B-35

STATE OF NEW JERSEY

In the Matter of Justin Miller, Middlesex County

CSC Docket No. 2017-59

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Request for Counsel Fees

ISSUED: MAY 23 2017 (CSM)

Justin Miller, a County Correction Officer with Middlesex County, represented by Christopher Gray, Esq., requests counsel fees in light of the Civil Service Commission decision on reconsideration, *In the Matter of Justin Miller* (CSC, decided November 18, 2015).

By way of background, in January 2013, Miller began attending the Somerset County Police Academy (Academy) to complete the Police Training Commission (PTC) training required for employment as a County Correction Officer. In April 2013, one week prior to completion of his training, Miller received the results of a mandatory drug test which were positive for testosterone use as his T/E ratio was in excess of PTC standards. When confronted with the results by staff, Miller admitted that he had not disclosed his prescribed testosterone supplement on his medication list, which resulted in his dismissal from the Academy effective April 25, 2013 for violating the drug screen policy. Thereafter, Middlesex removed Miller from employment effective April 25, 2013 based on charges of incompetency, inefficiency or failure to perform duties, as he failed to obtain the required PTC certification because he was removed from the Academy for violating its drug screen policy. Miller appealed the matters of his removal from the Academy and from Middlesex to the PTC and the Civil Service Commission (Commission), which were transmitted to the Office of Administrative Law (OAL) as contested cases, and thereafter consolidated.

The Administrative Law Judge (ALJ) determined that Miller did not violate the drug policy but did fail to report his prescription medication and recommended

that the PTC reinstate appellant to the Academy, assess him a penalty of "four demerits", and also that Middlesex reinstate him to employment. The PTC adopted the ALJ's recommendation to reinstate Miller to the Academy and assess him four demerits. The Commission also adopted the ALJ's recommendation to reverse Miller's removal from employment with Middlesex. With respect to counsel fees, the Commission determined that the primary issue before it was if Middlesex sustained its burden of proof to uphold Miller's removal for failure to complete the PTC training and that the issue before the PTC was if the Academy's drug test showed the use of any illegal substance and if the appellant disclosed his use of a prescription medication in support of its drug screen. The Commission also noted that any time expended by Miller's counsel concerning the PTC matter was not the primary issue before the Commission.

The record reflects that the parties were unable to reach an agreement regarding the amount of counsel fees due. Thus, the petitioner requested Commission review. In support of his request, the petitioner's attorney filed an application for counsel fees and provided certifications of services dated February 15, 2016 requesting a rate of $200 an hour for Charles J. Sciarra, Esq., Christopher Gray, Esq., and Matthew R. Curran, Esq. The petitioner provides an itemized statement for services performed by Sciarra, Gray, and Curran, from May 2, 2013 to July 1, 2016 for a total of $14,810.00 for 74.05 hours of work and $575.58 in costs for a grand total of $15,385.58. These records indicate that Sciarra dedicated a total of 2.0 hours to the petitioner's appeal, Gray dedicated a total of 65.55 hours to the petitioner's appeal, and Curran dedicated a total of 6.50 hours to the petitioner's appeal. Sciarra is a partner in a law firm and public records indicate that he was admitted to the New Jersey Bar in 1996, Gray is an associate with a law firm and public records indicate that he was admitted to the New Jersey Bar in 2007, and Curran is an associate in a law firm and public records indicate that he was admitted to the New Jersey Bar in 2005.

In his certification, Gray details his involvement in this matter and provides copies of decisions from the New Jersey Superior Court where he was awarded hourly rates of $295 an hour. Therefore, he maintains that his request for a rate of $200 an hour is not excessive based on his experience in Civil Service and non-Civil Service law enforcement officer defense matters.

Although provided the opportunity, the appointing authority did not provide any additional information or argument for the Commission to review in this matter.

CONCLUSION

Initially, *N.J.A.C.* 4A:2-2.12(a) states:

> The Commission shall award partial or full reasonable counsel fees incurred in proceeding before it and incurred in major disciplinary proceeding at the departmental level where an employee has prevailed on all or substantially all of the primary issues *before the Commission.* (emphasis added).

N.J.A.C. 4A:2-2.12(c) provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with practice concentrated in employment or labor law, is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(e) provides a fee amount may also be determined or the fee ranges in (c) above adjusted based on the circumstances of a particular matter, in which case the following factors (see the Rules of Professional Conduct of the New Jersey Court Rules, at RPC 1.5(a)) shall be considered: the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services, applicable at the time the fee is calculated; the nature and length of the professional relationship with the employee; and the experience, reputation and ability of the attorney performing the services. *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs, such as costs associated with expert witnesses, subpoena fees and out-of-state travel, shall be awarded. However, costs associated with normal office overhead shall not be awarded. *N.J.A.C.* 4A:2-2.12(d) provides that, if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth above may be adjusted. *N.J.A.C.* 4A:2-2.12(e) provides that the fee amount or fee ranges may be adjusted based on the circumstances of the particular matter, and in consideration of the time and labor required, the customary fee in the locality for similar services, the nature of length of the relationship between the attorney and client and the experience, reputation and ability of the attorney.

The primary issue before the Commission in this case was if Middlesex sustained its burden of proof regarding Miller's removal for failure to complete PTC training. The issue before the PTC was if the Academy's drug test showed the use of any illegal substance and if the appellant disclosed his use of a prescription medication in support of its drug screen. However, it cannot be ignored that the basis on which the appellant was dismissed from the Academy cannot be disassociated with the reason why he was removed from employment by Middlesex – the petitioner's failure to complete PTC training. Thus, while the prior decision indicated that any time expended by Miller's counsel concerning the PTC matter was not the primary issue before the Commission, it is necessarily related since the PTC's restoration of the appellant to the Academy provided the basis on which the

appointing authority could not sustain his removal from employment. On the other hand, it cannot be ignored that Miller admitted that he had not disclosed his prescription on the medication list as he was embarrassed by the fact that he needed the testosterone supplement and was assessed a penalty by the PTC of four demerits. Therefore, given that the two matters are inextricably intertwined and the appellant's admitted lack of candor resulted in these appeals, the Commission finds that an award of partial counsel fees is appropriate. In this regard, clearly, a significant portion of Miller's attorneys' work was in the defense of his removal from employment. Thus, the Commission determines he is entitled to 50% counsel fees.

The petitioner requests $15,385.58 in counsel fees and costs for 74.05 hours of legal work at a rate of $200 an hour. Although provided the opportunity, the appointing authority did not provide any argument or information objecting to any specific amounts. However, the Commission finds that the petitioner's counsel is not entitled to the hourly amounts that he requested. Initially, the fees of $200 an hour as requested for Gray and Curran fall outside the established rates in *N.J.A.C.* 4A:2-2.12 for an Associate. In this regard, the above rules indicate that the established rate for an Associate with a law firm is to be awarded an hourly rate between $100 and $150. The rule also states that a partner with 15 or more years of experience practicing law is to be awarded an hourly rate between $175 and $200. Given this rule, Gray and Curran are entitled to be reimbursed $150 per hour for services rendered and Sciarra, who is a partner, is entitled to $200 an hour. The petitioner's attorneys have not established entitlement to reimbursement at a higher rate. Specifically, they have not established that the legal issues were novel or that they expended extraordinary time and labor in this matter. The underlying disciplinary matter was clearly not novel in any way and was no more complex than any of the thousands of disciplinary appeals involving removals decided over the years by the Commission. In this regard, an appeal of a removal from employment inherently lacks the legal complexity necessary to justify the hourly rate requested and no unique legal experience was required by counsel. Accordingly, there is no basis to increase the hourly rates for counsel. Therefore, counsel fees are awarded as follows:

Sciarra: 2.0 hours x (.50 x 200) = $200.00

Gray: 65.55 hours x (.50 x 150) = $4,916.25

Curran: 6.5 hours x (.50 x 150) = $487.50

Total: $5,603.75

In addition, as indicated above, the costs that represent normal office overhead will not be awarded. *See N.J.A.C.* 4A:2-2.12(g). These costs include photocopying expenses and expenses associated with the transmittal of documents

through use of Federal Express or a messenger service. *See e.g., In the Matter of Monica Malone,* 381 *N.J. Super.* 344 (App. Div. 2005). Further, fees or costs associated with telephone or facsimile equipment are considered normal office overhead. Moreover, parking fees and mileage fees that are not associated with out-of-state travel expenses are not compensable. Accordingly, the petitioner will not be reimbursed for the photocopying costs and Federal Express charges. However, the filing fees and discovery costs are considered reasonable. Thus, the petitioner should be reimbursed for 53.00 in costs.

Therefore, the Commission finds that the petitioner is entitled to reimbursement for $5,603.75 in counsel fees and $53 in costs.

ORDER

Therefore, it is ordered that the appointing authority pay $5,603.75 in counsel fees and $53.00 in costs within 30 days of the issuance date on this decision.

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
THE 17TH DAY OF MAY , 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
& Regulator Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Justin Miller
Christopher Gray, Esq.
Benjamin Liebowitz, Esq.
Records Center

STATE OF NEW JERSEY

In the Matter of Justin Miller, Middlesex County	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2015-392	Request for Reconsideration

ISSUED: NOV 20 2015 (CSM)

Middlesex County (Middlesex), represented by Benjamin D. Leibowitz, Senior Deputy County Counsel, requests reconsideration of the decision rendered on June 18, 2014 which ordered that Justin Miller be granted back pay, benefits, seniority and counsel fees.

By way of background, Miller was appointed as a County Correction Officer effective August 6, 2012. In January 2013, Miller began attending the Somerset County Police Academy (Academy) to complete the Police Training Commission (PTC) training required for employment as a County Correction Officer. In April 2013, one week prior to completion of his training, Miller received the results of a mandatory drug test which were positive for testosterone use as his T/E ratio was in excess of PTC standards. When confronted with the results by staff, Miller admitted that he had not disclosed his prescribed testosterone supplement on his medication list, which resulted in his dismissal from the Academy effective April 25, 2013 for violating the drug screen policy. Thereafter, Middlesex removed Miller from employment effective April 25, 2013 based on charges of incompetency, inefficiency or failure to perform duties, as he failed to obtain the required PTC certification because he was removed from the Academy for violating its drug screen policy. Miller appealed the matters of his removal from the Academy and from Middlesex to the PTC and the Civil Service Commission (Commission), which were transmitted to the Office of Administrative Law (OAL) as contested cases, and thereafter consolidated.

The Administrative Law Judge (ALJ) determined that Miller did not violate the drug policy but did fail to report his prescription medication and recommended

reinstatement to the Academy and employment with Middlesex. The PTC adopted the ALJ's recommendation to reinstate Miller to the Academy. The Commission also adopted the ALJ's recommendation to reverse Miller's removal from employment with Middlesex. Since the charges against Miller were dismissed, the Commission awarded mitigated back pay, benefits, seniority and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12. However, the Commission determined that Miller was not entitled to back pay, benefits, and seniority for the entire period of his removal to the date of his reinstatement. Specifically, it was noted that since Miller was still in his working test period when he was removed, it could not be assumed that he would have completed his working test period. Therefore, the Commission only awarded back pay, seniority, and benefits from April 26, 2013, the day after he was removed, to August 5, 2013, the last day of what would have been his one year working test period.

On reconsideration, Middlesex asserts that it should not be responsible for back pay or counsel fees because it only imposed disciplinary action as a direct result of the Academy's dismissal of Miller. Further, it argues that Miller was fully aware that if he failed to obtain the required PTC certification, his employment as a County Correction Officer would be terminated and Middlesex never opposed his reinstatement provided that the PTC matter was resolved in his favor. Middlesex notes that Miller signed a "Pre-Employment Conditions" form when he was initially hired in April 2012 acknowledging that if he did not complete the training, he would be terminated and it emphases that it did not play any role in dismissing him from the Academy. Nevertheless, upon receiving the ALJ's decision, it reinstated Miller effective April 21, 2014. Therefore, Middlesex maintains that the Commission's award of back pay and counsel fees was in error and that the Academy is liable for these items. With respect to counsel fees, with the exception of Miller's counsel filing a notice of appeal based on his termination from Middlesex, it argues that the majority of his attorney's time was spent on the Academy matter. As such, Middlesex contends that the Academy should be liable for counsel fees or that the time Miller's counsel spent on the matters be reasonably allocated between the time spent on each case. In this regard, Middlesex notes that it has yet to receive any itemized statement of professional services from Miller's counsel.

Somerset County, represented by Scott D. Rodgers, Deputy County Counsel, states that the Academy was never a party to the Commission appeal proceedings. Further, the Academy is not Miller's appointing authority nor is Somerset County a Civil Service jurisdiction, governed in any way by Civil Service law or rules. Rather, the award of back pay as reflected in Civil Service law and rules places the onus upon the appointing authority to bear the costs associated with an award of back pay and counsel fees.

Miller, represented by Christopher Gray, Esq., states that Middlesex has the obligation for back pay and counsel fees in accordance with Civil Service law and

rules and the Commission does not have the authority to order Somerset to pay these obligations. Additionally, Miller provides an affidavit indicating that he looked for work during his period of separation but was unable to obtain employment. Miller states that he received $21,435.00 in unemployment benefits from April 27, 2013 until December 28, 2013. The appellant also states that he is owed vacation and sick time that would have accrued from April 2013 through December 2013, which would include 8 vacation days, 10 sick days, and 3 personal days.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the present matter, Middlesex has not satisfied the standard for reconsideration. Notwithstanding its reliance on Miller's dismissal from the Academy as the basis for the charges, Middlesex imposed major disciplinary action on Miller and terminated his employment effective April 25, 2013. *N.J.A.C.* 4A:2-2.10(a) states that when a disciplinary penalty has been reversed, the Commission shall award back pay, benefits, seniority or restitution of a fine. Although Middlesex relied on the Academy's dismissal of Miller as a basis for its charges, this does not relieve it of the obligation for back pay, benefits, and seniority. The situation in this case is somewhat similar to *N.J.A.C.* 4A:2-2.10(c), where an employee is suspended based on a pending criminal complaint or indictment. This provision states that, if the employee is found not guilty at trial, the complaint or indictment is dismissed, or the prosecution is terminated, the appointing authority is still liable for back pay. By way of analogy, an appointing authority relies on a criminal complaint issued by another governmental agency as the basis to suspend an employee. Even if the criminal complaint is determined to be unfounded, under that rule, it is the appointing authority, not the complainant who is liable for back pay. As such, regardless of any document Miller signed acknowledging that he would be terminated if he did not complete PTC training, he was vindicated of the charges that led to his termination and he is entitled to all remedies afforded under Civil Service law and rules. Further, as noted by Somerset, since it is not a Civil Service jurisdiction, the Commission does not have the authority to order it to comply with a back pay award.

Notwithstanding who is responsible for the actual payment, in this case, Miller's back pay award would be **$0.** Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C.* 4A:2-2.10(d)3 provides that

an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations. As stated above, the Commission only awarded back pay for the period from April 26, 2013, the day after he was removed, to August 5, 2013, what would have been the end of his working test period. In his certification, Miller indicated that he received unemployment compensation from April 27, 2013 until December 28, 2013 and that his salary at the time of his termination was $36,515.00. Therefore, Miller's salary during the period he was entitled to back pay was $10,037.98 ($145.47 x 69 work days). Since Miller received $21,435.00 during the period of his separation, neither Middlesex nor Somerset would be required to award him back pay.

As to benefits, Miller requests reinstatement of a number of vacation, sick and personal leave days that he would have accrued from April 2013 through December 2013. However, Miller is not entitled to these benefits from August 6, 2013 through December 31, 2013 since the Commission did not award him benefits for that time frame. With respect to any vacation time he would have earned from April 26, 2013 to August 5, 2013, vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A.* 11A:6-3(e) and *N.J.A.C.* 4A:6-1.2(g). In this regard, the appellant was reinstated in 2014. At that time, he could only be credited with vacation leave earned in 2013. Therefore, at present, Miller is only due pro-rated vacation time earned in 2013 for the period of time he was entitled to back pay. As to the amount of sick time due to Miller, he should receive any unused sick days up to and following his suspension and the period of time the Commission determined he was entitled to back pay, since sick leave can accumulate from year to year without limit. *See N.J.S.A.* 11A:6-5 and *N.J.A.C.* 4A:6-1.3(f). With respect to his personal days, the Commission does not have jurisdiction over personal days in local service and cannot address this issue.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12(a) states:

> The Commission shall award partial or full reasonable counsel fees incurred in proceeding before it and incurred in major disciplinary proceeding at the departmental level where an employee has prevailed on all or substantially all of the primary issues *before the Commission*.

The primary issue before the Commission in this case was if Middlesex sustained its burden of proof to uphold Miller's removal for failure to complete PTC training. The issue before the PTC was if the Academy's drug test showed the use of any illegal substance and if the appellant disclosed his use of a prescription medication in support of its drug screen. Thus, any time expended by Miller's counsel concerning the PTC matter was not the primary issue before the Commission. Similar to the back pay award, the Commission does not have the authority to order Somerset to pay reasonable counsel fees in this matter.

Nevertheless, Middlesex has indicated that it has not received an itemized statement of professional services from Miller's counsel, so the Commission is unable to review the matter at this time. Therefore, as ordered in the original decision, the parties should make a good faith effort to resolve any dispute as to the amount of counsel fees and if a settlement cannot be reached, either party may request, in writing, Commission review. *See N.J.A.C.* 4A:2-2.12(j).

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

This is the final administrative determination with regard to this issue. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF NOVEMBER, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence

Henry Maurer
Director
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Attachment

c: Justin Miller
Christopher Gray, Esq.
Benjamin D. Leibowitz, Esq.
Scott D. Rodgers, Esq.
Joseph Gambino

STATE OF NEW JERSEY

In the Matter of Justin Miller
Middlesex County
Department of Adult Corrections

CSC DKT. NO. 2013-2893
OAL DKT. NO. CSV 6176-13 &
PTC 6614-13
Consolidated

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: June 18, 2014 PM

The appeal of Justin Miller, a County Correction Officer with Middlesex County, Department of Adult Corrections, of his removal effective April 25, 2013, on charges, was heard by Administrative Law Judge Patricia M. Kerins, who rendered her initial decision on February 20, 2014, reversing the removal. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 18, 2014, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant in order to complete the remainder of his working test period.

ORDER

The Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Justin Miller.

Since the charges against the appellant have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12. However, the appellant is not entitled to receive back pay, benefits and seniority for the entire period from the date of his removal to the date of his reinstatement. In this regard, the Commission notes that the appellant was still in his working test period when he was removed. Specifically, he received a regular appointment effective August 6, 2012 and was removed effective April 25, 2013. Since it cannot be assumed that the appellant would have completed his working test period, he should only receive back pay until August 5, 2013, which is the remainder of the working test period he did not complete. See *In the Matter of Terrell Twiggs* (MSB, decided May 9, 2007), *In the Matter of Jennifer Mortimer* (MSB, decided April 26, 2006) and *In the Matter of Rosalind Candelaria* (MSB, decided November 10, 1998). Therefore, the appellant should be returned to work to complete the remainder of his working test period. Accordingly the appellant is entitled to receive back pay, benefits and seniority from April 26, 2013 to August 5, 2013.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 18, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. CSV 6176-13 AND PTC 6614-13
AGENCY DKT. NO. 2013-2893
(CONSOLIDATED)

IN THE MATTER OF JUSTIN MILLER, MIDDLESEX COUNTY DEPARTMENT OF ADULT CORRECTIONS AND THE SOMERSET COUNTY POLICE ACADEMY.

Christopher Gray, Esq., for appellant Justin Miller (Sciarra & Catrambone, attorneys)

Lawrence Bullard, Deputy County Counsel, for respondent Middlesex County Adult Correction Center (Thomas F. Kelso, County Counsel, attorney)

Scott D. Rodgers, Deputy County Counsel, for respondent Somerset County Police Academy (William T. Cooper, III, County Counsel, attorney)

Record Closed: January 7, 2014 Decided: February 20, 2014

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

STATEMENT OF THE CASE

Appellant Justin Miller (Miller), a probationary employee of the Middlesex County Department of Adult Corrections (Middlesex) who was attending the Somerset County Police Academy (Somerset) basic training course, appeals his dismissal from Somerset as the result of failing to disclose his use of prescription testosterone and his subsequent removal by Middlesex.

PROCEDURAL HISTORY

On April 25, 2013, the Police Training Commission (PTC) issued a Dismissal Notice to appellant, removing him from Somerset. Appellant filed a timely notice of appeal. The PTC transmitted the case to the Office of Administrative Law (OAL), where it was filed on May 14, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On April 25, 2013, Middlesex issued a Preliminary and Final Notice of Disciplinary Action removing appellant. Appellant filed a timely notice of appeal. The Civil Service Commission transmitted the case to the OAL, where it was filed on May 8, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

An order of Consolidation and Determination of Predominant Interest was entered on August 15, 2013, consolidating both matters for hearing and determining that the Police Training Commission had the predominant interest since the disciplinary action taken against appellant by Middlesex stems from the action taken by and under the auspices and control of the Training Academy appellant was attending.

The matter was heard on December 2, 2013, and the record closed January 7, 2014 after the post hearing submission of exhibits.

FACTUAL DISCUSSION

Many of the relevant facts in this matter are undisputed. As set forth in the parties' Joint Stipulation of Facts (J-1), Miller was hired by Middlesex on August 6, 2012, as a Corrections Officer. In January 2013 he began attending Somerset to complete his PTC mandated training for his Correction Officer employment. At Somerset Miller was an exemplary candidate and was named Class Leader. In April 2013, one week from his completion of the training course, Miller received the results of his mandatory drug screening from March 2013. His results showed positive for testosterone use as his T/E ratio was in excess of PTC guidelines. Miller does not contest the chain of custody for the sample. Prior to the drug screening Miller had completed the Somerset form requiring him to list all medications taken for the previous thirty days. Although Miller listed several medications, he did not list his doctor prescribed testosterone supplement. When confronted with the results by Somerset staff Miller admitted that he had not disclosed the prescription on his medication list, explaining that he was deeply embarrassed by his need for the supplement. He then provided medical documentation to Somerset showing that the testosterone supplement had been prescribed lawfully. None of the other results from Miller's testing raised any issues or showed the use of illegal substances. Upon consultation with PTC staff, Somerset dismissed Miller from the class.

Somerset presented the testimony of Detective Sgt. Lisa Gilmurray (Gilmurrary). Her duties at the Academy included oversight of training and operations and she reviewed a trainee's duty to disclose medications taken within the prior thirty day period as set forth in Somerset's training manual (R-1). That duty was explained to the trainees as part of the Academy's program (R-2) and Miller did not disclose his testosterone supplement prescription on the required form (R-3, page 6, question 5). Nor did Miller list the supplement in the book maintained in the training area for recruits to update their medicine intake. According to Gilmurray, failure to disclose consumption of medicine is a violation for which the training manual assesses four demerits. Dismissal from the Academy usually does not result until twenty demerits.

Gilmurray's testimony was supplemented by Detective William Brown of Somerset. He too reviewed the training program and the notice provided to the trainees of their duty to disclose medication they were taking. He concurred with Gilmurray that recruits were advised that the drug testing could include screening for steroids.

Captain Peter Lubas also testified during the presentation of Somerset's case. He reviewed Miller's dismissal after the receipt of the drug test results. Miller was cooperative, disclosed the prescription and provided documentation from his physician. He stated he contacted PTC Investigator Jim Grover regarding Miller's results and was advised that dismissal was warranted for failure to report the prescription medication and that Miller's only recourse was to file an appeal of the dismissal. On cross-examination, Lubas acknowledged that drug testing was not required under the New Jersey Attorney General's Law Enforcement Drug Testing Policy (R-8). He also acknowledged that one of Miller's classmates was not dismissed despite the presence of amphetamines in her drug sample since she had disclosed the medicine that resulted in the positive test.

Somerset's final witness was Richard Celeste, the Director of the Academy. He described Miller as a good student and the class leader. He wanted to retain him in the class if possible and consulted with an Administrator at the PTC in that effort. He was advised that dismissal was appropriate with Miller left to his rights of appeal.

Appellant Miller testified on his own behalf and presented the testimony of Lt. Robert Grover of the Middlesex County Department of Corrections. Grover stated that Miller was a good employee. Miller stated that in mid 2012 he had been hospitalized for a serious allergic reaction to poison ivy. After losing weight and experiencing a number of symptoms, he consulted a physician who advised him that his testosterone was low after tests in October 2012. The physician prescribed a testosterone supplement and he was to return every three months to have his levels tested. His medical insurance covered the prescription. Miller admitted that he did not disclose the prescription stating he that was deeply embarrassed by his need for the supplement. He also was reluctant to disclose his need for the supplement in the book in the training area maintained for that purpose. The book was in a common area and was accessible to other recruits

and staff. He was embarrassed to have such personal information available to his classmates.

When advised of the results Miller immediately disclosed the prescription and provided documentation from his physician regarding his condition and the prescription. By letter of April 23, 2013, his physician provided his diagnosis and the medicines prescribed for him. Miller testified as to which prescriptions he had taken and which were prescribed on an as needed basis. Miller was forthright and direct in his testimony, admitting his mistake in failing to disclose his prescription medication. He was credible in his testimony that his reason for failing to disclose was his deeply felt embarrassment regarding his need for a prescription testosterone supplement.

In addition to testimony, the parties entered documentary evidence into the record. Miller's test results do not show the presence of any illegal substances. Nor does it show the presence of a specific steroid drug. Rather the test result, which precipitated this matter, was a reading of a chemical ratio, the T/E ratio that implicated a naturally occurring hormone, testosterone.

I **FIND** that appellant's drug test result did not show the use of any illegal substance but that appellant did fail to disclose his use of a prescription medication, a testosterone supplement. From the record before me I **FIND** that the testosterone supplement was prescribed by a physician for a medical condition. As set forth in the dismissal notice from Somerset it was petitioner's failure to disclose that prescription which was the stated reason for his dismissal from the Academy. I further **FIND** that the penalty set forth in respondent's training manual for such a failure to disclose is four demerits. I **FIND** as set forth on the record by the parties that appellant was an excellent recruit who excelled at the Academy.

LEGAL ANALYSIS AND CONCLUSIONS

Police Training Commission

N.J.S.A. 52:17B-71(h) provides that the PTC is authorized to make such rules and regulations as may be reasonably necessary or appropriate to accomplish the purposes and objective of the Police Training Act, N.J.S.A. 52:17B-66 to -77.12. Pursuant to this authority, the PTC has the authority to dismiss a trainee who has demonstrated that he or she will be ineligible for PTC certification for unacceptable behavior or for other good cause. N.J.A.C. 13:1-7.2(a)(8). The PTC also has the authority to conduct drug screening of all trainees so as to provide for the safety and welfare of all trainees, instructors and other school personnel. N.J.A.C. 13:1-7.2(a)(19). All drug testing must be consistent with and utilize the procedures and methods set forth in the New Jersey Law Enforcement Drug Testing Policy and the New Jersey Drug Testing Manual. N.J.A.C. 13:1-7.2(a)(19)(i).

The resolution of this matter rests on whether the respondent has met the burden of proof by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). In this matter it is undisputed that appellant failed to disclose his use of a prescription medication and the parties are in agreement that was the reason for his dismissal. The issue is whether that infraction merited dismissal from the Academy.

The reason for dismissal of Miller was his failure to disclose his use of a prescription medication he was taking. Such an infraction would usually result in the imposition of four demerits pursuant to Section 1.24.7 of the Academy's training manual (P-1). That manual further provides at Section 1.23.3 that "...as a general guideline, any recruit accumulating 20 demerits is subject to immediate Academy dismissal." In

this matter, even with an imposition of four demerits for this infraction, under the general rule Miller would not warrant dismissal given his exemplary record. Section 1.23.0 of the manual does cite PTC regulation "13:1-7.2(a)8" which permits the dismissal of a trainee who demonstrates "that he or she will be ineligible for a Commission certification for unacceptable behavior or for other good cause."

In reviewing whether respondent has shown that dismissal would be warranted due to unacceptable behavior or for other good cause, the record shows that dismissal is not the appropriate penalty in this matter. The offense for which Miller was dismissed was the failure to report medication he was taking. While respondent may have been concerned that his drug test result indicated the unwarranted use of steroids, appellant promptly produced a valid medical reason and prescription for his use of a legal testosterone supplement. His drug test did not show the presence of specific drugs but merely indicated that his T/E ratio was at a level that signaled the possible use of the hormone. While the illegal or medically inappropriate use of steroids by those in law enforcement may be of concern, neither the PTC regulations nor the policies in place by the Attorney General's office prohibit the use of medically prescribed testosterone supplements after a physician's diagnosis. As such, good cause for appellant's dismissal has not been shown.

Miller was an exemplary trainee whom the Director of the Academy wished to retain. His explanation of why he failed to report his use of a prescription medication was credible and heartfelt. As a young man trying to excel in his law enforcement training course, the deep embarrassment he felt at disclosing his medically diagnosed low testosterone level was understandable. While such embarrassment does not excuse his action, it does mitigate against the penalty of dismissal. I **CONCLUDE** that appellant should be reinstated to the Academy to complete his training course and he be assessed four demerits as set forth in Section 1.24.7 of the Academy's Training Manual.

Civil Service Commission

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such an employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2.

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the appellant's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

An employee may be disciplined for conduct unbecoming a public employee, insubordination, neglect of duty, and other sufficient cause, among other reasons. N.J.A.C. 4A:2-2.3. This matter involves a major disciplinary action, brought by Middlesex, seeking removal. N.J.A.C. 4A:2-2.3(a). Respondent has charged appellant with failing to obtain a PTC Certification as required by law due to his removal from the mandated training course.

Although the Final Notice of Disciplinary Action by Middlesex cites a violation of Somerset's drug screening policy as the reason for his failure to obtain a PTC certification, his removal from Somerset was not based on an illegal substance in the test result but rather upon his failure to disclose his use of a prescription medication. As his dismissal from Somerset has been reversed and he is being returned to complete his mandated training, I conclude his removal from Middlesex is not

warranted. He should be returned to his employment and allowed to complete his training in order to obtain the required certification.

ORDER

I **ORDER** that the decision of the **POLICE TRAINING COMMISSION** to dismiss the appellant from the Somerset County Police Academy is **REVERSED**. Appellant shall be reinstated into and permitted to complete the program and assessed a penalty of four demerits. It is further **ORDERED** that the decision of Middlesex County is **REVERSED** and appellant shall be reinstated to his position at the Middlesex County Department of Adult Corrections as a probationary employee pending his completion of his required training and certification by the **POLICE TRAINING COMMISSION**.

I hereby **FILE** this Initial Decision with the **POLICE TRAINING COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest, namely whether appellant's dismissal from the Training Academy was warranted based on his alleged failure of a drug screening. If the **POLICE TRAINING COMMISSION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10. The factual findings regarding the issue of whether appellant failed the drug screening which are made or adopted by the PTC in its final decision in this matter will be binding on the **CIVIL SERVICE COMMISSION**.

Pursuant to the Joint Order and N.J.A.C. 1:1-17.8, upon rendering its final decision the **POLICE TRAINING COMMISSION** shall forward its decision and the complete record to the **CIVIL SERVICE COMMISSION**, which shall determine whether appellant's removal from employment was appropriate under the circumstances.

Upon transmitting the record to the **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant agency decision. If the **CIVIL SERVICE COMMISSION** does not does not adopt, modify or reject the decision within the scope of its interest within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of its interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/20/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at 2/21/14

Date Mailed to Parties: 2/21/14

/lam

WITNESSES

For appellant:

Robert Groves
Justin Miller

For respondents:

Lisa Gilmurray
William Brown
Peter Lubas
Richard Celeste

EXHIBITS

Joint:

J-1 Stipulation of Facts, dated December 13, 2013

For appellant:

P-17 Memo, dated May 6, 2013

P-18 Memo, dated May 6, 2013

P-19 Memo, dated May 6, 2013

P-20 Letter, dated May 2, 2013

P-21 Memorandum, dated May 7, 2013

P-22 Medical Report, Justin Miller

For respondents:

R-1 Basic Recruit Training Manual

R-2 Orientation Day Guide, BCCO Class # 24-13

R-3 Trainee application (Justin Miller)

R-4 Trainee Medical File (Justin Miller)

R-5 Memorandum, dated April 25, 2013

R-6 Memorandum, dated April 26, 2013

R-7 Memorandum dated April 25, 2013

R-8 Memorandum, dated May 7, 2013

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION
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JOHN J. HOFFMAN
Acting Attorney General

ELIE HONIG
Director

JUSTIN MILLER,

Petitioner

v.

SOMERSET COUNTY POLICE ACADEMY

Respondent

FINAL DECISION

OAL Docket No. PTC 6614-13
& CVS 6614-13

The Police Training Commission received an Initial Decision in this matter on February 20, 2014. This final decision was rendered within the time limits prescribed by *N.J.A.C.* 1:1-18.6, and included one extension until May 21, 2014.

Petitioner Justin Miller was enrolled in a basic training course for County Corrections Officers which began on January 17, 2013. Petitioner was dismissed from the basic course on April 25, 2013 for drug test failure.

A plenary hearing on the merits of petitioner's appeal was conducted by Administrative Law Judge (ALJ) Patricia M. Kerins. At issue was whether petitioner was properly dismissed from the basic training course.

Judge Kerins concluded that the petitioner's failure to report his use of a prescription medication did not warrant dismissal from the Somerset County Police Academy. She ordered

that appellant be reinstated to the Academy to complete his training course and that he be assessed four demerits.

On Wednesday, April 2, 2014 at a regular meeting of the Police Training Commission, the commissioners reviewed the Initial Decision rendered by Judge Kerins. The commissioners voted to adopt the finding of fact and conclusions of law contained in the Initial Decision as the **FINAL DECISION**.

Therefore, the petitioner's dismissal from the Somerset County Police Academy is reversed .

POLICE TRAINING COMMISSION

By: 04-7-14
Robert Melson - Designated Chairman