

Re: Anthony Holmes

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 19, 2016



Robert M. Czech
Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION ON MOTION FOR
SUMMARY DECISION**

OAL DKT. NO. CSR 07505-12

AGENCY DKT. NO. N/A

**IN THE MATTER OF ANTHONY
HOLMES, JUVENILE JUSTICE
COMMISSION.**

Timothy J.P. Quinlan, Esq., for appellant (Quinlan, Nigro & Kempf, LLC,
attorneys)

Randy Miller, Deputy Attorney General, for respondent (Robert Lougy, Acting
Attorney General of New Jersey, attorney)

Record Closed: June 1, 2016

Decided: June 10, 2016

BEFORE **PATRICIA M. KERINS**, ALJ:

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

This matter arises from petitioner Officer Anthony Holmes's (Holmes) termination from the respondent Juvenile Justice Commission (JJC) for failure to maintain his qualification for duty weapons. On April 10, 2012, Holmes was terminated for inability to perform duties required for the job of corrections officer. Holmes appealed his termination, and the matter was transmitted by the Civil Service Commission

(Commission) to the Office of Administrative Law (OAL) for a hearing as a contested case on May 15, 2012.

The matter was assigned to Administrative Law Judge (ALJ) John Russo. On motion of counsel for appellant, ALJ Russo entered an Order on May 13, 2013, permitting the late filing of an expert report and in which appellant waived his right to back pay. The hearing scheduled in the matter was adjourned to allow Holmes to obtain his expert report and the 180 day period for the resumption of pay pursuant to N.J.S.A. 40:14-201 and N.J.A.C. 4A:2-2.13 was waived. The waiver of back pay was confirmed in a letter from counsel dated June 6, 2013. Subsequent to the waiver the case was placed on the inactive list due to the pendency of the decisions by the ALJ Bingham, the Commission and the Appellate Division of Superior Court in a related case, In The Matter Of Annie Baker. Upon the receipt of those decisions, the parties resolved the issue of Holmes's employment and in January 2016 he returned to his position at the JJC. The parties, however, could not resolve the issue of whether Holmes was entitled to back pay given his earlier waiver and appellant has moved for summary decision on the issue of his right to back pay.

JJC officers are required to pass a Handgun Qualification Course bi-annually. In 2011, after six opportunities and a remedial training, Holmes failed to requalify. Holmes failed two additional attempts in January 2012. On this basis, on April 10, 2012, Holmes was terminated for inability to perform duties required for the job as a corrections officer.

On May 15, 2012, Holmes appealed his termination. In his appeal, Holmes argued that there were deficiencies in the Handgun Qualification Course that caused him to fail. In support of this argument, Holmes was to produce an expert report by March 11, 2013. Holmes was unable to file the expert report on time and, on March 26, 2013, filed a motion to permit the late filing. As a condition for allowing the late filing of the expert report, Judge Russo required Holmes to waive his claim for back pay. Through his counsel, Holmes agreed to the condition and, on May 30, 2013, Judge Russo issued an Order (the Order) finalizing an agreement in which Holmes waived his right to pursue a claim for back pay and, in exchange, was permitted to submit the late expert report.

While Holmes' case was pending, on November 10, 2014, the Appellate Division decided Baker. In re Baker, 2014 N.J. Super. Unpub. LEXIS 2650 (App. Div. Nov. 10, 2014). Baker was a juvenile justice corrections officer who failed the handgun qualification course in the same class as Holmes. The Appellate Division found that there was disparate treatment between Baker and other officers at the JJC who, for various reasons other than failure to qualify, were unable to carry a firearm, yet were not subject to removal. On remand, Baker was given her job back and awarded full back pay. The issue of disparate treatment was not part of ALJ Bingham's Initial Decision. As the parties in this matter had focused on issues related to the handgun qualification process itself, the production of expert testimony was seen as a key component of the litigation by Holmes, necessitating the agreement at issue here.

In early 2015, Holmes was offered his job back and offered assistance to help him requalify for his service weapon. The parties, however, did not resolve the issue of back pay. On November 10, 2015, Holmes filed this Motion for Summary Decision seeking re-employment and back pay and the matter was reassigned to the undersigned. Holmes returned to work on January 23, 2016, leaving only the issue of back pay.

LEGAL DISCUSSION

Under N.J.A.C. 1:1-12.5(b) a "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Id.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533.

“When a motion for summary decision is made, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . .” N.J.A.C. 1:1-12.5(b). A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-529. When making a summary decision, the “judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. at 540.

In this matter, the record shows that the only remaining issue between the parties, the award of back pay, is appropriate for summary decision. The material facts are not in dispute and the issue is a discrete one. In support of his motion Holmes argues that his waiver should be set aside because the Baker decision made the expert report that was the basis for the agreement unnecessary to earn reinstatement. He asserts that the waiver was entered into based on a mutual mistake of the parties that the focus of the claim would be the adequacy of the handgun qualification course and, thus, the waiver should be set aside.

“A settlement agreement between parties to a lawsuit is a contract.” Nolan v. Lee Ho, 120 N.J. 465, 472 (N.J. 1990); Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div. 1983). To set aside an agreement, “courts require ‘clear and convincing proof’ that the agreement should be vacated.” DeCaro v. DeCaro, 13 N.J. 36, 42 (1953). Generally, agreements will be honored “absent a demonstration of ‘fraud or other compelling circumstances.’” Nolan, supra, 120 N.J. at 472; (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)). Compelling circumstances include “mutual mistake, undue haste, pressure or unseemly conduct in . . . negotiations.” Smith v. Fireworks by Girone, Inc., 380 N.J. Super. 273, 291-292 (App. Div. 2005); see Lampley v. Davis Mach. Corp., 219 N.J. Super. 540, 549, (App. Div. 1987) (an agreement is

voidable by the disadvantaged party when there has been a mutual mistake “as to a basic assumption on which the contract was made”).

Courts will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying an agreement fairly and deliberately made. Pascarella, supra, 190 N.J. Super. at 125. “[W]here there is no showing of ‘artifice or deception, lack of independent advice, abuse of confidential relation, or similar indicia generally found in the reported instances where equity has declined to enforce, as unfair or unconscionable, an agreement voluntarily executed by the parties,’ the agreement should be enforced.” Id.; quoting DeCaro, supra, 13 N.J. at 44. “It is only where the inadequacy of consideration is grossly shocking to the conscience of the court that it will interfere.” Id.

“To be enforceable . . . , an agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty.” Borough of W. Caldwell v. Borough of Caldwell, 26 N.J. 9, 24-25 (1958). If the parties agree on the essential terms and agree to be bound by those terms, they have created an enforceable contract. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (N.J. 1992). A change of heart after accepting an offer is not a basis to set aside the agreement. Hewitt v. Kingdom Builders Servs., 2015 N.J. Super. Unpub. LEXIS 2914 (App. Div. Dec. 16, 2015); see Zuccarelli v. State Dep’t of Env’tl. Prot., 326 N.J. Super. 372, 381 (App. Div. 1999) (holding that “[a] party is bound to the contract it made at the time, even if it turns out to be a poor deal” (quoting N.J. Mfrs. v. O’Connell, 300 N.J. Super. 1, 7 (App. Div. 1997)).

However, “[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party.” Lampley v. Davis Mach. Corp., 219 N.J. Super. 540, 549-550 (App. Div. 1987); citing Restatement, Contracts, 2d (1981) § 152, comment c. at 387-388. “A compromise which is the result of a mutual mistake is not binding and consent to [an] agreement is not considered freely given when it is obtained as the result of a mistake.” Id.

In this matter, Holmes entered into an agreement in which he waived any claim for back pay in order to file an expert report beyond the deadline for filing. In support of his request, Holmes argues that the agreement should be vacated because it was entered into on the basis of a mutual mistake; i.e. that the expert report was important for Holmes' claim to be successful. However, neither Holmes nor ALJ Russo appears to have been mistaken in this belief. At the time the Order was entered, Holmes was relying on the expert report to support his claim that the qualification course was inadequate. The fact that Baker, supra, a case decided over a year later, found disparate treatment for another employee at the JJC does not show that there was a mistake made as to the assumption that the expert report was important for the claim that Holmes asserted at that time. Thus, neither Holmes nor ALJ Russo relied on a mistaken belief at the time the Order was entered.

When the Order was entered, the agreement was sufficiently definite in its terms and the performance of each party ascertainable with reasonable certainty. Holmes waived his right to pursue back pay in exchange for the opportunity to submit an expert report. While the facts here are unique, they do not rise to the level of compelling circumstances that warrant vacating the agreement. Therefore, Holmes is bound to the agreement made at the time, even if it turned out to his detriment.

Based on the above, appellant's Motion for Summary Decision is **DENIED**. As the issue of back pay is the only remaining issue in this case and it has not been decided in appellant's favor, his appeal is **DISMISSED**.

DECISION AND ORDER

Appellant's Motion for Summary Decision on the issue of his entitlement to back pay is **DENIED** and his appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 10, 2016
DATE



PATRICIA M. KERINS, ALJ

Date Received at Agency:

June 10, 2016 (mailed)

Date Mailed to Parties:

6/10/16

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