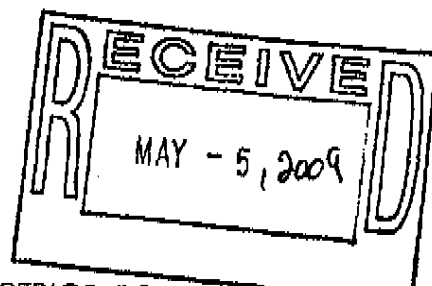


JOHN F. PILLES, JR., ESQ.
223 High Street, 2nd Floor
Mount Holly, New Jersey 08060
(609) 267-7711
Attorney for Plaintiff



DAVID J. MacFARLAND,

Plaintiff,

v.

COMMISSIONERS OF FIRE DISTRICT NO. 2
IN THE TOWNSHIP OF BORDENTOWN,
BURLINGTON COUNTY, NEW JERSEY, a body
corporate and politic; STEPHEN MONSON, an
elected fire commissioner; MATT DILLON, an
elected fire commissioner; JOSEPH FRESCO, an
elected fire commissioner; ANDREW WATSON,
an elected fire commissioner; and DAVID
HORSNALL, an elected fire commissioner,

Defendants.

SUPERIOR COURT OF NEW JERSEY
BURLINGTON COUNTY
LAW DIVISION

DOCKET NO.

CIVIL ACTION

VERIFIED COMPLAINT
WITH JURY DEMAND

The plaintiff, David J. MacFarland, as and for his complaint against the defendants above captioned, says:

PARTY IDENTIFICATION

1. The plaintiff, David J. MacFarland (hereinafter "MacFarland"), currently resides at 156 7th Avenue in the Township of Florence, Burlington County, New Jersey.
2. The defendant, Commissioners of Fire District No. 2 in the Township of Bordentown, Burlington County, New Jersey (hereinafter "Fire District"), is a body corporate and politic organized and existing pursuant to N.J.S.A. 40A:14-70, et seq for the purpose of providing fire suppression and prevention services to the public residing and/or visiting within the geographical area serviced by same governmental entity; and at all times relevant herein, said defendant maintains its

principle offices at 262 Crosswicks Road in the Township of Bordentown, Burlington County, New Jersey.

3. The defendant, Stephen Monson (hereinafter "Commissioner Monson"), holds public office as an elected commissioner of the Fire District; and this defendant currently resides at 11 Winding Brook Road in the Township of Bordentown, Burlington County, New Jersey.

4. The defendant, Matt Dillon (hereinafter "Commissioner Dillon"), holds public office as an elected commissioner of the Fire District; and this defendant currently resides at 2 West Constitution Drive in the Township of Bordentown, Burlington County, New Jersey.

5. The defendant, Joseph Fresco (hereinafter "Commissioner Fresco"), holds public office as an elected commissioner of the Fire District; and this defendant currently resides at 24 Lexington Road in the Township of Bordentown, Burlington County, New Jersey.

6. The defendant, Andrew Watson (hereinafter "Commissioner Watson"), holds public office as an elected commissioner of the Fire District; and this defendant currently resides at 23 Locust Road in the Township of Bordentown, Burlington County, New Jersey.

7. The defendant, David Horsnall (hereinafter "Commissioner Horsnall"), holds public office as an elected commissioner of the Fire District; and this defendant currently resides at 15 Oxford Court in the Township of Bordentown, Burlington County, New Jersey.

FACTUAL ALLEGATIONS

8. Plaintiff is, at all times relevant herein, employed on a full time basis by the Fire District as a career firefighter.

9. The Fire District is statutorily empowered by N.J.S.A. 40A:14-81.1 to create paid firefighter positions; and N.J.S.A. 40A:14-81.3 authorizes supervisory authority over such paid personnel to be exercised by the commissioners of the Fire District."

10. Although firefighters employed by the Fire District possess tenure rights in continuing employment, which can not be deprived absent showing of just cause in compliance with due process as referenced at N.J.S.A. 40A:14-19, et seq, the Fire District is subject to and controlled by the New Jersey Civil Service Act (hereinafter "the Act"), N.J.S.A. 11A:1-1, et seq.

11. Similar to Title 40A, the Act not only provides, but also requires, a public employer to comply with both procedural and substantive due process components which, by Legislative enactment, thereby creates a property and liberty interest held by such career firefighters protected by the Fourteenth Amendment to the United States Constitution.

12. With respect to procedural due process, the Act (as expounded by administrative regulations codified at N.J.A.C. 4A:1-1.1, et seq) provides the following rights:

(a) Prior to taking any action, which would interfere or suspend a career firefighter's continuation in position, the public employer must serve such employee with a Preliminary Notice of Disciplinary Action setting forth the charges premising contemplated suspension or removal ~~and afford said employee the opportunity for a hearing prior to taking such action unless "it is~~ determine that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services." Recited from N.J.A.C. 4A:2-2.5(a)(1).

(b) In those exceptional instances where the public employer believes the employee unfit for duty or a hazard to any person if permitted to remain on the job, "the employee must first be apprised either orally or in writing of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority;" and even then, were immediate suspension imposed, a Preliminary Notice of Disciplinary

Action with opportunity for a hearing must be served in person or by certified mail within five (5) days following the immediate suspension. See again N.J.A.C. 4A2-2.5(a)(1).

(c) The aforesaid Preliminary Notice of Disciplinary Action includes notice that the subject employee may request a departmental hearing which, if requested, shall be held within thirty (30) days of the Preliminary Notice of Disciplinary Action unless waived by the employee or a later date as agreed to by the parties. See, N.J.A.C. 4A:2-2.5(d). In the alternative, an employee may waive opportunity for departmental hearing whereupon a Final Notice of Disciplinary Action would be issued. See, N.J.A.C. 4A:2-2.5(c).

(d) In addition, the employee is provided opportunity to review the evidence supporting the charges and present and examine witnesses incidental to a departmental hearing conducted pursuant to N.J.A.C. 4A:2-2.6.

(e) Should the disciplinary action impose five (5) days or more suspension, then the employee has a procedural due process right to request de novo hearing through the Merit System Board within the New Jersey Department of Personnel. See, N.J.A.C. 4A:2-2.8 and 4A:2-2.9(b).

(f) As alleged *supra*, immediate suspension could be imposed upon MacFarland only upon a showing that he "is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services," which defines the just cause standard necessary to interfere with said plaintiff's property and/or liberty interests incidental to uninterrupted maintenance of employment position.

(g) The Act further imposes upon the public employer the burden of proof pursuant to N.J.S.A. 11A:2-21.

13. MacFarland has been suspended without pay for three (3) months effective on or

about January 29, 2009 on the allegation that a psychologist's evaluation conducted on January 14, 2009 has deemed said plaintiff unfit for duty as a firefighter. Annexed hereto as Attachment "A" is a copy of correspondence dated January 29, 2009 addressed to MacFarland communicating the defendants' decision and action.

14. The defendants have failed and refused to provide MacFarland with any procedural due process as required by the Act notwithstanding request made by the plaintiff, through his attorney in correspondence dated February 6, 2009, for same. A copy of said correspondence is annexed hereto as Attachment "B".

15. In addition to making such request to be afforded procedural due process as required by the Act addressed directly to the defendants, the plaintiff through his attorney communicated same to the Fire District's solicitor, Richard M. Braslow, Esq. (hereinafter "Braslow"), via correspondence dated February 13, 2009. A copy of said letter is annexed hereto as Attachment "C".

16. When no response was received from the defendant in timely manner, MacFarland ~~sought administrative intervention by filing appeal through the Merit System Board.~~ Annexed hereto as Attachment "D" is a copy of said appeal dated February 19, 2009.

17. Braslow did contact plaintiff's attorney by telephone to advise that the Fire District had neither requested nor authorized his involvement in this matter. Such communication was confirmed by correspondence dated March 5, 2009 annexed hereto as Attachment "E".

18. The Merit System Board thereafter communicated request for supplemental submissions by the parties in correspondence dated March 5, 2009, a copy of which is annexed hereto as Attachment "F".

19. Commissioner Watson and Commissioner Monson responded to the Merit System Board, on behalf of the Fire District, by correspondence dated March 13, 2009. A copy of said

response, without exhibits as referenced therein, is annexed hereto as Attachment "G".

20. Conspicuously absent from defendants' aforesaid response is any discussion or justification as to the reasons the Fire District denied and refused MacFarland procedural due process as required by the Act; and instead, the defendants proffered argument allegedly justifying its decision to impose ninety (90) day suspension upon the plaintiff.

21. MacFarland responded to the Merit System Board by correspondence dated April 3, 2009, a copy of which is annexed hereto as Attachment "H", focusing upon defendants' failure to comply with the Act.

22. To date, the Merit System Board has not provided adjudication in this matter.

FIRST COUNT

23. The defendants' conduct violated the Fourteenth Amendment to the United States Constitution (hereinafter "Federal Constitution") by depriving the plaintiff property and/or liberty interests incidental in continuing employment with the Fire District without due process of law.

(a) With regard to procedure, defendants have failed to provide the plaintiff with meaningful notice in timely manner concerning the basis for imposing suspension, an opportunity to be heard either/both prior to and/or after the imposition of ninety (90) day suspension without pay, and an opportunity to obtain and review the psychological reports and other documentary basis upon which the public employer has premised its decision, which rights are as explicitly defined and required by state law.

(b) With regard to substance, the defendant's decision to impose ninety (90) day suspension without pay lacks just cause in that, at all times relevant to the suspension, the plaintiff was physically excused from duty since he suffers a medical condition addressable through the New Jersey Workers Compensation Act (hereinafter "W.C.A."), N.J.S.A. 34:15-1, et seq, on which claim

MacFarland is represented by Robert R. Hahnemann, Jr., Esq. as evidenced by correspondence dated February 5, 2009 annexed hereto as Attachment "I". Assertion by defendants that the Fire District had just cause to impose suspension is both ludicrous and irrational since the plaintiff would not be on employment premises impacting employer's interest due to his placement on medical leave.

24. MacFarland has been damaged by defendants' action in the following, non-exclusive, manner:

(a) There is an employment practice involving the Fire District whereby firefighters on medical leave of absence for workers compensation injuries receive their full weekly pay. Whatever weekly benefits are received by the employee on workers compensation leave are remitted to the Fire District. This practice is not unique to only the defendants in this case; and it is a common practice in other fire districts and municipal departments throughout the State. As a result of suspension imposed, MacFarland will receive only his temporary benefits under the W.C.A. which is less than his full wage entitlement.

~~(b) Since the defendants are not paying MacFarland wages for the ninety (90) day~~
suspension term, there are no contributions being made to the Police and Firemen Retirement System within the New Jersey Division of Pensions. Accordingly, MacFarland loses the three months of pension time accrual by suspension imposed. The plaintiff has not yet been "vested" with pension entitlement, since he has not been employed for five (5) years as required by state law, and consequently, plaintiff can ill afford interruption of any accrual time.

25. As a proximate result of the defendants' unlawful actions aforesaid, MacFarland has suffered damages for which he seeks appropriate equitable and legal redress under the provisions of the Civil Rights Act of 1871 (hereinafter "Section 1983"), 42 U.S.C. §1983.

26. The defendant, Fire District, is at all times relevant herein a public entity subject to suit

under Section 1983.

27. The fire commissioners, individually named as party defendants, have by their conduct perpetrated a state action within the meaning of the Fourteenth Amendment to the Federal Constitution thereby making each liable to plaintiff under Section 1983.

SECOND COUNT

28. The plaintiff repeats each and every allegation set forth in the preceding Count and incorporates the same herein as though full set forth at length.

29. In addition to violating the procedural and substantive due process protection afforded by the Fourteenth Amendment to the Federal Constitution, the defendants have also violated same constitution's First Amendment guarantee to bodily privacy similarly actionable under the provisions of Section 1983.

30. At all times relevant herein, the defendants failed to demonstrate a compelling state interest incidental to requiring MacFarland undergo psychological counseling and/or impose ~~employment suspension to ensure compliance with such directive.~~

31. Even assuming, arguendo, that defendants are found to possess rights to invade the constitutionally protected right of bodily privacy, the defendants have failed and refused to provide minimal procedural due process as otherwise required.

32. As a proximate result of defendants' unlawful actions, the plaintiff has suffered damages for which he seeks appropriate equitable and legal redress through this litigation.

THIRD COUNT

33. The plaintiff repeats each and every allegation set forth in the preceding Counts and incorporates the same herein as though full set forth at length.

34. In addition to possessing constitutionally protected rights premised upon the First and

Fourteenth Amendments to the Federal Constitution, MacFarland also enjoys protection against the public employer's intrusion into medial, emotional and psychological interests pursuant to the Americans with Disabilities Act (hereinafter "A.D.A."), 42 U.S.C. §12101, et seq, which federal statute states that an employer "shall not require a medical examination and shall not make inquires of a . . . (current) employee as to whether such employee is an individual with the disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be related and consistent with business necessity."

35. The defendants lack any "business necessity" warranting MacFarland's referral to the Fire District's psychologist, Robert L. Tannenbaum, Ph.D. (hereinafter "Tannenbaum"), in the first instance and/or basis to require MacFarland to comply with Tannenbaum's recommendations.

36. The A.D.A. creates a property (and/or liberty) interest in the privacy of an individual's health condition which may not be infringed by an employer, either public or private, except in those exceptional situations defined by same federal statute which are not relevant and/or applicable sub
judice.

37. As a proximate result of the defendants' unlawful actions, the plaintiff has suffered damages for which he seeks appropriate equitable and legal redress through this litigation.

FOURTH COUNT

38. The plaintiff repeats each and every allegation set forth in the proceeding Counts and incorporates the same herein as though full set forth at length.

39. Even assuming, arguendo, that MacFarland suffers disability within the meaning of such term as defined by the A.D.A. or handicap within the meaning of such term as defined by the New Jersey Law Against Discrimination (hereinafter "L.A.D."), N.J.S.A. 10:5-1, et seq, whereupon the defendants possess a compelling state interest requiring the plaintiff to participate in ongoing

counseling, his placement on ninety (90) day suspension without pay is not a reasonable accommodation for such disability/handicap.

40. Since the defendants have, themselves, characterized MacFarland as an individual suffering disability/handicap in need of addressment, his placement on ninety (90) day suspension without pay constitutes discriminatory and/or retaliatory action for such status, thereby violating both the A.D.A. and L.A.D.

41. As a proximate result of defendants' unlawful actions -- both in context with defendants' failure to afford plaintiff medical leave under the provisions of the federal Family and Medical Leave Act (hereinafter "F.M.L.A."), 29 U.S.C. §2601, et seq whereby the plaintiff could have used earned and available vacation, sick and personal time thereby continuing to derive regular weekly income and/or in plaintiff's placement on suspension without pay status which can only be regarded as discriminatory and retaliatory for the disability/handicap condition identified by Tannenbaum -- the plaintiff has suffered damages for which he seeks appropriate legal and equitable redress through this litigation.

FIFTH COUNT

42. The plaintiff repeats each and every allegation set forth in the proceeding Counts and incorporates the same herein as though full set forth at length.

43. The plaintiff has incurred, and will continue to incur, attorney fees and legal costs incidental to the prosecution of the action sub judice.

44. The Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. §1988, empowers the Court to award reasonable attorney fees and legal costs to a prevailing plaintiff in a Section 1983 action, which recovery plaintiffs seek, as provided by said statute.

45. The A.D.A., L.A.D. and F.M.L.A. similarly authorize award of reasonable attorney fees

to a plaintiff prevailing on such claims, which recovery plaintiffs seek, as provided by said statutes.

SIXTH COUNT

46. The plaintiff repeats each and every allegation set forth in the proceeding Counts and incorporates the same herein as though full set forth at length.

47. The Superior Court of New Jersey is empowered with subject matter jurisdiction to conduct a hearing de novo by way of common law right certiorari as discussed in Romanowski v. Brick Tp., 185 N.J. Super 197 (Law Div. 1982), aff'd per curiam 192 N.J. Super 79 (App. Div. 1983), and as applied in Akridge v. Barres, 118 N.J. Super 557 (Ch. Div. 1972), aff'd 122 N.J. Super 476 (App. Div.), aff'd 65 N.J. 266 (1973), cert. den. 420 U.S. 966, 95 S. Ct. 1361, 43 L. Ed. 2d 445.

48. The plaintiff requests that the Court exercise its certiorari authority to review and redress defendants' decision to impose ninety (90) day suspension without pay against him.

WHEREFORE, the plaintiff demands judgment against the defendants for compensatory, incidental and punitive damages; for declaratory judgment that just cause, as required and established by state law, did not exist upon which to substantiate imposing any period of suspension without pay; for declaratory judgment that defendants failed and refused to provide plaintiff with procedural due process violative of both the Federal Constitution and state law, which provisions are referenced in this pleading; for equitable relief in the form of an injunction precluding the defendants from continuing plaintiff's placement on suspension without pay status; for mandamus requiring the expungement of this incident from any and all records maintained by the defendant involving the plaintiff such that same neither can nor will be referenced in futuro; for equitable relief in restoring the plaintiff to status quo ante his placement on suspension, without pay, status, and in connection therewith, award plaintiff recovery of such back wages which would have been paid to him in accord with past practice involving individuals placed on workers compensation leave of absence; for attorney fees, interest and

costs of suit; and for such other relief as may be deemed appropriate and/or necessary albeit not explicitly requested herenow.

JURY DEMAND

The plaintiff hereby demands a trial by a jury of twelve (12) persons on all issues as provided by N.J. Court Rule 1:8-1 as made specifically applicable to the Law Division per N.J. Court Rule 4:35-

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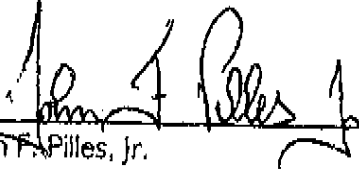
RESERVATION OF CLAIMS

Plaintiff reserves the right to add any additional claims, counts or parties as same may become known during the course of this litigation.

RULE 4:5-1 CERTIFICATION

Pursuant to N.J. Court Rule 4:5-1, the undersigned hereby states that the within matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding. To the best of plaintiff's belief, no other judicial actions or arbitration proceedings are contemplated. The undersigned notes, however, that an administrative appeal has been filed with the Merit System Board within the New Jersey Department of Personnel asserting some, but not all, claims as alleged herein, which adjudication has not yet been made. Further, other than the parties set forth in this pleading, the undersigned knows of no other party that should be joined in the above action. Finally, the undersigned recognizes the continuing obligation of each party to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

Dated: 4/29/09

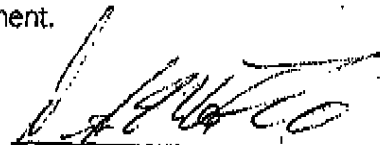


John F. Pilles, Jr.
Attorney for Plaintiff

CERTIFICATION OF VERIFICATION

The undersigned plaintiff, identified in this pleading, hereby certifies in compliance with N.J. Court Rule 1:4-4(b) and 1:4-7 that he has read the within complaint and that the allegations set forth therein are true to the best of his knowledge and belief. The undersigned further certifies that the foregoing statements made by him are true and he is aware that if any of the foregoing statements made by him are wilfully false, he is subject to punishment.

Dated:



David J. MacFarland

FIRE DISTRICT No. 2 BORDENTOWN TOWNSHIP

COPY



CONFIDENTIAL

262 Crosswicks Road
Bordentown Twp., NJ 08505

January 29, 2009

VIA HAND DELIVERY AND CERTIFIED MAIL
David MacFarland
156 Seventh Avenue
Roebling, NJ 08554

PRIVILEGED AND CONFIDENTIAL COMMUNICATION

Re: Duty Status

Dear Firefighter David MacFarland:

Pursuant to your psychological evaluation on January 14, 2009, Dr. Robert Tanenbaum has deemed you unfit for duty as a firefighter. As a result this letter is to inform you that as of January 29, 2009, you are being suspended from duty without pay. Dr. Tanenbaum has recommended that you be suspended pending a minimum of three months of ongoing psychological/psychiatric treatment. You must obtain counseling from a qualified, doctoral-level, certified psychologist or psychiatrist. Treatment should be of at least three months duration on a once weekly basis and it is highly suggested that you give written authorization for the treating professional to notify Dr. Tanenbaum on a monthly basis on your ongoing involvement in treatment and progress. Kindly read and review the attached "Request and Authorization to Release/Obtain Records and Information". Please sign and return same to Captain Herzberg by February 5, 2009.

Furthermore, it will be your responsibility to ensure that such treatment communications (notes) are regularly forwarded to Captain Herzberg and Dr. Tanenbaum.

Treatment should not be terminated until mutually agreed upon by you and your therapist. Upon completion of treatment, you must have the therapist write a letter to Captain Herzberg indicating that treatment has been completed; specifying the degree of improvement seen, and that you are or are not capable of continuing to fully carry out your job duties.

Upon receipt of notice of your completed treatment, Fire District #2 will then send you to Dr. Tanenbaum, and/or any other appropriately credential professional, for the purposes of undergoing an updated psychological fitness for duty re-evaluation to independently verify your reported progress in treatment. Your ability to return to duty

Rca 1

COPIES

CONFIDENTIAL

will not occur unless and until this psychological fitness for duty re-evaluation is complete and satisfactory evidence is provided demonstrating your fitness for duty.

Fire District #2 will allow you to maintain your health benefits during this treatment process so that you may obtain the appropriate counseling through your insurer's provider list. As a result, you must provide Captain Herzberg with a written list of possible candidates to provide treatment by February 5, 2009. This list will be reviewed by a licensed professional and subsequently returned to you indicating acceptable candidates to provide you treatment. If no candidates from your list are deemed acceptable, the fire district will make best efforts to locate a treating physician within your provider network but cannot guarantee the outcome of same.

As an aside, your psychological evaluation is property of the fire district and not subject to review absent a court order or other applicable law.

In closing, the fire district supports you in achieving overall health and well being. We wish you the best and understand this is a trying time. However, please understand that failure to complete or continue any portion of this treatment program may result in the immediate termination of your employment as firefighter from the fire district. Nonetheless, do not hesitate to contact us should you have any questions or concerns during this period.

Respectfully,



Jake Archer
Chairman
Fire District #2
Bordentown Township

Ra

John B. Pillea, Jr.

Attorney at Law

223 High Street - 2nd Floor

Mount Holly, New Jersey 08060

February 6, 2009

Bordentown Township Fire District No. 2
262 Crosswicks Road
Bordentown, New Jersey 08505

Attention: Jake Archer
Commission Chairman

Re: David J. MacFarland
and Bordentown Twp. Fire District No. 2
3 Month Suspension Without Pay
Our File No. 01-0707

Dear Chairman Archer:

Please be advised that I represent F/F David J. MacFarland. I understand that you had informed him by telephone on Thursday, January 29, 2009 that he has been suspended three (3) months without pay premised upon a forensic psychologist's report recently requested and received by your Fire District. It is my understanding that same psychologist had evaluated F/F MacFarland on two (2) past occasions concluding him fit to assume and/or continue fire suppression duties.

The administrative regulations promulgated under the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq, are codified at N.J.A.C. 4A:1-1.1, et seq. An employee may be suspended immediately and prior to a hearing under two circumstances. The first occurs "where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services." See, N.J.A.C. 4A:2-2.5(a)(1). The second occurs when the employee "is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job." See, N.J.A.C. 4A:2-2.5(a)(2). Notwithstanding whether suspension is immediate under either N.J.A.C. 4A:2-2.5(a)(1) or (a)(2), "the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority."

This is otherwise known as a "Loudermill" hearing. Indeed, when an employee is being

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New Jersey
Texas

Bordentown Township Fire District No. 2
Re: David J. MacFarland
February 6, 2009
Page 2

suspended because s/he is believed unfit for duty, a hazard to any person if permitted to remain on the job, or that such suspension is necessary to maintain health and safety of public services, a preliminary notice of disciplinary action with opportunity for a hearing must be served in person or by certified mail within five (5) days following the immediate suspension. See again, N.J.A.C. 4A:2-2.5(a)(1).

Please accept this correspondence as formal request that your Fire District immediately provide to my office true and complete copies of the following:

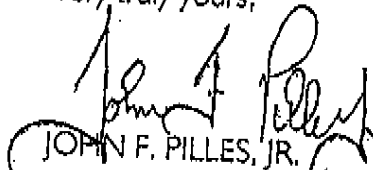
1. All written correspondences and/or electronic communications addressed to any and all forensic psychologists and/or psychiatrists from (and/or on behalf of) your Fire District requesting such professional conduct an evaluation upon F/F MacFarland;
2. All written correspondences and/or electronic communications addressed to any and all forensic psychologists and/or psychiatrists from (and/or on behalf of) your Fire District providing to such professional any information referring, characterizing, depicting, complaining and/or involving F/F MacFarland;
3. All traditionally mailed and/or electronically transmitted documentation provided by (and/or on behalf of) your Fire District to any and all forensic psychologist and/or psychiatrist upon which reference, characterizes, depicts, and/or otherwise involves F/F MacFarland intended to be used incidental to any requested evaluation to be performed upon my client which may include, but is not limited to, components of F/F MacFarland's personnel file;
4. Identification of all agents and/or representatives of your Fire District who had any personal, telephonic and/or electronic mail communication with any of the professionals referenced above with indication as to when such individuals conducted and/or engaged in such communication;
5. All professional reports received by (and/or on behalf of) the Fire District from any and all forensic psychologists and/or psychiatrists upon which the public employer has premised its decision to suspend immediately, without pay, F/F MacFarland; and
6. All professional reports received by (and/or on behalf of) the Fire District from any other forensic psychologist and/or psychiatrist referencing and/or involving F/F MacFarland at any time.

Bordentown Township Fire District No. 2
Re: David J. MacFarland
February 6, 2009
Page 3

You are reminded that all professional reports supplied to your Fire District from any forensic psychologist and/or psychiatrist, upon which decision was made to suspend immediately without pay F/F MacFarland from employment duties, must comport to the requirements outlined at N.J.A.C. 17A:4-6.5(e)(1) through (5). In connection herewith, my discovery demands should be understood as including all components of that regulation.

Request is also demanded that your Fire District expound, in writing, as to why it did not provide my client with a "Loudermill" hearing and/or the procedural due process rights outlined by administrative code provisions prior to placing my client on suspension, without pay, employment status.

Very truly yours,


JOHN F. PILLES, JR.

JFP/krs

cc: Mr. David J. MacFarland
Richard M. Braslow, Esq.
01-0707

John F. Pilles, Jr.

Attorney at Law

223 High Street - 2nd Floor

Mount Holly, New Jersey 08060

February 13, 2009

Richard M. Braslow, Esq.
516 Fielders Lane
Toms River, NJ 08755

Re: David J. MacFarland
and Bordentown Twp. Fire District No. 2
3 Month Suspension Without Pay
Our File No. 01-0707

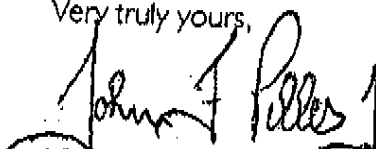
Dear Mr. Braslow:

I understand that you are the solicitor for Bordentown Township Fire District No. 2 (hereinafter "the Fire District"). I represent F/F David J. MacFarland who is, at all times relevant herein, employed by the Fire District as a full time and permanent firefighter.

Pursuant to our telephonic conversation yesterday afternoon, I am enclosing herewith copy of correspondence addressed to the Fire District's Chairman, Jake Archer, mailed this same date.

Please advise, at your earliest convenience, whether you will be involved in this matter. I will provide the Fire District with a reasonable time period within which to respond to my discovery requests and to provide my client with due process as mandated by the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq. Should I not receive reasonable response, then I shall have no other alternative but refer this matter to the New Jersey Department of Personnel on complaint.

Very truly yours,


JOHN F. PILLES, JR.

JFP/krs

cc: Mr. David J. MacFarland
01-0707

Telephone (609) 267-7711
Telefax (609) 267-9303

Licensed to Practice in:

New Jersey
Texas

John F. Piller, Jr.

Attorney at Law

223 High Street - 2nd Floor

Mount Holly, New Jersey 08060

February 19, 2009

State of New Jersey
Merit System Board
3 Station Plaza
44 South Clinton Avenue
Post Office Box 312
Trenton, New Jersey 08625-0312

Re: David J. MacFarland
and Bordentown Twp. Fire District No. 2
3 Month Suspension Without Pay
Our File No. 01-0707

Dear Sir or Madam:

I represent the petitioner, David J. MacFarland, whom the public employer has suspended without pay for three months on the allegation that a psychological evaluation conducted on January 14, 2009 has deemed him unfit for duty as a firefighter. It is my understanding that same psychologist had evaluated F/F MacFarland on two (2) past occasions concluding him fit to assume and/or continue fire suppression duties.

It is my understanding that an employee may be suspended immediately and prior to a hearing under two circumstances. The first occurs "where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services." See, N.J.A.C. 4A:2-2.5(a)(1). The second occurs when the employee "is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job." See, N.J.A.C. 4A:2-2.5(a)(2). Notwithstanding whether suspension is immediate under either N.J.A.C. 4A:2-2.5(a)(1) or (a)(2), "the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority." Such "Loudermill" hearing has not been afforded to the petitioner.

In addition, N.J.A.C. 4A:2-2.5(a)(1) mandates that the public employer serve "in person or by

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Merit System Board
Re: David J. MacFarland
February 19, 2009
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certified mail within five (5) days following the immediate suspension" a Preliminary Notice of Disciplinary Action with opportunity for a hearing. Since it appears that the public employer's suspension has been premised upon this administrative regulation, the procedural due process requirements are to be afforded. As of this late date, however, the petitioner has neither received a Preliminary Notice of Disciplinary Action nor been afforded a departmental hearing from which a final notice of disciplinary action would be issued thereby premising de novo review by your administrative agency in accord with the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq.

I annex hereto as Attachment "A" copy of my correspondence addressed to the public employer dated February 6, 2009 requesting specificity of the factual basis premising the appointing authority's decision to suspend my client without pay and demand for departmental hearing in accord with the aforesaid regulations. As of this late date, I have not received the courtesy of a response.

I also annex hereto as Attachment "B" copy of correspondence dated January 29, 2009 served upon my client from the appointing authority. This written communication confirms, inter alia, the verbal notice afforded appellant by telephone conference with Chairman Jake Archer on Thursday, January 29, 2009.

Although I have only recently been retained by F/F MacFarland, my preliminary investigation suggests possible political reprisal contra N.J.A.C. 4A:2-5.1(a) and/or (b). Such reprisals have been manifested by past minor disciplinary actions, the most recent evidenced by Final Notice of Disciplinary Action dated February 5, 2009 imposing a forty (40) hour suspension.

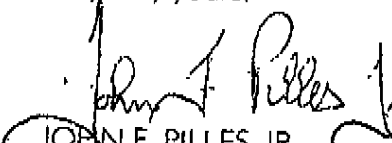
The petitioner requests reinstatement to employment with full back pay and benefits together with such further compensatory and incidental damages as may be deemed appropriate, including award of attorney fees, as generally provided by N.J.A.C. 4A:2-2.10, 4A:2-2.11 and 4A:2-2.12.

It is respectfully submitted that an evidentiary hearing should be conducted in this matter since there exists a material and controlling dispute of facts, as prescribed by N.J.A.C. 4A:2-1.1(d). Request is therefore made that this matter, when transferred to the New Jersey Office of Administrative Law, not be processed as a summary action since extensive discovery via interrogatories appears necessary.

Please refer all communications involving this matter directly to my office. This appeal is being mailed to you certified, with return receipt requested, so as to ensure your receipt of same.

Merit System Board
Re: David J. MacFarland
February 19, 2009
Page 3

Very truly yours,


JOHN F. PILLES, JR.

JFP/krs

Enclosures

cc: F/F David J. MacFarland
156 7th Avenue
Roebling, New Jersey 08554

Bordentown Township Fire District No. 2
262 Crosswicks Road
Bordentown, New Jersey 08505
Attention: Jake Archer
Commission Chairman

01-0707

700A 0508 0001 5671 9845

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PS Form 3800, August 2006

John F. Pilles, Jr.

Attorney at Law

223 High Street - 2nd Floor

Mount Holly, New Jersey 08060

March 5, 2009

Richard M. Braslow, Esq.
516 Fielders Lane
Toms River, NJ 08755

Re: David J. MacFarland
and Bordentown Twp. Fire District No. 2
3 Month Suspension Without Pay
Our File No. 01-0707

Dear Mr. Braslow:

Pursuant to our telephonic conversation late Wednesday afternoon, March 4, 2009, I understand that Bordentown Township Fire District No. 2 (hereinafter "Fire District") has not contacted you requesting your involvement in the matter above referred. As you are aware, I have filed an appeal with the New Jersey Department of Personnel - Merit System Board (hereinafter "M.S.B.") contesting the Fire District's placement of my client on ninety day suspension, without pay, for psychological (or psychiatric) reasons. Your office has been provided copy of such appeal.

I am scheduled to take my vacation on a Caribbean cruise from Thursday, March 5, 2009 until Sunday, March 15, 2009. I expect to be in my office the next business day. Since I have not received any response whatsoever from the Fire District to my previous correspondence dated February 6, 2009, wherein I requested discovery of all reports premising the Fire District's decision, I may have no other alternative but seek immediately application for emergent relief.

Would you please contact the Fire District to inquire as to their intent in this matter.

Very truly yours,

John F. Pilles, Jr.
JOHN F. PILLES, JR.

JFP/krs

cc: Mr. David J. MacFarland
01-0707

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JON S. CORZINE
GOVERNOR

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Merit System Practices and Labor Relations
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 292-8227 Fax: (609) 984-0442

HOPE L. COOPER
Chair/Chief Executive Officer

March 5, 2009

John F. Pilles, Esq.
223 High Street
2nd Floor
Mount Holly, New Jersey 08060

Jake Archer, Chairman
Bordentown Township Fire District 2
262 Crosswicks Road
Bordentown, New Jersey 08505

**Re: David MacFarland; CSC Docket No. 2009-2959;
Request for Interim Relief**

Dear Messrs. Pilles and Archer:

The above-referenced matter has been received in this office. A decision in this matter will be rendered on the basis of written argument and documentation. A copy of the appellant's submission has been enclosed.

In your submissions, please address the following factors for consideration in evaluating petitions for interim relief pursuant to *N.J.A.C. 4A:2-1.2(c)*:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

The parties may submit additional information within five (5) calendar days of receipt of this letter. Please indicate on your cover letter that you have sent copies of all materials submitted to the other party named above. If a party wishes to review the file, please contact this office at the above-listed telephone number to schedule an appointment.

Sincerely,

A handwritten signature in black ink that reads "Kelly A. Glenn".

Kelly A. Glenn
Personnel and Labor Analyst

Enclosure
c: David MacFarland

FIRE DISTRICT No. 2 BORDENTOWN TOWNSHIP



262 Crosswicks Road
Bordentown Twp., NJ 08505

March 13, 2009

Ms. Kelly A. Glenn, Personnel & Labor Analyst
Written Records Appeals Unit
Merit System Practices & Labor Relations
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Re: David MacFarland; CSC Docket No. 2009-2959
Response to Request for Relief

Dear Ms. Glenn:

This letter and the accompanying enclosures (see appended list) are submitted as additional information and in response to your correspondence dated March 5, 2009, in the above captioned matter. Please note that the Bordentown Township Board of Fire Commissioners, Fire District No. 2 (hereafter Commissioners), received the above referenced correspondence on Tuesday, March 10, 2009.

It is the view of the Commissioners that the enclosed information will enable you to render a decision denying the relief requested by the Appellant, MacFarland. In support of our view we submit that the Appellant has offered no evidence sufficient to meet or satisfy the four (4) factors listed for consideration in your evaluation of a petition. The Commissioners also wish to draw your attention to the following pertinent facts, as supported by the enclosed materials.

1. In the most recent psychological evaluation of the Appellant, it is noted the Appellant admitted his failure to satisfy his January 2006 agreement to follow up requirements that he "initiate a course of psychological counseling ..., with a focus on stress management, work relationships, and control of alcohol consumption." See: "Fitness for Duty" Report, Jan. 25, 2006, prepared by Robert L. Tanenbaum, Ph.D., at p. 6; and "Fitness for Duty (Firefighter)" Report, Jan. 21, 2009, prepared by Robert L. Tanenbaum, Ph.D., at

David MacFarland; CSC Docket No. 2009-2959

2

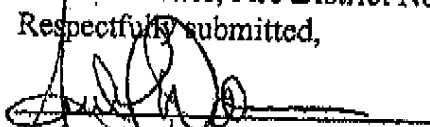
pp. 3, 5-6.¹

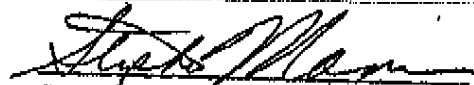
2. It is also noted that Appellant apparently continues to have an alcohol abuse issue, a fact noted in the 2006 evaluation report. See: Tanenbaum, "Fitness for Duty" Report, Jan. 25, 2006, at p. 4, 5, 6; and Tanenbaum, "Fitness for Duty (Firefighter)" Report, Jan. 21, 2009, at p. 5.

In light of these specific facts the Commissioners submit that there is: No clear likelihood of success of this petition on the merits; The Appellant's continued work place behaviors, as well as his failure to "initiate a course of psychological counseling ..." within the close working environment of a fire house could constitute a danger to him, those working with him, and the public; and the vital need to serve the public interest in having a fully functioning fire fighting force to protect the community.

The Commissioners welcome this opportunity to present the CSC with a complete record in this matter, and trust that, upon your review, you will determine this matter is without merit.

For the Bordentown Township, Board of Fire
Commissioners, Fire District No. 2
Respectfully submitted,


Andrew Watson, Chairman
Commissioner


Stephen Monson
Commissioner

encl. (See Appendix)

- c. John J. Pilles, Jr. Esq., Attorney for Appellant MacFarland, w/encl
Richard M. Braslow, Esq., Attorney for Bordentown Township, Board of Fire
Commissioners, Fire District No. 2

¹ Please note that the "Fitness for Duty" Reports, included herein, bear a heading "Privileged & Confidential" and are subject to federal (HIPPA) and State laws governing privacy. Notwithstanding that provision, these "Fitness for Duty" Reports have been included herein to provide a complete record in this matter. Moreover, in as much as counsel for the Appellant made specific reference to those Reports in his transmittal letter to the CSC, we interpret that reference as a waiver of any claim of privilege.

David MacFarland: CSC Docket No. 2009-2959

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APPENDIX

- | <u>Ra</u> | <u>Description of Document(s)</u> |
|------------------|---|
| 1 | Approved Therapists Letter, dated Feb. 17, 2009, to David MacFarland from Andrew Watson, Chairman, Bordentown Township Board of Fire Commissioners, Fire District No. 2, 1 page. |
| 2 | CMRRR card for receipt of Ra 1 |
| 3 | Approved Therapists Letter, dated Feb. 8, 2009, to David MacFarland from Jake Archer, Chairman, Bordentown Township Board of Fire Commissioners, Fire District No. 2, 1 page. |
| 4 | Acknowledgment of receipt form, dated Feb, 8, 2009, Approved Doctor's List, Ra 3 |
| 5 | CMRRR receipt & card for receipt of Ra 3 |
| 6 | Final Notice of Disciplinary Action (31-B) Suspending Firefighter David MacFarland, for 40 hours, dated as served Feb. 8, 2009, 1 page. |
| 7 | Attachment to Final Notice of Disciplinary Action (31-B) Suspending Firefighter David MacFarland, 1 page. |
| 8 | Acknowledgment of receipt form, dated Feb. 8, 2009, 31-B-Final Notice of Disciplinary Action, Ra 7 |
| 9 | CMRRR card for receipt of Ra 8 |
| 10 | Duty Status Letter, dated Jan. 29, 2009, to David MacFarland from Jake Archer, Chairman, Bordentown Township Board of Fire Commissioners, Fire District No. 2, 2 pages. |
| 12 | CMRRR receipt of Ra 10 |
| 13 | Acknowledgment of receipt form, dated Jan. 30, 2009, Phone conversation with Archer, Ra 10 |
| 14 | CMRRR card for receipt of Ra 10 |
| 15 | Institute for Forensic Psychology, Privileged & Confidential Psychological Report, Fitness for Duty (Firefighter), to Capt. Joseph Herzberg, Bordentown Township Fire District No. 2, Re: FF David MacFarland, dated Jan. 21, 2009, prepared by prepared by |

David MacFarland: CSC Docket No. 2009-2959

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APPENDIX

Ra Description of Document(s)

- Robert L. Tanenbaum, Ph.D., 6 pages.
- 21 Letter Requesting Formal Hearing, dated Jan 10, 2009, to Capt. Herzberg, from David MacFarland, 1 page.
- 22 Notice of Disciplinary Action, letter, dated Jan. 9, 2009 to Firefighter David MacFarland from Capt. Joseph Herzberg, 1 page.
- 23 Preliminary Notice of Disciplinary Action (31-A), Dave MacFarland, Firefighter, dated as served Jan. 9, 2009, 1 page
- 24 Institute for Forensic Psychology, undated letter to FF MacFarland, from Robert L. Tanenbaum, Ph.D.; 1 page.
- 25 Appointment Letter, dated Jan. 9, 2009 to FF Dave MacFarland from Capt. Herzberg, 1 page.
- 26 Institute for Forensic Psychology, Privileged & Confidential Psychological Report, Fitness for Duty (Firefighter), to Lt. Frank Nucera, Bordentown Township Fire District No. 2, Re: David MacFarland, dated Jan. 25, 2006, prepared by prepared by Robert L. Tanenbaum, Ph.D., 6 pages.
-
- 32 Blank Request & Authorization to Release/Obtain Records & Information form, Institute for Forensic Psychology, undated and unsigned, referenced in Ra 10 & Ra 15, 2 pages

John F. Pillas, Jr.

Attorney at Law

223 High Street - 2nd Floor

Mount Holly, New Jersey 08060

April 3, 2009

State of New Jersey
Civil Service Commission
Merit System Practices and Labor Relations
Written Record Appeals Unit
Post Office Box 312
Trenton, New Jersey 08625-0312

Attention: Kelly A. Glenn
Personnel and Labor Analyst

Re: David J. MacFarland
C.S.C. Dkt. No. 2009-2959
Request for Interim Relief
Our File No. 01-0707

Dear Ms. Glenn:

I represent the petitioner, David J. MacFarland (hereinafter "F/F MacFarland"), who is, at all times relevant herein, employed on a full time basis as a career firefighter by Bordentown Fire District No. 2 (hereinafter "Fire District"). My office has filed an administrative appeal with your agency (hereinafter "Commission") contesting F/F MacFarland's placement on suspension without pay for three (3) months on the allegation that a psychological evaluation conducted on January 14, 2009 has deemed him unfit for duty as a firefighter. F/F MacFarland's administrative appeal dated February 19, 2009 (hereinafter "Appeal Notice") was forwarded to the Commission by certified mail; and the return receipt card evidences the Commission's receipt of same on February 24, 2009.

Your correspondence dated March 5, 2009 was not received by me until my return from vacation on March 16, 2009. I indicated to you, during our telephonic conversation on Tuesday, March 17, 2009, that I would be proffering written response. Please accept this correspondence as

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Re: David J. MacFarland
April 3, 2009
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same.¹

STATEMENT OF FACTS

In correspondence dated January 29, 2009, F/F MacFarland was informed "that as of January 29, 2009, (he is) being suspended from duty without pay" on recommendation from Robert L. Tannenbaum, Ph.D. that he "be suspended pending a minimum of three months of ongoing psychological/psychiatric treatment."² This written communication had confirmed the verbal notice previously afforded appellant by telephone conversation with the Fire District's Chairman, Jake Archer, on same date.

F/F MacFarland was neither provided copy of Dr. Tannenbaum's report nor advised as to the professional analysis premising his professional opinion.³

In correspondence addressed to the Fire District dated February 6, 2009,⁴ specificity of the factual basis premising the appointing authority's decision to suspend petitioner without pay was requested. In addition, this letter communicated demand for departmental hearing. The courtesy of a response was never provided.⁵

¹Preparation of this reply was further delayed by my need to address certain legal issues involving my son's pursuit of a college education in Georgia. My son suffers with a disability; and the college, at which he is attending, has failed to afford him reasonable accommodation as required by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §793, thereby necessitating my coordination of advocacy with a Georgia attorney.

²A copy of said January 29th (2009) correspondence is annexed to F/F MacFarland's Appeal Notice as Attachment "B". Same is referenced herein as though annexed hereto.

³I have been copied with the Fire District's response dated March 13, 2009 to which is annexed Dr. Tannenbaum's report dated January 21, 2009. This is the first opportunity either F/F MacFarland or myself have had to review this document. I am in the process now of having petitioner's own psychologist review and respond to same.

⁴A copy of this letter has been annexed to the Appeal Notice as Attachment "A". Such document is referenced herein as though annexed hereto.

⁵In addition to communicating directly with the Fire District, I also authored two (2) correspondences addressed to respondent's solicitor, Richard M. Braslow, Esq., which were dated February 13 and March 5, 2009. Both correspondences are annexed hereto as Attachment "C".

Civil Service Commission

Re: David J. MacFarland

April 3, 2009

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As briefed herebelow, F/F MacFarland has a cause of action against the Fire District premised upon the Civil Rights Act of 1871 (hereinafter "Section 1983"), 42 U.S.C. § 1983. Although Section 1983 does not require exhaustion of administrative remedies prior to commencement of judicial proceedings, F/F MacFarland filed his administrative Appeal Notice asserting argument that, since he was not afforded procedural due process, he was without means to address effectively the propriety of the Fire District's interference with his property interest.

THE FIRE DISTRICT FAILED TO COMPLY WITH STATE ADMINISTRATIVE REGULATIONS

The administrative regulations promulgated under the New Jersey Civil Service Act (hereinafter "the Act"), N.J.S.A. 11A:1-1, et seq, are codified at N.J.A.C. 4A:1-1.1, et seq. An employee may be suspended immediately and prior to a hearing under only two circumstances. The first occurs "where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services." See, N.J.A.C. 4A:2-2.5(a)(1). The second occurs when the employee "is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job." See, N.J.A.C. 4A:2-2.5(a)(2). Notwithstanding whether suspension is immediate under either N.J.A.C. 4A:2-2.5(a)(1) or (a)(2), "the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority."⁶ Indeed, when an employee is being suspended because s/he is believed unfit for duty, a hazard to any person if permitted to remain on the job, or that such suspension is necessary to maintain health and safety of public services, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five (5) days following the immediate suspension. See again, N.J.A.C. 4A:2-2.5(a)(1).

The Fire District has failed and refused to comply with its legal obligations aforesaid. No preliminary notice of disciplinary action has been served upon the petitioner. No departmental hearing has been afforded the petitioner. No reasonable specificity of information premising petitioner's placement on three month suspension without pay has been provided. No reasonable opportunity was afforded petitioner to review the evidence premising the appointing authority's action. The Fire District has effectively precluded F/F MacFarland from contesting any component premising his placement on suspension without pay status.

⁶Since there is no evidence that suspension was premised upon pendency of a criminal complaint, the only basis premising the Fire District's action sub judice involves N.J.A.C. 4A:2-2.5(a)(1).

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Re: David J. MacFarland
April 3, 2009
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THERE ARE NO MATERIAL FACTS IN DISPUTE
REQUIRING REFERRAL OF THIS MATTER FOR
EVIDENTIARY HEARING, AND ACCORDINGLY,
RELIEF OUGHT BE AWARDED ON THE BASIS
OF THE PARTIES' SUBMISSION

Administrative appeals contesting employment action taken by an appointing authority often involve disputed material facts. Most administrative agencies, excluding the New Jersey Public Employment Relations Commission which conducts evidentiary hearings within its own agency, refer such case controversies to the New Jersey Office of Administrative Law (hereinafter "O.A.L.") for evidentiary hearings. The administrative law judge's recommended findings of fact and conclusions of law are then transmitted back to the referring agency for adoption or modification. There is no need to brief herenow the legal authority referencing such procedure since same is presumably well known to all parties.

There are no material facts in dispute sub judice. The procedural due process, defined and required by the Act as elaborated by regulations promulgated thereunder, have not been afforded F/F MacFarland by the Fire District. The only appropriate remedy is to require the appointing authority to comply with its legal obligations; and in connection therewith, the petitioner must be restored to status quo ante the Fire District's unlawful actions. Not to do so would, in practical effect, evidence the Commission's condonement of the Fire District's disregard of state law.

I respectfully disagree with your view of F/F MacFarland's Appeal Notice as requesting interim relief pursuant to N.J.A.C. 4A:2-1.2(c). The petitioner is not requesting interim, but rather final, relief. The petitioner is requesting that the Commission enforce the Act by requiring the appointing authority to afford F/F MacFarland his procedural due process rights.

The Fire District has attempted to re-direct the focus of F/F MacFarland's Appeal Notice by asserting that it had just cause to place petitioner on the three (3) month suspension without pay. Although petitioner contests such basis -- and the propriety of reasons premising such employment suspension involves substantive due process considerations -- the appeal at present focuses upon petitioner's argument of procedural due process deprivation. Once F/F MacFarland is restored to status quo ante his suspension, and the petitioner is afforded his departmental hearing rights incidental to issuance of preliminary notice of disciplinary action, then any further contestment of the substantive issues can be addressed through a new administrative appeal. That appeal becomes ripe only upon issuance by the Fire District of a final notice of disciplinary action imposing three (3) month suspension without pay.

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ASSUMING, ARGUENDO, THAT THE COMMISSION VIEWS
PETITIONER'S APPEAL AS CONTESTING BOTH PROCEDURAL
AND SUBSTANTIVE DUE PROCESS COMPONENTS OF THE APPOINTING
AUTHORITY'S ACTION, THEN INTERIM RELIEF IS APPROPRIATE

The considerations to evaluate request for interim relief as addressed by N.J.A.C. 4A:2-1.2(c) mirrors the judicial standard outlined by the Supreme Court of New Jersey in Crowe v. DeGioia, 90 N.J. 126 (1986). Such principles "are not to be looked upon as hard and fast and sharply defined in scope; rather they are but factors, among others, which must be weighed, one with another, all going to the exercise of an exacting judicial discretion as to whether or not to issue a preliminary injunction." General Electric Co. v. Gemm Vacuum Stores, 36 N.J. Super 234, 237 (App. Div. 1955).

It is respectfully argued that there is a clear likelihood of success on the merits by the petitioner. As argued supra, the Fire District failed to comply with N.J.A.C. 4A:2-2.5(a)(1) in that no preliminary notice of disciplinary action had been served, no specificity of reasons premising Dr. Tannenbaum's analysis was provided, and no departmental hearing was afforded; and consequently, the petitioner has been denied all procedural due process.

Addressing next the absence of substantial injury to other parties, I anticipate the Fire District may argue prejudice should F/F MacFarland be awarded back wages for time served to date on suspension. Yet, it must not be forgotten that the mischief was caused by the Fire District's own actions (or, more appropriately stated, failure) premising this administrative appeal. Unless the Commission wishes to characterize its own regulations as unclear or ambiguous, the Fire District bluntly did not comply with same for no good and/or proper reason. Any "prejudice" which may be visited upon the Fire District incidental to remediation by the Commission is solely the consequence of the appointing authority's own decisions.

Nor can the Fire District argue prejudice to the public interest. The public interest has been defined by the Act at N.J.S.A. 11A:1-2; and the regulations further such policy. Indeed, the Fire District's failure to comply with the aforesaid administration regulations violates the public interest. Only by providing appropriate remediation can the Commission ensure that the public interest remain secure and unviolated.

Finally, it is imminently clear that petitioner is incurring immediate harm. He has been suspended without pay; and the harm is his lack of income. For those reasons briefed infra, the petitioner possesses a property interest which is being deprived on a daily basis.

Civil Service Commission
Re: David J. MacFarland
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THE PETITIONER HAS A CAUSE OF ACTION AGAINST
THE FIRE DISTRICT PREMISED UPON SECTION 1983

In Sixth Camden Court v. Evesham Twp., 420 F. Supp. 703 (D.N.J. 1975), the Court held that to establish a cause of action under Section 1983, a plaintiff must prove two elements: (a) that defendant acted under color of state law; and (b) that a constitutional right had been denied.

The Fourteenth Amendment to the Constitution of the United States provides, inter alia, that no state may "deprive any person of life, liberty or property, without due process of law." It is fundamental law that a property or liberty interest as protected by the Fourteenth Amendment is "created" (1) by virtue of the fact that the interest has been initially recognized and protected by state law or by some understanding with the state; or (2) by the fact that it is a fundamental right guaranteed by the United States Constitution. Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. ed. 2d 405 (1976).

The terms "property" as well as "liberty" are evasive of precise definition. As Justice Stewart observed in Board of Regents v. Roth, 408 U.S. 564, 572, 92 S. Ct. 2701, 2706, 33 L. ed. 2d 458 (1972):

"Liberty" and "property" are broad and majestic terms. They are among the (g)reat (Constitutional) concepts . . . purposely left to gather meaning from experience . . . They relate to the whole domain of social and economic facts, and the statesmen who founded this nation knew too well that only a stagnant society remains unchanged. National Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 Sup. Ct. 1173, 1195, 93 L.Ed. 1556 (Frankfurter, J. dissenting).

Instead of attempting to define in precise terms such concepts, Justice Stewart defined the attributes thereof:

Certain attributes of "property" interest protected by procedural due process emerged from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

⁷Such right is similarly reflected in Article I, Paragraphs 1 and 19 of the Constitution (of 1947) for New Jersey.

Civil Service Commission

Re: David J. MacFarland

April 3, 2009

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He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. (Ibid at 408 U.S. 578, 92 S. Ct. 2709.)

The State of New Jersey has, by adopting the Act and promulgating regulations thereunder, created a property interest in continuing public employment for the petitioner, which can not be deprived absent due process.

In addition to his "property" interest, F/F MacFarland also possesses a "liberty" interest. In Williams v. Civil Service Commission, 124 N.J. Super 444 (App. Div. 1973), mod. 66 N.J. 152 (1974), the Court concluded that plaintiff was entitled to procedural due process, notwithstanding the fact that no party interest was discernable, because there existed a valid liberty interest. As Justice Mountain explained:

Thus removal from the public service -- has occurred to this plaintiff -- may indeed have imposed upon him a stigma or potential disability, seriously affecting his liberty to seek future employment in a position which falls within the domain of the civil service regulations. Moreover, the publicity and the press attended upon his dismissal may well have damaged his ability to obtain employment in the private sector. For these reasons, we feel that the plaintiff is entitled to a post termination evidentiary hearing to clear any damage to his reputation. (Ibid at 66 N.J. 157.)

See also Chief Justice Hughes' discussion of the subject in Nicoletta v. No. Jersey District Water Supply Commission, 77 N.J. 145, 155-162 (1978).

Having established the existence of a "property" and "liberty" interest, the analysis must proceed as to what type of process is due. Even assuming, arguendo, that state regulations were

Civil Service Commission

Re: David J. MacFarland

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silent on the subject -- and, of course, they are not since the procedure prescribed, as briefed supra, were not followed by the respondent -- the judiciary has provided independent guidance.

At the minimum, procedural due process mandates that, in the absence of a contravailing state interest of overriding significance, notice be afforded to the affected party. Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. ed. 2d 725 (1975), and Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. ed. 2d 556 (1972). The manner of notice to be given has been defined by Justice Jackson in Mullane v. Central Hanover Bank, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 339 L. ed. 2d 306 (1950), as that which is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Inherent within the concept of notice is the requirement that reasons for the contemplated deprivation of property must be given since, without same, the affected party is precluded from positing meaningful objection hereto. Raper v. Lucy, 448 F. 2d 748, 752-53 (1st Cir.), and Katris v. Waukegan, 498 F. Supp. 48, 53 (N.D. Ill. 1980).

It is well settled law that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). Thus, it is clear that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-58, 94 S. Ct. 2963, 2975-76, 41 L. Ed. 2d 935 (1974).

The exact timing when such hearing is to be afforded depends, however, upon the circumstances of the case. If the deprivation will not cause a substantial hardship on the individual, because the government action can be easily reversed or because an emergency requires that the action be taken before a hearing can be held, then a hearing held after the government action will satisfy due process. See, Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. ed. 2d 18 (1976), and North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908). The preferred procedure, however, is for the government to conduct a hearing prior to taking the action against an individual. Thus, in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), the Court held that such prior hearing was necessary before welfare benefits could be terminated; in Morrissey v. Brewer, 409 U.S. 471, 92 S. Ct. 2593, 33 L. ed. 2d 484 (1972), before parole could be revoked; and in Goss v. Lopez, supra, before suspension from school is imposed.

Moreover, due process implies not merely an opportunity to be heard, but also an opportunity to be heard with reasonable promptness. Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. ed. 2d 365 (1979).

It is respectfully argued that the Act, inclusive of state regulations promulgated thereunder, fall squarely within the contemplation of procedural due process as briefed supra. The denial of

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procedural due process violates therefore both the state administrative regulations and the judicial constitutional expectations.⁸

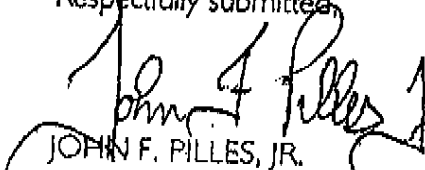
CONCLUSION

As requested in his Appeal Notice, F/F MacFarland seeks "reinstatement to employment with full back pay and benefits together with such further compensatory and incidental damages as may be deemed appropriate, including award of attorney fees, as generally provided by N.J.A.C. 4A:2-2.10, 4A:2-2.11 and 4A:2-2.12." This would restore F/F MacFarland to status quo ante his suspension which should have been made in context with appropriate notice, departmental hearing, and timely manner.

Should the Commission act in such manner, then F/F MacFarland's appeal becomes moot. Should the Fire District reinstate the petitioner to status of suspension without pay after a departmental hearing is afforded, then a new appeal will be filed contesting the "just cause" basis for such action. That challenge is, as referenced by the legal briefing supplied, a component of "substantive due process".

Should the Commission decline to provide immediate remediation, then request is made to transfer this matter to the O.A.L. for evidentiary hearings on the appropriate basis for the Fire District's actions. F/F MacFarland would then reserve his right to pursue judicial action premised upon Section 1983 violation for procedural due process deprivation.

Respectfully submitted,


JOHN F. PILLES, JR.

JFP/krs

Enclosures

cc: F/F David J. MacFarland
01-0707

⁸Were the Commission inclined to tolerate the Fire District's failure to provide F/F MacFarland with due process as defined by its own regulations, asserting that petitioner has been provided sufficient "notice" in context with the Fire District's response sub judice, then judicial proceedings may have to be commenced premised upon Section 1983. No appointing authority should ever be permitted to avoid its due process responsibilities and then claim "no foul" since the substantive due process resolution can be addressed in context with appeal to the Commission. Due process must always be afforded in a meaningful manner within a reasonable time.

GEORGE T. KOTCH

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Carol A. Cassenti
Paralegal

February 5, 2009

Fire District #2 Bordentown Township
262 Crosswicks Road
Bordentown, NJ 08505
Attn: Jack Archer, Chairman

RE: David MacFarland

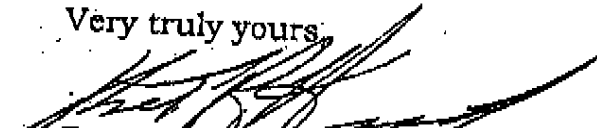
Dear Mr. Archer:

Please be advised that this office represent Mr. MacFarland in pending worker's compensation claims. I have received a copy of recent correspondence indicating that Mr. MacFarland has been suspended without pay for 90 days based on an evaluation completed by Dr. Robert Tannebaum. It is my understanding that Mr. MacFarland is currently out of work and has been out of work directly related to a work accident of December 24, 2008. I have not received any information that would indicate that he has been released to return to work. In fact, I have been informed that there is recommendation by the authorized treating physician Dr. Abud that Mr. MacFarland undergo surgery to correct his debilitating back injury.

Mr. MacFarland has been receiving his full duty pay as part of the worker's compensation claim. It is expected that his full pay will continue based on the fact that he is still out of work directly related to the work injury of December 24, 2008. There should be no disruption of his benefits.

Under State law, Mr. Macfarland is entitled to these benefits until such time as the authorized treating physician returns him to light duty activity, (if same in available) or until such time as he is released from care. Please be guided accordingly.

Very truly yours,


Robert R Hanneman Jr., Esq.

RRH

cc: David MacFarland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

DAVID J. MACFARLAND,

Plaintiff,
vs.

COMMISSIONERS OF FIRE DISTRICT
NO. 2 IN THE TOWNSHIP OF
BORDENTOWN, BURLINGTON
COUNTY, NEW JERSEY, a body
corporate and politic; STEPHEN MONSON,
an elected fire commissioner; MATT
DILLON, an elected fire commissioner;
JOSEPH FRESCO, an elected fire
commissioner; ANDREW WATSON, an
elected fire commissioner; and DAVID
HORSNALL, an elected fire commissioner,
Defendants.

CIVIL NO. 09-2865 (JEI/JS)

**SETTLEMENT AGREEMENT
AND GENERAL RELEASE**

THIS AGREEMENT, executed in two (2) counterparts by and among David J. MacFarland (hereinafter "MacFarland"), the Commissioners of Fire District No. 2 in the Township of Bordentown, Burlington County, New Jersey (hereinafter "District"), and Stephen Monson, Matt Dillon, Joseph Fresco, Andrew Watson and David Horsnall (hereinafter "Commissioners"), is effective on the last date signed below.

WHEREAS, MacFarland, who currently resides at 156 7th Avenue in the Township of Florence (Roebbling), Burlington County, New Jersey, had heretofore been employed, on a full time basis, as a career firefighter by the District; and

WHEREAS, the District is a body corporate and politic organized and existing pursuant to N.J.S.A. 40A:14-70, et seq., for the purpose of providing fire suppression and prevention services to the public residing and/or visiting within the geographical area serviced by same governmental entity, maintaining its principle offices at 262 Crosswicks Road in the Township of Bordentown, Burlington County, New Jersey; and

WHEREAS, the Commissioners hold or held public office as elected members to the District's Board of Fire Commissioners; and

WHEREAS, MacFarland has challenged certain decisions and actions taken by the Commissioners, on behalf of the District, impacting MacFarland's terms and conditions of employment by commencement of litigation in the Superior Court of New Jersey – Law Division venued in Burlington County assigned Docket No. BUR-L-1456-09, which was subsequently removed to the United States District Court for the District of New Jersey venued in the Camden Vicinage assigned Civil Action No. 09-2865 (hereinafter "the Litigation"), naming the District and individual Commissioners as party defendants; and

WHEREAS, the District and Commissioners deny and reject all allegations premising the Litigation commenced against them by MacFarland; and

WHEREAS, MacFarland has determined to resign his position as a firefighter as of December 31, 2009 in good standing and intends seek appropriate disability or other pension benefits available to him; and

WHEREAS, all parties hereto wish to afford finality to any and all claims which are at issue and/or may become an issue not presently asserted by and/or known to the parties thereby resolving all matters in controversy and compromising their respective positions with reference to claims currently pleaded and/or unpleaded, known or unknown, suspected or threatened; and

WHEREAS, it is expressly understood that the execution of this Agreement is not an admission by the District or Commissioners of any liability for any violation of any statute, order, regulation, rule, ordinance, contract, agreement, promise, representation, duty, or obligation of any nature for any purpose whatsoever, and in connection herewith, all parties hereto explicitly acknowledge that execution of this Agreement and release shall not be held or deemed an admission, determination, conclusion or evidence of any kind whatsoever that MacFarland has prevailed as to any issue in dispute within the Litigation; and

WHEREAS, the parties to this matter wish to amicably resolve all of the issues between them and to move forward in a manner which will create a peaceful environment by providing for limited or no contact between plaintiff and defendants and which will avoid the potential for future controversies; and

WHEREAS, all signatures hereto wish to resolve all matters in controversy and hereby compromise their respective positions in reference to this matter; and

WHEREAS, the parties hereto, intending to be legally bound and for good and valuable consideration, receipt of which is hereby acknowledged, memorialize herein the following covenants, agreements, understandings and restrictions.

NOW, THEREFORE, it is mutually stipulated and agreed as follows:

1. Resignation of MacFarland: The parties hereby acknowledge that Firefighter MacFarland has tendered his written resignation effective December 31, 2009 and the Board of

Fire Commissioner has accepted said resignation and further acknowledges that MacFarland resigned in good standing.

2. Payment to MacFarland: The District has tendered a check to MacFarland and MacFarland hereby acknowledges receipt and payment in the amount of Thirteen Thousand Seven Hundred and Fifty Six Dollars and Ninety Eight Cents (\$13,756.98) as full and complete payment of all compensation due MacFarland through and including the date of his resignation, said sum including full payment for all unused sick, vacation and personal time (342.5 hours) accumulated by MacFarland. This sum also includes the amount of \$2,874.91 in overwithheld taxes.

3. Dismissal of Pending Lawsuit: In consideration of MacFarland's resignation and the District's acceptance of thereof in lieu of pursuing further disciplinary action against him, and in consideration of the payment specified in paragraph 2 hereof, MacFarland agrees to the stipulation of dismissal with prejudice of the pending litigation between the parties including all claims against the individual Commissioners.

4. Waiver of Attorney's Fees and Costs: MacFarland and the District hereby acknowledge that this agreement represents the complete resolution of all claims between them and between MacFarland and the Commissioners. MacFarland acknowledges that he is not to be considered a "prevailing party" under applicable state or federal law and hereby knowingly and voluntarily relinquishes and all claims for attorney's fees and/or costs which he may have been able to assert in this or as a result of this lawsuit.

5. Cooperation by the District: The District shall extent cooperation to MacFarland with regard to his application for accidental disability pension benefits to the extent that it may reasonably may do so consistent with its status as an insured under its worker's compensation

insurance. MacFarland acknowledges that the District cannot take a position or do acts inconsistent with its legal defense and position in the pending worker's compensation matter.

6. Non-Admission: This Agreement is not, and shall not in any way be considered or construed as an admission by the District or any Commissioner of any liability, responsibility, tortious conduct, or of any violation of any law, civil right, common law, or federal, state or local statute or regulation, or of any policy, practice, contract or agreement, or of any alleged duty owed by the District or any Commissioner to MacFarland or of any unlawful or wrongful acts whatsoever by the District or any Commissioner.

7. Full and Complete Settlement: The parties agree that the payment and other consideration described in paragraph 2 and elsewhere in this Agreement will be received by MacFarland in full and complete settlement, as more fully detailed, of all known or unknown claims, asserted or unasserted, by MacFarland arising out of any and all conduct or actions or omissions of the District or any Commissioner. MacFarland reserves, however, the right to pursue appropriate claims for workers compensation benefits against the District in accordance with the New Jersey Workers Compensation Act, N.J.S.A. 34:15-1, et seq., and any rights to enforce the terms of this Agreement.

8. General Release and Waiver of all Claims by MacFarland: In consideration for the payment, acceptance of resignation in good standing and other consideration specified elsewhere in this Agreement, MacFarland fully releases and forever discharges the District and all past and current Commissioners and the District's insurer, ACE USA, their successors and assigns, and each of them of and from any and all claims, actions, causes of action, judgments, obligations, rights, demands, debts, sums of money, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses

liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claim" or "Claims"), through the effective date of this Agreement, including any Claims against any current or former employees or officers of the District. MacFarland again understands and agrees that he will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Agreement. It is understood and agreed, however, that MacFarland is not waiving, releasing or giving up any claim for workers compensation benefits or vested pension plan benefits.

9. Entire Agreement. This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

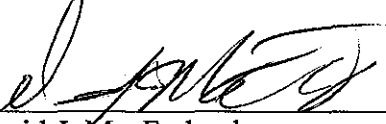
10. Full Knowledge. The parties warrant, represent, and agree that in signing this Agreement, they do so with full knowledge of any and all rights which they may have with respect to each other or the Lawsuit. Each party and their representatives acknowledge that the resolution as expressed herein is in the best interests of the Parties and that the disposition by way of Jury Trial and Judgment may result in a judgment of an amount greater than the terms herein, lesser than the terms herein, the same as the terms herein or 'no cause'. However, in consideration of the within agreement, the Parties agree that in any event their rights and obligations are limited to the extent of this agreement and neither Party nor their representatives shall seek payment, collection or reduction of any amount other than is provided within this Agreement.

11. Headings: The headings of the paragraphs in this Agreement are for convenience only and shall not control or affect the meaning or construction of, or limit the scope or intent of, any of the provisions of this Agreement.

12. Construction: The parties hereby acknowledge that this Agreement is the final product of negotiation and no language used herein shall be construed against either party as its purported draftsman.

IN WITNESS WHEREOF, and intending to be legally bound, the parties have executed this Settlement Agreement and General Release as of the dates set forth below.

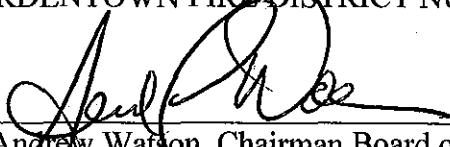
DAVID J. MACFARLAND



David J. MacFarland

Dated: 7/29/10

BORDENTOWN FIRE DISTRICT NUMBER 2

By: 

Andrew Watson, Chairman Board of Commissioners

Dated: 8/17/10

STEPHEN MONSON



Stephen Monson

Dated: 20 Aug 2010

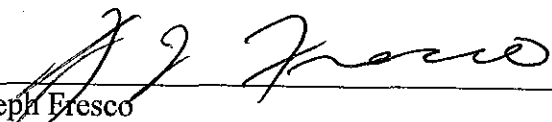
MATT DILLON



Matt Dillon

Dated: 8/23/2010

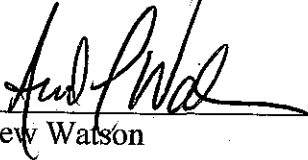
JOSEPH FRESCO



Joseph Fresco

Dated: 8/23/2010

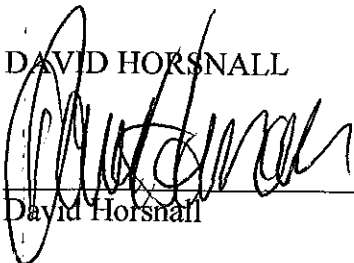
ANDREW WATSON



Andrew Watson

Dated:

DAVID HORSNALL



David Horsnall

