA’s punishment against Chief Eggert shocks the conscience. In reviewing sanctions imposed by agencies, “the test ... is ‘whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness.’” In Re Herrmann, 192 N.J. at 28-29 (citing In re Polk, 90 N.J. 550, 578 (1982)).

Contrary to the DCA’s assertion, there was no lengthy investigation, no continued cooperation from DFS to resolve any issues, and no repeat violations by Chief Eggert. The entire “investigation” from the first anonymous complaint to the revocation of Chief Eggert’s certifications lasted approximately five months, from

March 1, 2022 to August 15, 2022. (1T24:5-7; Pa1 – Pa5). Nelsen spent much of the investigation stalling Chief Eggert’s compliance efforts, moving the goalposts, and purposefully concealing when Chief Eggert had met the required standards, rather than cooperating with Chief Eggert to resolve any alleged deficiencies. (Pa121-Pa128; 1T54:14-18; 1T179:17-181:1). Notably, the DCA has provided no citation for Nelsen’s alleged “many attempts to resolve the ongoing issues”. Ra. Brief 43. The DCA has also failed to identify any “repeat violations,” other than the PEOSH violations, which were not Chief Eggert’s responsibility as Chief, and which have not been the cause for discipline of any other fire chief in New Jersey, to Nelsen’s knowledge. (1T163:3-5).

The DCA also failed to prove that the alleged violations affected public safety in any way. Rather, according to the Division, Chief Eggert’s certifications were revoked because “he wasn’t getting [the job] done” administratively as Chief. (1T96:18-23). The record simply does not reflect that Chief Eggert’s action endangered the public.

Rather, the testimony shows Chief Eggert has a reputation as an excellent firefighter, with no history of wrongdoing, as attested to by Borough Administrator Gleghorn, Chief Wetmore, and Chief Troiano. (1T:134:2-4; 2T99:20-100:8; 3T10:7-16; 3T54:6-55:14). Nevertheless, the DCA chose the most lethal weapon in its arsenal, total revocation of all of Chief Eggert’s certifications. The severity of

the punishment is shocking, as the discipline is grossly disproportionate to the administrative failures alleged. No allegation by the Division related to Eggert's abilities as a firefighter, yet the punishment was to deprive Eggert of his ability to perform the important public service of providing fire protection to his community.

IV. THE DCA MISINTERPRETED THE LAW IN REVOKING EGGERT'S CERTIFICATIONS.

Despite having ample opportunity to do so, the State failed to address Chief Eggert's argument that the DCA misinterpreted the law when revoking his certifications for purported administrative shortcomings. Accordingly, Chief Eggert's contentions in this regard should be deemed uncontested and have not been fully set forth at length in this Reply. As stated in Appellant's opening brief, nothing in either the applicable Statute or Regulations permits the revocation of a certificate as a punitive measure for some perceived failure as an administrator. Therefore, the DCA misapplied the law in allowing the revocation of Chief Eggert's certifications for alleged administrative deficiencies.

CONCLUSION

Should an outstanding firefighter be prevented from performing the important task of fighting fires for his community on the basis of perceived (and unproven) administrative deficiencies? Appellant respectfully requests DCA's decision to revoke Eggert's firefighting certifications be overturned (1) as arbitrary, capricious,

and unreasonable, and not based on substantial credible evidence and (2) for DCA's failure to properly interpret and apply the controlling statute.

Respectfully submitted,

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