MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

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IN THIS ISSUE

TO OUR READERS:

We are pleased to announce the appointment of Ida L. Castro as the Commissioner of Personnel.

In 1998, Commissioner Castro was nominated by President Bill Clinton and confirmed by the U.S. Senate to serve as Chairwoman, U.S. Equal Employment Opportunity Commission in Washington, D. C. Prior to this experience, she worked at the U.S. Department of Labor from 1994-1998 where she served as the Director of the Women's Bureau, Acting Deputy Solicitor, and Deputy Assistant Secretary in the Office of Workers' Compensation. From 1990-1994, Commissioner Castro worked for New York Health and Hospitals Corporation and from 1988-1990, she was the Director of Labor Relations at the City University of New York. Before working at a New York law firm in 1987, Commissioner Castro was an Assistant Deputy Public Advocate for the State of New Jersey from 1986-1987 where she was responsible for representing the Public Interest Advocacy Units. Commissioner Castro was also a tenured Associate Professor from 1976-1983 at the Rutgers Institute of Management and Labor Relations.

Commissioner Castro is the recipient of many distinguished awards including three Vice Presidential awards for improved government services, the Public Service Award from Rutgers School of Law Alumni Association and the D.C. Hispanic Bar Association Distinguished Service Award. Commissioner Castro holds an honorary Ph.D. from St. Joseph College in Connecticut, a law degree from Rutgers-Newark School of Law, a Master of Arts Degree from Rutgers University and a Bachelor of Arts degree from the University of Puerto Rico.

NJ DOP Personnel

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James E. McGreevey, Governor

Ida L. Castro, Commissioner

WRITTEN RECORD APPEALS

Minor Discipline for Attendance Violation not Supported by the Record
In the Matter of Michael Gallagher, Department of Corrections
(Merit System Board, decided June 26, 2001)

Michael Gallagher, a Correction Sergeant, New Jersey State Prison, Department of Corrections, represented by John H. Rittley, Esq., requests Merit System Board review of an official written reprimand on a sustained charge of unsatisfactory attendance: absent from work without permission.

The record shows that on May 30, 2000, the appellant called Central Control to utilize an emergency compensatory leave because his wife had injured herself and he was needed to take her for emergency medical treatment. The appellant satisfied institutional requirements by submitting documentation supporting his request which, in this instance, included an emergency department medical record form from CentraState Medical Center. On June 26, 2000, the appointing authority denied his use of an emergency compensatory leave indicating only that his reason and/or documentation was not acceptable or sufficient. The appointing authority then imposed an official written reprimand upon the appellant for being absent without permission. At the departmental hearing, the hearing officer concluded that the appointing authority met its burden of proof and denied the appeal.

On appeal, the appellant argues that he is being discriminated against based upon his obesity, that departmental rules prohibit the supervisor who disallowed a day off from imposing discipline, that he properly utilized an emergency compensatory leave and that he was denied due process because the written decision was not served on him until more than two months after his hearing. The appellant maintains that on May 30, 2000, he was at home preparing to go to work when his wife required urgent medical care and a trip to the emergency room. He asserts that he called Central Control to advise the appointing authority that he was using emergency compensatory leave and submitted the documentary evidence within 72 hours as required. Moreover, the appellant argues that the incident was a pretense for the Director of Custody Operations (DOCO), Wilford Y. Smith, to impose discipline as a discriminatory act because the appellant is obese and that he has been unlawfully discriminated against in the past by DOCO Smith.

Despite being provided the opportunity to supplement the record, the appointing authority submitted no arguments for review by the Board.

It is noted in the hearing officer's report that the appellant testified that he believed he exhausted his allotment of sick time and that even if he had tried to use the sick time, he would have been penalized for calling late so he opted for emergency compensatory leave. The hearing officer found that it was against departmental policy to utilize emergency time off in lieu of sick time to avoid possible discipline for a late call.

Findings of Fact

Upon independent review and careful consideration of all material presented, the Board made the following findings:

1. On May 30, 2000, the appellant was compelled to miss work because of a medical emergency involving his wife.

2. The emergency arose less than one hour before the appellant's reporting time.

3. The appellant followed departmental policy by requesting emergency compensatory leave and providing documentation of the emergency within 72 hours.

4. The appointing authority imposed an official written reprimand, charging the appellant

with being absent from work on May 30, 2000 without permission.

CONCLUSION

Merit System Board review is the final administrative step concerning minor discipline actions for State employees. Where the standard of review has been met, the Board has the discretion to render a final decision upon the written record. *See N.J.A.C.* 4A:2-3.7. The appointing authority shall have the burden of proof in such matters. *See N.J.A.C.* 4A:2-3.2.

In considering minor discipline matters, the Department of Personnel generally will not disturb the hearing officer's judgment. However, in this case the appointing authority has not met its burden of proving that the appellant was absent from work without permission. The record clearly demonstrates that the appellant was met with a medical emergency involving his wife on May 30, 2000. He contacted the appointing authority and requested the use of emergency compensatory leave so he could attend to his wife. The hearing officer's conclusion that the appellant should have used sick time is a narrow and short-sighted interpretation of the time and attendance policy that is not supported by logical analysis or common sense. The appellant believed that he had exhausted his allotted sick time and, met with an emergency, albeit of a medical nature, he reasoned that he could utilize his emergency compensatory leave to cover himself for the day. To apply the appointing authority's basis for discipline in such circumstances would place the appellant in an untenable position. An emergency existed and the appellant correctly utilized his emergency compensatory leave. The departmental policy cannot be construed so narrowly that an emergency of a medical nature cannot be deemed to be an emergency. In fact, because of the medical nature of the emergency, the circumstances could also fall within the scope of the sick leave provisions of the policy. However, the policy appears to require that sick leave be requested at least one hour before the employee's reporting time. Such a provision, if applied inflexibly, would not allow for medical emergencies which, by their very nature, can arise at any time.

Accordingly, the appointing authority has not met its burden of proof and the charges must be dismissed. Since the charges are being dismissed on the basis that the appointing authority has not met its burden of proof in this matter, there is no need to address the issue of whether the action of the appointing authority was motivated by unlawful discriminatory purposes.

ORDER

The Merit System Board finds that the action of the appointing authority in imposing an official written reprimand against the appellant was not justified. Therefore, the Board reverses that action and upholds the appeal of appellant. The Board further orders that records of appellant be corrected consistent with this decision and that the official written reprimand be stricken.

Board Clarifies Veterans' Preference in Multiple Promotional Appointments

In the Matter of Emile Morency, Assistant Engineer in Charge Maintenance 1 (PS8094U), Department of the Treasury

(Merit System Board, decided June 26, 2001)

The Department of the Treasury appeals the decision of Human Resource Information Services (HRIS) which found that the appointing authority did not present a sufficient basis to bypass Emile Morency on the Assistant Engineer in Charge Maintenance 1 (PS8094U), Department of the Treasury, eligible list.

Morency, a veteran, passed the promotional examination for Assistant Engineer in Charge Maintenance 1 (PS8094U) and was tied with a nonveteran, Steven Costanzo, in the

number three position on the August 24, 2000 certification. In disposing of the certification, the appointing authority appointed Costanzo along with the first and second-ranked veterans, John Lampman and Michael Ryan, respectively, effective August 24, 2000. The appointing authority stated that it did not appoint Morency because the three appointed eligibles possessed the necessary qualifications to perform the required duties of the position. Upon Morency's appeal, HRIS returned the certification to the appointing authority for proper disposition in accordance with *N.J.A.C.* 4A:5-2.2(c), which provides that whenever the name of a veteran appears in the highest rank on a promotional certification, a nonveteran shall not be appointed unless the appointing authority shows cause why the veterans should be removed from the promotional list.

On appeal to the Merit System Board (Board), the appointing authority argues that since the nonveteran was appointed on the same date as the number one and two veterans, it was not required to appoint Morency because he was tied with a nonveteran and did not rank number one on the certification. Additionally, the appointing authority indicates that it properly disposed of the certification in accordance with past interpretations provided by the staff of the Department of Personnel (DOP).

Although provided with the opportunity to supplement the record, Morency has not submitted a response.

CONCLUSION

N.J.A.C. 4A:5-2.2(b) states that "[a] list of eligibles who have passed a promotional examination shall appear in the order of their scores regardless of veteran or nonveteran status. However, when scores are tied, the names of veterans shall be listed first within each rank." *N.J.S.A.* 11A:5-7 provides that "[w]henever a veteran ranks highest on a promotional certification, a nonveteran shall not be appointed unless the appointing authority shall show cause before the [B]oard why a veteran should not receive such promotion." *See also N.J.A.C.* 4A:5-2.2(c). Furthermore, *N.J.A.C.* 4A:5-2.2(d) states that "[i]f the names of one or more veterans appear on a promotional certification headed by a veteran, any veteran among the top three interested eligibles may be appointed in accordance with the 'rule of three.' " *N.J.A.C.* 4A:5-2.2(e) provides that "[w]henever a nonveteran heads a promotional certification, any reachable eligible may be appointed in accordance with the 'rule of three.' " *N.J.A.C.* 4A:4-4.8(a)3ii states that "[i]f the eligible who ranks first on a promotional list is a veteran, then a nonveteran may not be appointed." Finally, *N.J.A.C.* 4A:4-2.15(i) states "[t]ies in final earned ratings shall not be broken."

It is initially noted that there are two situations involving promotional certifications where veterans' preference applies. The first situation is where a veteran is the number one ranked individual on a certification or is tied with a nonveteran for that rank. In this circumstance, the number one ranked veteran or another veteran within the first three interested eligibles must be offered an available appointment. If a nonveteran heads the list, then the appointing authority can appoint any reachable eligible regardless of his or her veteran's status.

The second situation is where an appointing authority has appointed all individuals on a certification ranked above a veteran and then wishes to appoint from the rank occupied by the veteran or below the veteran. In this circumstance, the appointing authority would be required to consider the veteran as the number one ranked eligible, even if the veteran were tied with other nonveterans, and appoint accordingly. This is the case in the instant matter.

N.J.S.A. 11A:5-7, as implemented in *N.J.A.C.* 4A:5-2.2, states that "nothing contained in *N.J.S.A.* 11A:5-4 through *N.J.S.A.* 11A:5-6 shall apply to promotions, but whenever a veteran ranks highest on a promotional certification, a nonveteran shall not be appointed unless the appointing authority shall

show cause before the [B]oard why a veteran should not receive such promotion." The proper application of veterans' preference under *N.J.S.A.* 11A:5-7, as indicated above, requires separate consideration for each promotion when multiple appointments are made from eligible lists that include veterans. *See Zigenfus v. Balentine, et al.*, 129 *N.J.L.* 215 (S.Ct. 1942).

In *Zigenfus*, *supra*, the New Jersey Supreme Court interpreted veterans' preference in multiple promotional appointments under *N.J.S.A.* 11:27-6, which has since been replaced by *N.J.S.A.* 11A:5-7. According to the Court, the first appointment is made from the top three eligibles, and the second appointment is made from the first three eligibles on the list as it stands revised after the first appointment, and so forth. There is no reasoned basis in this instance to depart from the Court's treatment of the preference given to veterans on an eligible list used to make multiple appointments. *Zigenfus* involved a since-repealed statute, however, *N.J.S.A.* 11A:5-7 is indistinguishable from the predecessor statute interpreted in *Zigenfus*.[1] Additionally, it is noted that the Legislature's intent in enacting veterans' preference was to reward military service to our nation. This intent is promoted by the consideration of each appointment in cases where multiple appointments are made. Accordingly, such an interpretation is proper and shall be followed by the Board in all future cases.

In the instant matter, the appointing authority contends that it properly bypassed Morency because he was not ranked as the number one veteran on the promotional certification and was only tied with a nonveteran as the number three eligible. However, pursuant to the above analysis, although Morency was tied with a nonveteran, he headed the list as a veteran according to *N.J.A.C.* 4A:5-2.2(b) after the number one and two veterans were appointed, regardless of the effective date of appointment. Therefore, the nonveteran should not have been appointed pursuant to *N.J.A.C.* 4A:4-4.8(a)3ii.

However, Morency's appointment is not mandated. When fewer than three interested eligibles are certified, the appointing authority has the discretion to either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title. *See N.J.A.C.* 4A:4-4.2(c)2i. Morency and the nonveteran were the only two interested eligibles remaining after the first two veterans were appointed. There were no other names on the list or any certifications after this list. Additionally, veterans' preference in promotional situations under *N.J.S.A.* 11A:5-7 is mandated only when a permanent appointment is made. This was recognized by the Superior Court, Appellate Division, in *Lavitz v. Civil Service Commission*, 94 *N.J. Super* 260 (App. Div. 1967), where a disabled veteran passed a promotional examination but was not selected as the provisional because there was an incomplete list. The court noted that veterans' preference only pertained to permanent appointments and not to provisional appointments.

Thus, the appointing authority has several options with regard to the instant certification. If Morency is also offered a regular appointment, Costanzo's appointment would be undisturbed. If Morency is not appointed, Costanzo's regular appointment must be rescinded. The appointing authority then can choose to vacate the position or appoint either interested eligible provisionally pending a complete list. Once there is a complete list, Morency or another veteran must be given a regular appointment.

Finally, the appointing authority indicates that the certification was disposed of in accordance with the interpretation provided by unidentified staff of the DOP. It is not clear

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[1] *N.J.S.A.* 11:27-6 had provided, in language virtually identical to *N.J.S.A.* 11A:5-7, that:

whenever any examination for promotions be held and any veteran shall receive the highest certification from among three qualified, before such appointive power shall appoint for promotion any nonveteran, such appointive power shall show cause before the Civil Service Commission why such veteran should not receive such promotion.

from the record what, if any, interpretation was given. However, even if an incorrect interpretation were given, the Board notes that no vested or other rights are accorded by such an administrative error. *See Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super* 538 (App. Div. 1998). Accordingly, the appointing authority has not presented a sufficient basis to bypass Emile Morency on the Assistant Engineer in Charge Maintenance 1 (PS8094U), Department of the Treasury, eligible list.

ORDER

Therefore, it is ordered that this appeal be denied and the appointing authority return the certification with a proper disposition within 20 days of the issuance of this decision.

Disability Provides Basis for Waiver of Competitive Examination for Exemplary Employee
In the Matter of M. S., Security Guard (M1097A) Vineland City Public School District
(Commissioner of Personnel, decided October 24, 2000)

The Vineland City Public School District requests a waiver of competitive examination for M.S.

M.S. is a provisional appointee in the title Security Guard, pending open-competitive examination, as of October 18, 1999. The required open-competitive examination was announced in October 1999 and held in November 1999 as a written test. The appointing authority had requested two testing accommodations for M.S. who had been a special education student. The accommodations were to include additional time to complete the examination as well as a reader.

Due to inadvertent error, neither accommodation was available and M.S. left without completing the examination. A make-up examination was immediately scheduled at which time the accommodations were provided. Unfortunately, M.S. did not achieve a passing test score. The examination contained 50 test questions; a total of 25 correct answers were needed to pass; M.S. correctly answered 19 test questions. A total of 28 applicants applied; 23 passed and five failed. The employment list was certified on December 16, 1999 and 14 eligibles responded as interested. In this regard, it is noted that there are 17 provisional Security Guards, including M.S.

In support of this request, the appointing authority provides a 1995 psychological evaluation, which stated, in the way of background information, that M.S.'s academic performance was not considered at the level required for a G.E.D. Her basic skills were found to be at the 5th grade level in English, at the 2nd grade level in Spanish and at the 3rd grade level in Math. She was additionally found to have difficulties with integrating multiple information and with abstract thinking and conceptual analysis.

The appointing authority submitted a letter attesting to the fact that M.S. performs all necessary duties for her position as a Security Guard in an exemplary manner and is a dedicated and enthusiastic worker. It noted that she never misses a day of school, even when ill, and that she walks to work every day regardless of the fact that she lives several miles from the school.

N.J.S.A. 11A:7-13 and *N.J.A.C.* 4A:4-2.14(b) provide that an examination may be waived for an otherwise qualified candidate or provisional with a physical, mental or emotional affliction, injury, dysfunction, impairment or disability which makes it physically or psychologically not practicable to undergo the testing procedure for a particular title, but does not prevent satisfactory performance of the title's responsibilities under conditions of actual service.

CONCLUSION

Upon review of the documentation presented, M.S. meets the requirements for being granted a waiver of the examination pursuant to *N.J.S.A.* 11A:7-13 and *N.J.A.C.* 4A:4-2.14. The record establishes that M.S. has a disability, which cannot be reasonably accommodated but does not prevent her from satisfactorily performing the duties of a Security Guard.

ORDER

Therefore, it is ordered that the written examination for Security Guard for M.S. be waived and she be placed on the employment list under symbol number M1097A, with a score of 70.000. Additionally it is ordered that her name be added to the outstanding certification #OL992488 so that she may be considered for permanent appointment.

HEARING MATTERS

Board Finds Untimely Amendment of Charges Invalid
In the Matter of Lamont Walker
(Merit System Board, decided December 19, 2000)

Lamont Walker, a Burlington County Supervising Building Maintenance Worker was suspended for 10 days and demoted to Building Maintenance Worker, effective March 11, 1996, on charges of, *inter alia*, conduct unbecoming a public employee, neglect of duty and misuse of a County vehicle. The County alleged that on February 20, 1996, Walker was involved in a motor vehicle accident while on duty, at which time, he was found not to have a valid license, and he continued to drive a County vehicle without a valid license until February 26, 1996. Walker was subsequently removed, effective August 5, 1996, on charges that included a violation of the County Drug Free Workplace policy. The specifications referenced a June 11, 1996 arrest by the Westampton Police Department, in which Walker was charged with possession of a controlled dangerous substance (marijuana).

Walker's appeals were transmitted to the Office of Administrative Law (OAL), and consolidated for a hearing. In regard to the suspension and demotion, the Administrative Law Judge found that Walker, who did not have a valid driver's license at that time, used a County vehicle for personal business during work hours, in violation of a County policy, and failed to provide the required notification to his supervisor that he was involved in a motor vehicle accident or that his driver's license had been suspended. In light of these findings, the ALJ upheld the charges and the penalty. The Merit System Board (Board) agreed with the ALJ's determination of the charges and the penalty.

In regard to the removal, during the hearing, the ALJ noted that the County was addressing issues related to Walker's positive test for cocaine, which were beyond the parameters of the charges referred for hearing, and therefore that evidence was not admissible. The ALJ advised the parties that any effort to proceed on evidence that had been barred must begin with a County motion to amend its pleadings.

N.J.A.C. 1:1-6.2(a) provides that unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice. As a result of the ALJ's ruling, the County issued an amended preliminary notice of disciplinary action, dated February 19, 1999, regarding Walker's removal. Upon review of the ALJ's initial decision which upheld the removal, the Board noted that the amended notice not only referred to events which took place at the time of the arrest on June 11, 1996, but also included a reference to a June 20, 1996 incident wherein Walker was informed that he tested positive for cocaine, as well as Walker's subsequent admission that he had used cocaine two weeks prior to the June 14, 1996 drug test. Therefore, the Board remanded the matter to OAL for further clarification as to the original and amended notices.

In his initial decision on remand, the ALJ stated that at the time of the original hearing dates, "the County had *not* given adequate notice concerning one aspect of the case being presented by the County: the drug-related charges. Moreover, that aspect also did not fall within the parameter of those charges forwarded by the [Board] for hearing in the OAL. In short, appellant lacked that complete notice necessary to afford him due process." [Emphasis in original]. The ALJ also found that neither party in this matter could identify the documents that were attached to the June 14, 1996 preliminary notice as specifications for the charges. The ALJ found that neither party disagreed that during the original hearing, the existing charges related to the removal action were insufficiently specific. The ALJ, however, concluded that "the entire problem of notice was cured with amended notices . . ." The Board strongly disagreed with this conclusion.

The Board concluded that the ALJ erroneously permitted the charges to be amended more than two years after the original charges had been served. The effort to amend the charges was inexcusably late and was not to be condoned. *Cf., Hammond v. Monmouth County Sheriff's Department*, 317 *N.J. Super*. 199 (App. Div. 1999). It was also notable that at the date of the original preliminary notice, the positive drug test relied upon in the amended notice had not yet occurred. Therefore, the ALJ erred in relying on *N.J.A.C.* 1:1-6.2, since the allegation that Walker tested positive for cocaine constituted a new event that could not, even remotely, be considered as a clarification of his prior arrest for marijuana possession. Moreover, the Board noted that, in this matter, the ALJ was not in compliance with the criteria set forth in *N.J.A.C.* 1:1-18.5, which requires that motions to reopen the record before an initial decision is filed may be granted only for *extraordinary* circumstances. There was no evidence that the County demonstrated any extraordinary circumstances to justify its request to reopen the record.

Since the Board found that the removal action was based on charges not properly brought before OAL, the Board dismissed those charges and reversed the removal.

Removal for Positive Drug Test Reversed Based on Irregularities in Drug Screening Process
In the Matter of Darryl Martin
(Merit System Board, decided October 24, 2000)

Darryl Martin, a Monmouth County Correction Officer was removed, effective February 17, 1998, on charges of conduct unbecoming a public employee and the violation of the Sheriff's Office Substance Abuse Policy, based on his positive test for marijuana during a random drug screening. Martin's appeal was transmitted to the Office of Administrative Law (OAL) for a hearing.

The Administrative Law Judge (ALJ) set forth that Martin was one of the officers called to provide a urine sample during a random drug screening conducted at the County jail. The testing took place on a bus which was equipped with a work table. In the normal process, the officer is provided a four inch square drug box covered in plastic, which contains a cup with a thermometer and two bottles with two bags plus an envelope with a napkin. The officer takes the cup to the bathroom, urinates, and then places the open cup back on the work table station. A measured amount of the urine sample is placed in each bottle. The officer initials the seals on the paperwork, and the bottles are sealed and placed in the original box. The box is also sealed.

The ALJ reversed the removal since he determined that the conditions and circumstances surrounding the drug screening were flawed. There were four individuals present for testing on the drug screening bus, and at least three tests were being simultaneously performed. The ALJ found that the simultaneous presence of these officers and the side-by side placement of three open urine samples on the bus work table irremediably flawed the test. The ALJ noted that with one exception, every expert witness, including the County's own expert, agreed that a procedure in which more than one donor was tested at a time would invalidate the test. Even the remaining expert witness found the process uncommon and unusual. Further, the ALJ found that the Sheriff's Office own policy for drug testing was violated by having more than one drug test performed at a time. Therefore, the ALJ concluded that Martin's drug screening test was invalid and ordered his reinstatement.

The Board agreed with the ALJ's determination, noting that it was significant that the Sheriff's Office's own policy, which served as the basis for the disciplinary action, was violated. Accordingly, based on an invalid drug test, the Board found that there was insufficient evidence in the record to sustain the charges against Martin, and concluded that the removal should be vacated.

Back Pay Award Reduced Due to Failure to Mitigate
In the Matter of Edward O'Lone
(Merit System Board, decided February 14, 2001)

The Department of Human Services' request for a determination regarding the amount of back pay due to Edward O'Lone, based on the Appellate Division decision which modified his removal to a three-month suspension, was transmitted to the Office of Administrative Law (OAL) for a hearing. O'Lone was originally removed from his position as Section Chief, Health Care Facilities, Department of Human Services, effective September 8, 1994, on charges. The Board affirmed the removal on October 17, 1995, and O'Lone appealed that decision to the Appellate Division of Superior Court. On March 31, 1997, the court affirmed the charges, but,

based on its "strong sense" that the penalty of dismissal was unwarranted, the court remanded the matter to the Board to allow it to reconsider the penalty. On April 29, 1997, the Board reduced the penalty to a six-month suspension and granted mitigated back pay. Thereafter, O'Lone's suspension was further reduced to a three-month suspension by the Appellate Division. O'Lone returned to duty on October 20, 1997, but since the parties could not agree regarding the amount of back pay due, the Board granted a hearing.

After a hearing, the Administrative Law Judge (ALJ) determined that O'Lone was not entitled to any back pay for the period of time he was separated from employment since he made no attempt to mitigate the award by attempting to obtain other employment. The ALJ set forth that, upon reinstatement, O'Lone submitted an affidavit in which he indicated that for the three years that he had been separated from his job, he had not applied for a single job. The ALJ stated that "O'Lone did not send out a single resume. He did not register with any employment agency. He did not attend any job fairs. He did not prepare a resume." O'Lone testified that he was always sure he would get his job back, even after the Merit System Board upheld his dismissal. The ALJ did not find O'Lone's argument that the reason for his termination formed an impediment to finding employment as persuasive, since "the only true test of whether a job can be found is actually looking for one." While the Board agreed with the ALJ's conclusion that O'Lone failed to mitigate, it found that O'Lone was entitled to back pay for the period following the Board's April 29, 1997 decision to modify his removal to a six-month suspension. At that point, O'Lone had already been separated from employment for more than six months and the Board decision clearly reinstated him to his former position. Moreover, the Appellate Division's decision left little doubt regarding its "strong sense" that removal was inappropriate, and that further Appellate Division review could only result in a lesser penalty. Therefore, once the Board's decision was issued reinstating O'Lone, his affirmative duty to mitigate any award of back pay was alleviated, since he reasonably anticipated that he would be, and should rightfully have been, reinstated at that juncture.

Therefore, the Board granted back pay from April 30, 1997 through October 19, 1997.

OF PERSONNEL INTEREST

MAJOR RULE CHANGES

By: Elizabeth J. Rosenthal
Personnel and Labor Analyst

Four major changes to merit system rules have gone into effect since November 2001. These changes involve intergovernmental transfers, counsel fees in major disciplinary actions, discrimination and veterans preference.

Intergovernmental transfers, effective November 19, 2001. These rule changes include new rules N.J.A.C. 4A:4-7.1A and 4A:6-3.5 and amendments to N.J.A.C. 4A:4-2.15, 3.7, 7.1 and 7.4; 4A:6-1.2, 1.3 and 1.9; 4A:8-2.3 and 2.4; and 4A:10-2.2. The new rules and amendments establish an intergovernmental transfer program between State and local service and between local governments. New rule N.J.A.C. 4A:4-7.1A defines an intergovernmental transfer and establishes parameters for this type of transfer to occur. Included among eligible employees are those who have been separated from service due to layoff within 90 days preceding an intergovernmental transfer. Other provisions specify the types of titles to which an employee may transfer and the effect of a transfer on open competitive and promotional lists. These rule changes were adopted following the conclusion of a successful one-year pilot project.

Counsel fees in major disciplinary actions, effective November 19, 2001. Amendments to N.J.A.C. 4A:2-2.12 include a range of fees, based on attorney experience and expertise, that may be awarded an attorney representing an employee who prevails on all or substantially all of the issues in his or her major disciplinary appeal before the Board. Such fees include those incurred at the departmental level. The revised N.J.A.C. 4A:2-2.12 also provides criteria, based on New Jersey Court Rules and case law, which assist in setting the compensable rate for attorneys. The amendments further provide for other compensable fees, such as those for expert witnesses.

Discrimination in the workplace, effective January 7, 2002. Revisions to N.J.A.C. 4A:7 reflect changes and developments in the law, and incorporate the State-wide Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace. The amendments also restructure the discrimination appeals process and prohibit unlawful discriminatory conduct, including sexual harassment, by a State employee against a person doing business with the State.

Veterans preference, effective March 18, 2002. In accordance with a recently enacted law, amendments to N.J.A.C. 4A:5-1.1 add the Lebanon Crisis of 1958 and Operation Uphold Democracy in Haiti to the list of conflicts for which military service would qualify individuals for veterans preference. Amendments to N.J.A.C. 4A:5-1.2 include language recognizing that the Adjutant General of the Department of Military and Veterans Affairs now has, by statute, responsibility for making veterans preference determinations and deciding veterans preference appeals. Accordingly, the Department of Personnel is no longer involved in veterans preference eligibility matters.

For further information regarding these rule changes, please contact the Division of Merit System Practices and Labor Relations at (609) 984-7140.

FROM THE COURT

Following are recent Appellate Division decisions in Merit System cases. As some of these opinions have not been approved for publication, their use is limited in accordance with *R.*1:36-3 of the *N.J. Court Rules.*

Return from Disability Retirement not Subject to Pre-employment Testing

In the Matter of Town of Kearny v. Charles J. Rowan, Jr.

A-1371-99T3 (App. Div., March 22, 2001)

Appellant Town of Kearny appeals from a final administrative decision of the Merit System Board (the "Board"), ordering the reinstatement of respondent Charles J. Rowan, Jr., "to the position of firefighter pursuant to the determination of the Police and Firemen's Retirement System" ("PFRS") that respondent's disability has "vanished or has materially diminished." *See N.J.S.A.* 43:16A-8(2). We affirm.

The facts necessary to resolve this appeal are not in dispute. We rely on and set forth only those facts before the Board at the time of its final decision. On October 17, 1988, Rowan was granted an ordinary disability retirement by PFRS on the basis of migraine headaches. Almost ten years later, on May 19, 1998, PFRS determined, on Rowan's application, that his migraine headaches had vanished or had materially diminished so that he should be reinstated to either his former duty or any other comparable duty which may be assigned to him.

On July 20, 1998, Rowan requested reinstatement. Thereafter, appellant requested confirmation from the Department of Personnel, Division of Human Resource Management ("DHRM") of its right to request a fitness for duty physical, an updated background check and a psychological evaluation of Rowan. The manager of DHRM advised appellant that it could perform the above functions in connection with Rowan's reinstatement. Appellant conducted the evaluations of Rowan and concluded that he was not suitable for reinstatement. Appellant relied on: (a) a doctor's report which concluded that Rowan was disqualified because of his performance on an exercise stress test; (b) a report from a psychologist that found Rowan unfit; and (c) a police report that Rowan impersonated a police officer on August 22, 1998, in a bar in Kearny.

Subsequent to the evaluations, on October 23, 1998, appellant notified Rowan that he would not be reinstated. Rowan appealed to the DHRM. DHRM notified Rowan of appellant's obligation to reinstate him but cautioned that if appellant "wishes to remove you from employment following your reinstatement, it must do so through the utilization of disciplinary procedures." On March 23, 1999, DHRM ordered appellant to "immediately" reinstate Rowan "to his former position pursuant to the determination of . . . PFRS." DHRM notified appellant that if it wished to remove Rowan for cause, it had to resort to disciplinary procedures. Appellant appealed to the Board.

The Board, on October 5, 1999, held that appellant was required to reinstate Rowan. The Board said in part:

> The only issue before the Board in the instant matter is whether an appointing authority can bar the reinstatement of an employee returned to active duty following disability retirement. In this regard, the Board is mindful that if an employee on disability retirement regains the ability to perform his or her duties, the Legislature has mandated that the employee be returned to his or her former position. *See In the Matter of Allen*, 262 *N.J. Super.* 438, 444 (App. Div. 1993).

Notwithstanding erroneous advice from an HRM Manager to the contrary, there is no provision in Department of Personnel law or rule requiring an employee who is returning from disability retirement to undergo physical or psychological examinations, or any other preemployement screening, as a pre-condition to his or her reinstatement, beyond that which resulted in the determination of the PFRS of the employee's fitness for duty. Rather, the Board's role in this context is limited to determining an employee's rights upon reinstatement. Therefore, since the Board lacks jurisdiction to consider the merits of the determination by PFRS finding Rowan capable of returning to his position, it concludes that the Town must reinstate him to the next available Fire Fighter position pursuant to the determination of the PFRS.

Additionally, Rowan is entitled to an award of retroactive seniority and benefits for the period from the date that the City bypassed his appointment when a vacancy became available until the date of actual reinstatement. In the present matter, Department of Personnel records reveal that the Town effected nine appointments from the November 30, 1998 certification of the Fire Fighter (M0799U), Kearny list. All appointments were effective February 26, 1999. Therefore, petitioner is entitled to seniority and benefits for the period from February 26, 1999 to the date of his actual reinstatement. The Board notes that while Rowan is entitled to immediate reinstatement to the position of Fire Fighter with retroactive seniority effective February 26, 1999, the Town is not required to displace any individual who was appointed from the November 30, 1998 certification of the eligible list.

Finally, the Board notes that if the Town has a genuine concern about Rowan's ability to perform his duties, formal charges must be filed and served upon him, and must be provided the opportunity for a hearing. *See N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.1, *et seq*.

Appellant now appeals and contends that: (1) the Board's decision is not supported by sufficient credible evidence and (2) the Board's conclusion that appellant cannot bar Rowan's reinstatement is improper. We have carefully reviewed the record and, in light of applicable law, conclude that appellant's contentions are clearly without merit. *R.* 2:11-3(e)(1)(D) and (E). We add the following comments.

N.J.S.A. 43:16A-8(2) authorizes the medical board of the PFRS "to determine whether or not the disability which existed at the time [Rowan] was retired has vanished or has materially diminished." Here, the only relevant disability was Rowan's migraine headaches, which PFRS determined no longer prevented Rowan from performing his duties as a firefighter.

"It is apparent that the grant of disability retirement is conditioned on the continuation of the incapacity" that caused retirement based on a disability. *In re Allen*, 262 *N.J. Super.* 438, 444 (App. Div. 1993). If the disability that caused the employee's retirement vanishes or materially diminishes, he must "be returned to the former position." *Ibid.* Here, PFRS determined that Rowan was no longer disabled as a result of migraine headaches, therefore appellant had to reinstate him. If appellant wanted to remove Rowan from the position, it should have sought recourse in disciplinary proceedings. *See N.J.S.A.* 11A:2-13; *N.J.A.C.* 4A:2-2.1 to – 5.5.

Moreover, appellant's reliance on *N.J.A.C.* 4A:4-6.1 to support its position that Rowan had to be "physically or psychologically" fit "to perform effectively the duties of the title," is misplaced. This provision applies to initial appointments and examination eligibility, not

reinstatement. Reinstatement, under the circumstances here, is governed by *N.J.S.A.* 43:16A-8(2).

Affirmed.

Lengthy Disciplinary History Basis for Removal from Promotional List
In the Matter of Albert S. Waddington, County Correction Sergeant (PC0349T) Camden County
A-568-99T2 (App. Div., December 5, 2000)

Albert S. Waddington, a Camden County Corrections Officer, appeals from the final determination of the Merit System Board (Board) removing his name from the civil service eligible list for the position of "County Corrections Sergeant." We now affirm that decision.

Waddington has been a Camden County Corrections Officer since 1984. In April 1997, he passed the promotional exam for the sergeant's position and was ranked number eight, non-veteran, on the eligible list. Because of his poor employment history, the appointing authority recommended that Waddington's name be removed from the list of persons eligible for appointment as sergeant. This recommendation was upheld by the New Jersey Department of Personnel and subsequently by the Merit System Board. In its decision the Board concluded:

> *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)7, provides that an eligible's name may be removed from an eligible list when an eligible has a prior employment history which relates adversely to the title. In this regard, while the appellant claims that he has no record of major discipline, although provided an opportunity to present documentation to refute the County in this regard, he has failed to do so. Additionally, the appellant does not dispute the appointing authority's characterization of the minor discipline in his record which stems from a violation of the sick leave verification policy, a physical and verbal assault and two instances where he refused orders to work overtime. Further, while the appellant has received overall satisfactory evaluations for 1997, his deficiency in the area of attendance was noted on one evaluation and his quality of work and initiative were noted as fair on that evaluation.
>
> Correction Officers function in a paramilitary environment where discipline and adherence to law and rules are essential in maintaining the health and safety of the inmate population, the public and fellow Correction Officers. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). As a supervisor, the appellant would be held to even a higher standard than that for a Correction Officer. Further, he would be called on to evince the leadership qualities that would allow him to serve as a role model for his subordinate officers. The appellant's employment record shows a pattern of conduct which demonstrates his lack of adherence to the rules and regulations of the Sheriff's Office. Therefore, notwithstanding the appellant's satisfactory evaluations and commendations, the appellant's uncontroverted disciplinary record which demonstrates a consistent disregard for rules and regulations, provides a sufficient basis to remove his name from the eligible list for County Correction Sergeant (PC0349T).

On appeal, Waddington contends the Merit System Board's determination was "arbitrary, capricious, unreasonable and inconsistent with the record." We have reviewed the record in light of appellant's contentions and the applicable law. We are satisfied that the Board's decision should be affirmed. It was not arbitrary, capricious or unreasonable and it is supported by sufficient credible evidence in the record. A full written opinion would have no precedential value, *R.* 2:11-3(e)(1)(D) and (E), and we affirm substantially for the reasons set forth by the Board in its final decision. We add only the following comments.

Our role in reviewing the decision of an administrative agency is limited. *In re Taylor*, 158 *N.J.* 644, 656 (1999); *Brady v. Board of Review* 152, *N.J.* 197, 210 (1997). We will not upset the determination of an administrative agency absent a showing it was arbitrary, capricious or unreasonable, that it lacked fair support in the evidence, or that it violated legislative policies. *In re Musick*, 143 *N.J.* 206, 216 (1996); *Campbell v. Department of Civil Serv.,* 39 *N.J.* 556, 562 (1963). Further, decisions of administrative agencies carry with them a presumption of reasonableness. *See City of Newark v. Natural Resource Council*, 82 *N.J.* 530, 539, *cert. denied*, 449 *U.S.* 983, 101 *S. Ct.* 400, 66 *L. Ed.* 2d 245 (1980). We may not vacate an agency's determination because of doubts as to its wisdom or because the record may support more than one result. *See generally Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-580 (1980).

> Furthermore, it is not our function to substitute our independent judgment for that of an administrative body, . . . where there may exist a mere difference of opinion concerning the evidential persuasiveness of the relevant proofs. As a reviewing court, we will not weigh the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence, or resolve conflicts therein. [*De Vitis v. New Jersey Racing Comm'n, 202 N.J. Super.* 484, 489-490 (App. Div.), *certif. denied*, 102 *N.J.* 337 (1985) (citations omitted).]

Here, Waddington's employment record over approximately thirteen years indicated a lengthy list of "counseling" reports, poor evaluations, reprimands, minor disciplinary sanctions and two sustained major disciplinary actions. Waddington points to the good things in his record such as awards and commendations. As indicated, it is not for us to re-weigh the evidence and substitute our judgment for the expertise of the Merit System Board. Under the appropriate appellate standards, the Board's decision is legally unassailable.

Affirmed.

Forty-five Day Rule Inapplicable to County Correction Officer
In the Matter of Danielle Lewis
A-2091-9971 (App. Div., April 20, 2001)

This appeal by Danielle Lewis, a former corrections officer employed by the Burlington County Jail, from a determination of the Merit System Board (Board) affirming the Jail's decision to discharge her, raises the issue of whether *N.J.S.A.* 40A:14-106a applies to county corrections officers. The Board determined that the statute did not cover county correction officers. We affirm.

The facts, for purposes of this appeal, are not disputed. The County of Burlington (County) operates its correction facilities

through the Burlington County Corrections Department. The department has two facilities, the Burlington County Detention Center and the Corrections and Work Release Center. Danielle Lewis was hired as a county corrections officer on or about October 29, 1994. She was terminated from employment on October 29, 1997, after three years of service. Lewis' employment included a one-year leave of absence. The record before the Board revealed that Lewis received several letters of lateness in addition to a ten-day suspension and a twenty-day suspension for attendance-related deficiencies.

As a county correction officer, Lewis belonged to the Policemen's Benevolent Association (PBA) Local 249, representing county correction officers. As a member of the bargaining unit, her employment was covered by the terms of the 1995 to 1997 collective bargaining agreement between the County and PBA Local 249. Included within the negotiated agreement were schedules of discipline for attendance-related offenses. In implementing the terms of the negotiated agreement, the County and the union agreed to the placement of each unit member on the appropriate steps of attendance policy's schedules of discipline. Lewis, who at the time was out on leave, was sent notice of her placement on the representative schedules by way of regular and certified mail, with a copy to her union. She was placed at Step 2 on the schedule for pattern absence/attendance abuse.

Between February and May 1997, Lewis failed to appear for work on days prior to or after days that she had scheduled time off. She attempted to use sick days to account for these days off. Over the course of that period, Lewis failed to call out sick for duty on six different dates. Her actions allegedly constituted violations of the negotiated attendance policy regarding pattern absences. As a result, the Corrections Department brought charges against her in accordance with the negotiated attendance policy.

The first set of charges (which are *not* a subject of this appeal) against Lewis alleged a violation of the pattern absence attendance policy. The County, as did the Administrative Law Judge (ALJ), found that Lewis reached Step 3 of the policy as a result of her failure to show up for work on four occasions prior to her failure to appear for work on May 17, 1997. The second set of charges, which represents the discipline resulting in this appeal, alleged a violation of the same attendance policy. Again the County, as did the ALJ, found that Lewis had reached Step 4 of the policy warranting termination in accordance with the negotiated schedule of discipline for her failure to appear for work on four prior occasions, including May 25, 1997. These charges were embodied in a Preliminary Notice of Disciplinary Action dated September 11, 1997.

There is no dispute between the parties that Lewis was absent in violation of the attendance policy on the dates specified.

The dispositive issue before us is Lewis' contention that the Preliminary Notice of Disciplinary Action dated September 8, 1997, charging her with an absence on May 25, 1997, violated the forty-five day rule prescribed in *N.J.S.A.* 40A:14-106a. That provision is quoted in relevant part:

> A county law enforcement officer shall not be removed from the officer's employment or position, nor suspended, fined or reduced in rank for a violation of the internal rules and regulations established for the conduct of a law enforcement unit unless a complaint charging a violation of those rules and regulations is filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. A failure to comply with this section shall require a dismissal of the complaint.

On appeal on the Merit System Board following her termination by the County, Lewis found support for her view from the ALJ to whom the matter was initially referred. Citing several decisions of the Board, our decisions in *State vs. Thompson*, 142 N.J. *Super*. 274 (App. Div. 1976) and *County of Gloucester v. Public Employment Relations Comm.*, 107 N.J. *Super*. 150, *certif. granted*, 55 N.J. 164 (1969), *aff'd*, 55 N.J. 333 (1970) and regulations of the Department of Law and Public Safety, *N.J.A.C.* 13:1-1.1, the ALJ concluded that *N.J.S.A.* 40A:14-106a covered county corrections officers. She therefore concluded that while Lewis "violated the County's pattern absenteeism policy as charged," she was compelled to find,

> that the delay of three and one half months between the County being in possession of sufficient information upon which to based a complaint, and the filing of that complaint, is a violation of the statutory protections afforded by *N.J.S.A.* 40A:14-106a.

She therefore granted Lewis' appeal.

The County took exception to the ruling of the ALJ and the matter was finally reviewed and determined by Janice Mitchell Mintz, the Commissioner of the Department of Personnel. On behalf of the Board, the Commissioner found that *Thompson* was distinguishable because it did not deal with the statute at issue and that Board cases cited by the ALJ were inapposite. The Commissioner stated:

> [T]his position that the statute is not applicable to the title of County Correction Officer was discussed in *In the Matter of Michael Butler* (MSB, decided December 3, 1996). In *Butler, supra,* the Board found that the unambiguous dictate of *N.J.S.A.* 40A:14-106(a) *et seq.*, taken in its entirety, was intended to provide for the establishment and maintenance of county police departments for the express purpose of enforcing rules for the regulation of traffic upon the county highways and not for the establishment and maintenance of county correction departments. In support of this statutory interpretation in *Butler, supra,* the Board relied upon the well-established legal principle that the true meaning of an enactment and the intention of the Legislature in enacting it must be gained, not alone from the words used within the confines of the particular section involved, but from those words when read in connection with the entire enactment of which it is an integral part. Therefore, the Board finds that County Correction Officers should not be considered "county law enforcement officers" as the term is used in *N.J.S.A.* 40A:14-106a.

The Commissioner then concluded:

> Accordingly, the Board concludes that *N.J.S.A.* 40A:14-106a is not applicable to the instant matter, and therefore, there is no requirement to dismiss the instant charges against appellant based on the failure of the appointing authority to proffer those charges within the 45-day time limit prescribed by the statute. Under this circumstance, and upon its *de novo* review of the record, the Board adopts the ALJ's findings that appellant on May 25, 1997 committed an infraction which established a pattern of sick leave abuse, as defined by the appointing authority. Therefore, the Board finds that the appointing authority's imposition of a removal is justified.

We affirm for substantially the reasons given in the Commissioner Mintz's written decision. We comment briefly on several of the points raised in Lewis' brief. Lewis argues that

the legislative intent of *N.J.S.A.* 40A:14-106a was to protect all "law enforcement officers" whether police officers or county corrections officers. She asserts that *N.J.S.A.* 40A:14-106a was not enacted until 1988, long after the other provisions of *N.J.S.A.* 40A:14-106a *et seq,* which authorized the creation of county police forces. The argument is that *N.J.S.A.* 40A:14-106a was added at the same time that *N.J.S.A.* 40A:14-147 (giving municipal policemen certain job rights and protections) was enacted, evidencing an intent to cover all persons who may have law enforcement functions. We disagree. The term "law enforcement officers" is not defined by the statute. The fact that certain persons or positions of employment may be accorded law enforcement powers or duties does not make them "law enforcement officers" for purposes of employment rights, protections or job security.

We discern no legislative intent to extend to county correction officers the same level of job protections and security accorded policemen by these provisions. In that respect the two positions are sufficiently different to properly merit different levels of job protection.

Nor do we agree with the argument that the 106 day delay between Lewis' absence on May 25, 1997 and September 8, 1997, was so inordinately long as to constitute laches. The hearing was not until October 23, 1997, giving Lewis' ample time to prepare. Otherwise the delay occasioned no prejudice.

On the merits, Lewis argues that the findings of both the ALJ and the Board that she violated the absentee "pattern offense" was not supported by the record, largely based on the contention that her placement on Step 2 upon her return from leave of absence and the ten day suspension received in August 1997, were incorrect.

The record taken as a whole shows otherwise. It contains substantial, credible evidence in support of the Board's conclusions. *R.* 2:11-3(e)(1)(D) and (E). *Henry v. Rahway State Prison,* 81 *N.J.* 571 579-580 (1980); *In re Application of the Howard Savings Bank*, 143 *N.J. Super.* 1, 9 (App. Div. 1976).

Affirmed.

Reasonable Probability of Integrity of Drug Sample Sufficient in Administrative Proceeding
In the Matter of Mario Lalama
345 *N.J. Super* 560 (App. Div. 2001)

The City of Paterson appeals from a final decision of the Merit System Board (Board), which rejected a recommended initial decision of an Administrative Law Judge (ALJ) upholding the City's removal of appellant Mario Lalama from his firefighter position for using cocaine. The sole ground of the Board's decision was that the City failed to present adequate evidence of the "chain of custody" of the urine sample that tested positive for cocaine.

After informing his supervisors that he had an alcohol abuse problem, appellant was placed on paid sick leave and admitted into a residential substance abuse program for one month. Upon returning to active duty, appellant entered into an agreement with the City that he would be placed on probation. One of the conditions of appellant's probation was that he submit to random drug testing. Armando Cortez was the Paterson Fire Department official responsible for administering drug tests to firefighters, which involved taking a urine sample and sending it to an independent laboratory for analysis. Cortez had processed more than 100 urine samples before taking the sample from appellant that resulted in the termination of his employment.

Appellant's urine sample was taken on the morning of September 9, 1996, in the main bathroom at Fire Headquarters. Appellant voided into a container provided by Cortez, then sealed the container and placed his initials on the seal. Appellant placed the container in a bag, and both he and Cortez signed the form that accompanied the container when it was

sent to the laboratory. The same preprinted identification number that was on the form also was placed on a label affixed to the seal on the container and the bag enclosing the container. Cortez retained a copy of the form and gave a copy to appellant. Cortez placed the bag containing the urine sample in a locked box for which only he and the laboratory's courier had keys. He then called the courier to pick up the sample and later that afternoon observed the courier come and take the sample. However, the courier did not fill in the blank for his signature on the transmittal form, and Cortez failed to obtain a receipt from him.

The urine sample was received by the testing laboratory, Laboratory Corporation of America, the following day, September 10, 1996, with the seal on the container still intact, accompanied by two copies of the chain of custody transmittal form that included the preprinted identification number. The laboratory confirmed that the identification number on the urine sample container conformed with the number on the form, and when it analyzed the sample, it tested positive for cocaine.

After Paterson received the results of the drug test, it suspended appellant, effective September 18, 1996, and charged him with conduct unbecoming a public employee, in violation of *N.J.A.C.* 4A:2-2.3(a)(6); violating the Fire Department's rules and regulations, in violation of *N.J.A.C.* 4A:2-2.3(a)(11); failing to conduct his private life in such a manner as to avoid bringing the Department into disrepute, in violation of section 2:1.1 of the municipal ordinance governing the conduct of Fire Department employees; and taking drugs not duly prescribed and necessary for health, in violation of section 2:2.12 of the ordinance.

After a departmental hearing, appellant was found guilty of the charges and removed from his position, effective April 15, 1997.

Appellant appealed his removal to the Board, which referred the matter to the Office of Administrative Law. Based on the evidence presented at a hearing, an ALJ concluded that appellant was guilty of the charges of conduct unbecoming a public employee, failing to conduct his private life in such a manner as to avoid bringing the Fire Department into disrepute and taking drugs not duly prescribed and necessary for health. With specific reference to the chain of custody of appellant's urine sample, the ALJ stated:

> There is no dispute that the container after collection was sealed with a label with a unique number and signed by Lalama, and that the sealed container was placed in a plastic specimen bag with the same unique number and that Lalama signed the appropriate forms. There is also no dispute that the specimen container in the sealed bag arrived at the LabCorp that night with the seals intact. The irregularity in the chain of custody is that the courier that picked up the specimen did not sign the form but Cortez saw him pick it up and the person who received the specimen at the lab signed the form. I FIND that the evidence presented demonstrates by a preponderance of the evidence that the sealed specimen that arrived at LabCorp is the same specimen given by Lalama.

The ALJ further concluded that because appellant already had been placed on probation for substance abuse and participated in a rehabilitation program, the appropriate sanction for continued substance abuse was removal from the position of firefighter.

The Board rejected the ALJ's recommended initial decision and reversed Paterson's removal of appellant from the position of firefighter solely on the ground that Paterson had not presented adequate evidence of the chain of custody of the urine sample:

> [T]he Board recognizes that two "links" in the chain of custody have been broken. In particular, the City has no record of the date and time the urine sample was

picked up. Nor is there a record of the individual who made the pick up. Furthermore, LabCorp's forms were not accurately completed since there is no record of the mode of transportation of the sample. Therefore, the Board determines that the chain of custody of the subject urine sample was broken and that the integrity of the sample was compromised. Accordingly, based on an invalid drug test, there is insufficient evidence in the record to sustain the charges lodged against appellant and the Board concludes that the removal should be vacated.

An appellate court's review of an administrative agency's findings of fact is limited to a determination of whether those findings are supported by "sufficient credible evidence in the record." *In re Taylor,* 158 *N.J.* 644, 657 (1999). However, "an appellate court's review . . . is 'not simply a *pro forma* exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence.'" *Ibid.* (quoting *Chou v. Rutgers*, 283 *N.J. Super.* 524, 539 (App. Div. 1995), *certif. denied,* 145 *N.J.* 374 (1996)). "Appellate courts must engage in a 'careful and principled consideration of the agency record and findings.'" *Id.* at 657-58 (quoting *Mayflower Sec. Co. v. Bureau of Sec.*, 64 *N.J.* 85, 93 (1973)).

In a case where an administrative agency's findings of fact are contrary to the findings of the ALJ who heard the case, there is a particularly strong need for careful appellate review. Although an agency is not required to defer to an ALJ's findings, it "is not free to brush aside or disregard [them] without comment." *In re Waterfront Dev. Permit No. WD88-0443-1*, 244 *N.J. Super.* 426, 436 (App. Div. 1990), *certif. denied,* 126 *N.J.* 320 (1991); *see also P.F. v. New Jersey Div. of Developmental Disabilities*, 139 *N.J.* 522, 530 (1995). In fact, if an agency's fact finding is based on the credibility of witnesses, "a reviewing court need give no deference to the agency . . . on the credibility issue." *Clowes v. Terminix Int'l, Inc.,* 109 *N.J.* 575, 587-88 (1988); *accord Steinmann v. State, Dep't of the Treasury, Div. of Pensions, Teachers' Pension and Annuity Fund*, 116 *N.J.* 564, 576 (1989).

The sole basis of the Board's decision was that the City failed to present adequate evidence of the chain of custody of appellant's urine sample. The determination whether the chain of custody of a drug sample has been sufficiently established to justify admission of test results is committed to the discretion of the trier of fact. *See State v. Morton*, 155 *N.J.* 383, 446-47 (1998), *aff'd* 165 *N.J.* 235 (2000), *cert. denied*, ___ *U.S.* ___, 121 *S. Ct.* 1380, 149 *L. Ed.* 2d 306 (2001); *State v. Brunson,* 132 *N.J.* 377, 393 (1993). Such evidence should be admitted if there is a "reasonable probability that the evidence has not been changed in important respects." *Id.* at 393-94 (quoting *State v. Brown*, 99 *N.J. Super.* 22, 28 (App. Div.), *certif. denied*, 51 *N.J.* 468 (1968)). Thus, it is not necessary for the party introducing such evidence "to negate every possibility of substitution." *Brown, supra, 99 N.J. Super.* at 27; *see generally McCormick on Evidence* § 212 (Strong ed., 5th ed. 1999).

Although the reported New Jersey appellate decisions involving chain of custody issues have all been criminal cases, it is even clearer in an administrative proceeding that a party seeking to introduce drug test results only needs to show a "reasonable probability" that the integrity of the sample has been maintained, because a relaxed standard of admissibility of evidence applies in administrative proceedings. *See N.J.S.A.* 52:14B-10(a). This conclusion is supported by decisions in other jurisdictions that have applied the "reasonable probability" test in determining whether the "chain of custody" of a urine sample or other similar evidence was adequately demonstrated to justify the admission of test results in an administrative agency hearing. *See, e.g., Mollette v. Kentucky Personnel Bd.*, 997 *S.*W.2d 492, 495 (Ky. Ct. App. 1999); *Williamson v. Police Bd. of Chicago*, 537 *N.E.*2d 1058, 1061-63 (Ill. App. Ct. 1989), *appeal denied*, 545 *N.E.*2d 135 (1989).

The ALJ correctly determined that the City made the required showing of an uninterrupted chain of possession of appellant's urine

sample. That sample was immediately placed in a sealed container, which was identified by a preprinted number that was placed on a label covering the seal, the bag enclosing the container, and the transmittal form that accompanied the sample when it was sent to the laboratory for testing. When the laboratory received the sample, the seal with this identification number was unbroken. Furthermore, even though the laboratory's courier did not sign and date the transmittal form or leave a receipt with Cortez, Cortez testified that he saw the courier remove the sample from the locked box in which he had placed the sample, and the ALJ credited that testimony.

The Board's conclusion that "two 'links' in the chain of custody [were] broken," was based solely on the fact that the courier failed to sign the transmittal form or note the date and time and that the laboratory's form did not record how the sample had been transported. The Board failed to consider other evidence showing the reliability of the transmittal of appellant's urine sample, including the laboratory's receipt of the sealed container with the preprinted identification number together with the transmittal form signed by appellant and Cortez that included the same transmittal number and Cortez's testimony that he saw the laboratory's courier pick up the urine sample. The links in the chain of custody of a urine sample or other similar evidence are not required to be established by any particular form of evidence. *See Brown, supra*, 99 *N.J. Super.* at 28; *see also Middlesex County Dept. of Health v. Importico* 315 *N.J. Super.* 397, 423-25 (Law Div. 1998). Thus, even though the courier failed to complete the transmittal forms, the mode of transportation of the urine sample from Paterson Fire Department to the laboratory and the integrity of the sample was demonstrated by compelling other evidence that the ALJ found credible. Therefore, there is no basis in the record for the Board's rejection of the ALJ's recommended decision.

Because the Board reversed the City's removal of appellant from the firefighter position solely based on its erroneous view that the City failed to present adequate evidence of the chain of custody, it did not address the other issues presented by appellant. Accordingly, we reverse the Board's final decision and remand the matter to the agency. Jurisdiction is not retained.

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