



Commission upheld the removal. *See In the Matter of Annie Baker, Juvenile Justice Commission* (CSC, decided June 5, 2013).

Thereafter, the appellant pursued an appeal with the Appellate Division. The Court indicated that “[w]ere the evidence in this matter limited to [the appellant’s] failed attempts after adequate opportunities to re-qualify, we would determine this record contains adequate factual support to uphold the [Commission’s] decision.” However, the Court stated that “questions of fundamental fairness and the possibility of arbitrary conduct” were raised given the evidence showing that other JJC officers failed to meet the re-qualification requirements and were still employed. Thus, the Court determined that the record was unclear as to the reasoning for the continued employment of the disqualified employees. Consequently, it remanded the matter to the Commission to clarify the application of the re-qualification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC officers who failed to re-qualify in the use of firearms. *See In the Matter of Annie Baker, Juvenile Justice Commission*, Docket No. A-5340-12T1 (App. Div. November 10, 2014). In accordance with the Appellate Division’s decision, the Commission remanded the appellant’s removal to the OAL for additional hearings to clarify the application of the re-qualification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC officers who failed to re-qualify in the use of firearms. *See In the Matter of Annie Baker, Juvenile Justice Commission* (CSC, decided December 17, 2014) (copy attached).

In the instant matter, the ALJ set forth the testimony of the witnesses who confirmed that several officers were still employed by the JJC who were on the “Do Not Carry” list for various reasons, such as pending domestic violence charges. The ALJ evaluated the appointing authority’s argument that there was a distinction between these officers and those who could not qualify in the use of firearms and found that “[i]n the face of clear evidence that some of these officers have remained employed for years, it indeed strain[ed] credulity to posit that their status was ‘temporary.’” Further, the ALJ found that the accommodation of giving these officers assignments that do not require a firearm was discretionary on the part of JJC. Based on the foregoing, the ALJ determined that the appellant was treated less favorably and disparate treatment occurred in the application of the JJC’s firearms re-qualification policy. Thus, the ALJ concluded that the discipline against the appellant must be vacated. As to the appellant’s remedy, the ALJ stated that the appellant must be placed “on par with those individuals accused of domestic violence, by allowing her to maintain employment, while placing her on temporary prohibited status, and then permitting her to attempt requalification beginning with the next semi-annual session.” Accordingly, the ALJ recommended that the appellant be reinstated for one year and afforded an opportunity with the proper training to re-qualify in the use of firearms.

Upon its *de novo* review, the Commission agrees with the ALJ's recommendation to reverse the appellant's removal given the clarifying testimony and evidence obtained through this remanded proceeding. However, the appellant's reinstatement cannot be limited to a specific period of time contingent upon her re-qualification, since the charges against the appellant have been invalidated. Rather, upon reinstatement, the appellant should be afforded appropriate training and permitted to re-qualify in the use of firearms. If the appellant then fails to qualify, she should be subjected to discipline or other remedial action pursuant to the appointing authority's discretion and/or policy. However, this discretion cannot be applied arbitrarily. In other words, the appointing authority should be mindful that it must apply its firearms re-qualification policy uniformly. If there are individuals who have not or cannot qualify in the use of firearms and are permitted to remain employed, the appellant should be afforded a similar accommodation. In the alternative, all officers who cannot re-qualify in the use of firearms may need to be separated.

Accordingly, since the charges against the appellant have been dismissed, she is entitled to back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. Additionally, she is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

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*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and/or 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 to her permanent position.

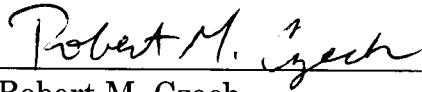
### ORDER

The Civil Service Commission finds that the action of the appointing authority in removing Annie Baker was not justified. Therefore, the Commission dismisses the charges against the appellant, reverses the removal, and orders that the appellant be granted back pay, benefits and seniority for the period of her separation from employment. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Additionally, the Commission grants counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. Proof of income earned and 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:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay

and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of these issues.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and/or 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 15<sup>TH</sup> DAY OF JULY, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
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Attachments



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 16785-14  
(Remand of CSR 7347-12)

**IN THE MATTER OF ANNIE BAKER,  
JUVENILE JUSTICE COMMISSION.**

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**Frank M. Crivelli**, Esq., for appellant Annie Baker (Crivelli & Barbati, attorneys)

**Randy Miller**, Deputy Attorney General, for respondent Juvenile Justice Commission (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: April 23, 2015

Decided: June 5, 2015

BEFORE **ROBERT BINGHAM II**, ALJ:

**STATEMENT OF THE CASE**

Appellant Annie Baker, a correction sergeant at the New Jersey Training School for Boys, appeals a removal from employment by respondent, the Juvenile Justice Commission (JJC), on charges of inability to perform duties and other sufficient cause, specifically, violation of JJC policy regarding firearms requalification, based upon a failure to successfully requalify with the JJC duty weapon.

## PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action (PNDA) dated February 10, 2012 (R-1), the JJC charged Baker with inability to perform duties, and other sufficient cause. Following a departmental hearing on March 30, 2012, the JJC issued a Final Notice of Disciplinary Action dated May 3, 2012 (R-3), removing her from employment based upon those charges, effective April 24, 2012.<sup>1</sup> Baker requested a hearing, and the matter was simultaneously filed with the Civil Service Commission (CSC or the Commission) and the Office of Administrative Law (OAL) on May 11, 2012, for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15.

The hearing was held on August 9, September 25, November 14, and December 11, 2012. The record was closed on May 3, 2013,<sup>2</sup> and an Initial Decision then was issued affirming the JJC's removal of appellant. In re Baker, Juvenile Justice Comm'n, CSR 7347-12, Initial Decision (May 3, 2013). On June 26, 2013, the Civil Service Commission adopted the findings and conclusions of the administrative law judge (ALJ), and issued a Final Decision sustaining disciplinary charges and removing appellant from her position as a correction officer. Baker appealed the final decision to the Appellate Division, asserting that the Commission's decision was arbitrary and capricious. On November 10, 2014, the Appellate Division affirmed in part, reversed in part, and remanded the case to the CSC for further fact finding. In re Baker, Juvenile Justice Comm'n, No. A-5340-12T1 (App. Div. Nov. 10, 2014). By Order dated December 17, 2014, the Commission remanded the case to the OAL for hearing, pursuant to the Appellate Division's decision.

<sup>1</sup> The FNDA was dated May 3, 2012, and was served on appellant on or about May 7, 2012.

<sup>2</sup> At the parties' request, the record remained open for the receipt of transcripts and submission of closing briefs. On or about January 11, 2013, the parties received transcripts. On February 25, 2013, I granted a request for a final fourteen-day extension, from February 28, for the submission of closing briefs, which were received by fax on March 14, 2013. On March 18, 2013, appellant's hard copy was filed, and the record was closed. On April 23, 2013, following a telephone conference on that date, the record was reopened for submission of appellant's disciplinary history. The parties jointly stipulated as to appellant's disciplinary history, and on May 3, 2013, when the hard copy of the parties' joint submission was filed, the record finally closed.

The remand hearing was held on March 25, 2015, and the record remained open for post-hearing submissions. The record closed on April 23, 2015, upon final receipt of post-hearing submissions.

### **FACTUAL DISCUSSION**

At the time of her termination, Sergeant Annie Baker was an employee of the State of New Jersey for approximately twenty-two years. And at the time of her termination, Sergeant Baker was a sworn law-enforcement officer employed with the JJC, specifically serving as a correction sergeant at the New Jersey Training School for Boys located in Jamesburg, New Jersey. In total, Sergeant Baker served as a correction officer for approximately seventeen years, with all the years of her law-enforcement service being at the New Jersey Training School for Boys. Presently, under the rules and regulations established by the New Jersey Department of the Treasury, Sergeant Baker is enrolled in the Police and Firemen's Retirement System.

Pursuant to the Attorney General Guidelines that pertain to firearms requalification, law-enforcement officers are required to qualify to use firearms on a semi-annual basis. Specifically, firearms-requalification courses must be passed in the spring and fall of each year. Each municipal, county and State law-enforcement department is in charge of administering its own firearms-requalification program. The firearms-requalification program in the JJC is divided into three sections: (1) handgun day fire; (2) handgun night fire; and (3) shotgun qualification.

On October 26, 2011, Sergeant Baker initially attempted to requalify for the use of firearms during the Fall 2011 qualification session with the JJC's service handgun, a .40-caliber Smith and Wesson, as well as a service-issued shotgun. During her initial attempt at requalification, Sergeant Baker passed the handgun-night-fire and shotgun requalification sections. However, she initially failed to qualify with the handgun during the handgun-day-fire session. As per the JJC Firearms Qualification Policy, she was afforded a second chance to requalify that same day. Sergeant Baker failed again. In accordance with the JJC policy, on November 3, 2011, she was provided two additional attempts to requalify. Sergeant Baker failed in both attempts to requalify with the

handgun during the day-fire session. After having failed four attempts at requalification, Sergeant Baker was ordered to attend a two-day remedial firearms training class on December 12 and 13, 2011, at the JJC Training Academy located in Sea Girt, New Jersey. Sergeant Baker attended this course as ordered, and on January 24, 2012, she was given two final attempts to pass the requalification course. She failed both attempts at requalification.

After failing these final attempts at requalification, Sergeant Baker was served with a Preliminary Notice of Disciplinary Action seeking her removal from employment. The charges lodged against her were as follows: (1) N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; and (2) N.J.A.C. 4A:2-2.3(a)(11) (now -2.3(a)(12)), other sufficient cause, as violation of JJC HR Policy 11H:3.2 "Firearms Requalification." The specifications to the charges provided as follows:

You have failed to requalify, with a JJC duty weapon, for use of firearms while participating in the Fall 2011 Firearms Requalification session. This failure was your third and final attempt and occurred on January 24, 2012. In accordance with Juvenile Justice Commission policy on Firearms Requalification and the Civil Service job description for Correction Sergeant law enforcement staff you must qualify in the use of firearms on a semi-annual basis. Your separation from services is required and your immediate suspension is necessary to maintain safety, order or effective direction of public services.

After a departmental hearing was conducted, the charges against Sergeant Baker were sustained on March 20, 2012. On or about May 7, 2012, a Final Notice of Disciplinary Action was served upon Sergeant Baker, thereby officially removing her from employment.

On or about May 8, 2012, Sergeant Baker appealed her removal and the matter was simultaneously filed with the Civil Service Commission (CSC) and the Office of



Administrative Law (OAL) on May 11, 2012, for hearing as a contested case.<sup>3</sup> Hearings were conducted before the undersigned administrative law judge (ALJ Bingham or the ALJ) on four separate dates, namely, August 9, 2012, September 25, 2012, November 14, 2012, and December 11, 2012. In the Initial Decision dated May 3, 2013, ALJ Bingham sustained the disciplinary charges against Sergeant Baker and affirmed her removal from employment. Thereafter, Sergeant Baker filed exceptions to the Initial Decision with the Civil Service Commission, and the JJC responded to the same.

On June 5, 2013, the Commission met and reviewed the underlying record, as well as the Initial Decision. On June 26, 2013, the Commission issued its final administrative action, wherein it accepted and adopted the findings of fact and conclusions of law rendered by ALJ Bingham. The Commission also accepted and adopted the ALJ's recommendation to sustain the disciplinary charges against Sergeant Baker and uphold her removal from employment.

On July 10, 2013, Sergeant Baker filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division. After reviewing the written submissions and hearing oral argument, on July 16, 2014,<sup>4</sup> an unpublished decision was issued by the Appellate Division on November 10, 2014, wherein the court affirmed the Commission in part, reversed it in part, and remanded the case for additional proceedings. Thereafter, the Commission again took jurisdiction of the case in light of the decision that was issued by the Appellate Division. On December 17, 2014, the matter was remanded to the Office of Administrative Law for additional proceedings. After additional discovery was exchanged, the case was set down for hearing on March 25, 2015, and March 27, 2015.<sup>5</sup>

<sup>3</sup> The parties' Joint Stipulations of Fact (J-20) inadvertently states that appellant Baker appealed to the Civil Service Commission, which took jurisdiction of the matter, deemed it to be a contested case, and transferred the same to the Office of Administrative Law for adjudication.

<sup>4</sup> The parties' Joint Stipulations of Fact (J-20) inadvertently indicated that oral arguments were heard on July 16, 2015.

<sup>5</sup> Testimony concluded on March 25, 2015, thus there was no hearing on March 27, 2015.

In remanding the case, the Commission noted that the Appellate Division found that there were “questions of fundamental fairness and the possibility of arbitrary conduct” raised in the matter given the evidence showing that other JJC officers failed to meet requalification requirements and were still employed. The Commission further stated that the Appellate Division indicated that there were JJC officers who had been disqualified since 2008, and the court

cannot discern why these JJC law enforcement officers have been afforded extended periods of weapons disqualification without employment discipline or how the extended periods could possibly be considered “temporary.” The only justification suggested, but not clearly explained or even linked to the specified officers, was the “prohibited” status resulted because of domestic violence and an accommodation was mandated by the Attorney General’s guidelines.

The Commission further noted that the Appellate Division did not find that such an accommodation existed. Rather, the “Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers” prepared by the Division of Criminal Justice directed that disciplinary consequences should result.

The Commission further stated that the Appellate Division found:

An officer prohibited from carrying a firearm after an adjudication of domestic violence cannot participate in semi-annual re-qualification as mandated by [the JJC Policy]. Accordingly, these officers cannot meet the requirements of [the] position and also should face discipline. The fact that their impediment arises by operation of law rather than from an inability to achieve the minimum passing score is not a distinction which can support disparate application of the policy.

The Commission stated that the Appellate Division determined that the record was unclear as to the reasoning for the continued employment of the disqualified employees, and remanded the matter to clarify the application of the requalification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC officers who failed to requalify in the use of firearms. Finally, the Commission noted that the

Appellate Division indicated that the JJC's policy must be revised to achieve uniform treatment," and directed that

[i]f the disparate treatment . . . is verified, [the appellant] must be given the same opportunities as others who have also not re-qualified, because they too are legally barred from carrying a firearm. . . . Thereafter, [the appellant's] circumstances must be assessed in light of the past practice of allowing other enforcement officers who failed to complete semi-annual weapons re-qualification, to continue employment.

The JJC Training Academy is responsible for the implementation of the JJC's policy regarding firearms requalification. As a result of this responsibility, and in an effort to implement the Attorney General's policy that all law-enforcement officers must qualify with their weapons on a semi-annual basis, the JJC Training Academy supervises the qualification range and runs both a spring and a fall qualification period. At the conclusion of each spring and fall qualification session, the JJC Training Academy personnel compiles a list of all officers employed within the JJC and indicates on the list the following information:

- a. The officer's name, rank, badge number and facility or unit that the officer is assigned to work on a daily basis;
- b. When the officer last attended the firing range to requalify and achieved a passing score;
- c. Whether the officer "passed" requalification for the current semi-annual period in which the list is compiled;
- d. Whether the officer "failed" requalification for the current semi-annual period in which the list is compiled;
- e. Whether the officer's weapons-carrying privilege expired for the current semi-annual period in which the list is compiled; and

- f. Whether the officer failed to qualify because he or she was prohibited from doing so for the current semi-annual period in which the list is compiled.

The semi-annual qualification list is maintained in the ordinary course of business by the JJC Training Academy personnel and stored at the JJC Training Academy facility.

The New Jersey Training School for Boys (hereinafter "NJTS") is an institution that houses juvenile inmates under the authority of the JJC. Subsequent to each semi-annual weapons-qualification period, NJTS training supervisor Sergeant B. Moore compiles a list of custody personnel that did not qualify with a weapon for the previous weapons-qualifications period. The individuals that appear on each "semi-annual list" are currently employed by the JJC but "DO NOT possess a valid/current weapons card at the NJTS." Additionally, in accordance with the required memo that is issued (relative to firearms prohibition), those individuals that appear on the list "are not authorized to be issued firearms or work positions that require the use or handling of firearms."

**I FIND AS FACT** all of the above, as was stipulated by the parties. (J-20.)

### Testimony

**Jeffrey Flora**, assistant chief at the JJC's Office of Investigations (the Office) since 2005, testified as follows on behalf of the respondent. The Office is charged with overseeing domestic-violence incidents involving JJC officers and it actively monitors the status of domestic-violence criminal cases. Flora plays a central role in gathering facts that are presented to the Division of Criminal Justice (DCJ) Operations Bureau (the Bureau), which makes a determination on the continued employment of officers who have been charged with domestic violence.

Pursuant to official policy, an officer to whom a Temporary Restraining Order (TRO) has been issued cannot carry a firearm while that TRO is in effect. However, the officer retains his or her employment because the outcome of the charges is then

unknown. (T18:14–20.) In Flora's experience, a TRO is usually adjudicated within one or two months, but consideration is also given to whether criminal charges have been filed. (T29:19 to 30:2.) If a Final Restraining Order (FRO) is issued, policy dictates that the officer would have to be terminated because the officer is no longer permitted to carry a firearm. (T18:21–25.) Flora recalls only one occasion when an officer had been issued an FRO, and that person resigned. Flora has never seen an officer maintain employment after a domestic-violence conviction. (T30:7.) In implementing these procedures, the Office follows its own internal policy, the Attorney General's Internal Affairs Policy, and New Jersey's criminal code, Title 2C, which governs domestic violence and the seizure of firearms. (T19:1–9.)

According to Flora, the Office does not have any discretion in determining whether officers charged with domestic violence (DV) can either retain their ability to carry a firearm or maintain their employment. If there is a pending criminal case, the Office must first await resolution of the criminal charges. If convicted, the officer cannot carry a firearm. But if the domestic-violence charge is dismissed, the Office still undertakes its own investigation, including interviews and a "fitness-for-duty" evaluation. The results are sent to the Bureau for its decision regarding the ability to carry a firearm. (T19:10–25, 28:11–25).<sup>6</sup> The whole process is governed by the Attorney General Guidelines. (T20:3.) The Office normally concludes its internal investigation in approximately a year. (T24:16–18, 25:13–17.)

The number of domestic-violence cases handled by the Office varies from year to year. Flora currently has four active domestic-violence cases that await determination.<sup>7</sup> One of the incidents occurred in 2015, two of them occurred in 2014, and one occurred in 2011. (T22:6.)

<sup>6</sup> Flora later testified that the internal investigation would involve interviews of the officer, the alleged victim, and any witnesses, and the results would be sent to the Human Resources Department, which would conduct a fitness-for-duty investigation that would be sent to the "Department" for an ultimate decision on the officer's ability to carry a weapon. (T23:6–22.)

<sup>7</sup> Additionally, there are five individuals who are permitted to carry a weapon on duty, but who cannot carry weapons off duty pursuant to Bureau policy. With respect to these five individuals, they do not have either a TRO or an FRO, or any domestic-violence criminal conviction, but rather had a psychological fitness-for-duty evaluation that restricted them from carrying off duty. (T21:19 to 22:2.)

Regarding the 2011 incident, an individual named C.J. (NJTS)<sup>8</sup> presented an unusual case because he had taken extended medical leave and had undergone five or six “fitness for duties” that yielded inconsistent results. In 2013 he reached an agreement with the JJC whereby he would attend counseling and have quarterly urine monitoring. If he met those conditions, he could apply to regain his firearm. Though the agreement was made in 2013, C.J. took medical leave for most of 2014 and thus was unable to comply. (T27:3–18.) He had not been permitted to carry a weapon since 2011. (T31:6.) On cross-examination, Flora first testified that he did not know whether C.J.’s inability to carry originated with a TRO, but later said that it could be inferred based upon JJC policy. According to Flora, C.J. had “medical issues” that—while not directly interfering with his ability to carry a weapon—prevented him from meeting the stipulated conditions to allow application for permission to carry again. The urinalysis prerequisite stemmed from a fitness-for-duty evaluation that indicated that he had a drug or alcohol problem. And fitness-for-duty examinations generally are triggered by domestic-violence actions, as (admittedly) in his case. From 2011 until now (notwithstanding a medical leave between January and the fall of 2014), C.J. has not been permitted to carry a weapon. Yet, he remains actively employed by the JJC. (T31:7 to 36:1.)

The semi-annual qualification list, or “master firearms list,” for Spring 2011 (Spring 2011 list) (J-2) reflects that at least one individual’s qualification status is listed as “expired,” which Flora believes to signify that the individual failed to qualify in the required time period. It could have been for different reasons, such as medical leave, in which case the individual would have been required to qualify immediately upon his return; otherwise, his qualification would expire. (T37:11–23.) Other individuals have a qualification status of “prohibited,” (J-2 at 11) meaning they cannot carry a firearm,

<sup>8</sup> Initials signify last names first, as appear in the pertinent exhibits, unless indicated otherwise. (T73:14–19.) C.J. was eventually identified, after being unnamed in earlier references, though identified and repeatedly referenced by Flora as J.C. (first name first), rather than C.J. (last name first). (T41:4, 42:11.)

because either they have a pending domestic-violence charge, or—totally unrelated to the Office’s function and responsibility—they failed to qualify at the range. (T38:3–24.)<sup>9</sup>

The Spring 2011 list describes C.J. as “prohibited,” and his last “range date” was October 29, 2008, the last date he went to the range to qualify with a weapon. (J-2 at 11; T41:2–7, 42:25 to 43:11.) Flora then explained that C.J. actually faced two separate allegations of domestic violence, one in 2008 and another in 2011. So, he really has been prohibited from carrying a weapon since 2008. He remained employed in 2009 and 2010, but did not go to the range or qualify while the 2008 investigation was pending. He still has an open domestic-violence matter from 2011 and is prohibited from carrying his weapon because of the domestic-violence issue. (T43:16 to 46:24.) He does not have an FRO, because if he did, he would have been terminated. (T46:21–24, 52:8.) A compilation of all range-qualification sessions from the spring of 2011 through the fall of 2014 (J-1) (the Compilation) lists C.J. as having been on “prohibited” status for that period of time. (T49:10–15.) Though C.J. is still unable to carry a weapon, he remains employed with the JJC, actively working and collecting pay. And though his criminal charges were dismissed, his inability to carry is because, as per “the A.G.’s policy,” the agency has been conducting its own Internal Affairs investigation, including multiple “fitness-for-duty” evaluations. (T51:20 to 53:21.)<sup>10</sup>

The Compilation (J-1) shows another individual, C.V.,<sup>11</sup> as “prohibited” from the spring of 2011 through the spring of 2012, though Flora could not verify that status “without looking at the records in the office.” (T49:18–24.) Yet another individual, K.Z.,<sup>12</sup> was “prohibited” from the spring of 2011 to the fall of 2013, a span of three years,

<sup>9</sup> Though the initial reference at J-2, page 11, was to “K.” as “prohibited,” a “K.Z.” is listed as “prohibited” in J-2 at page 15, rather than page 11, where only “C.J.” and “C.V.” are highlighted as “prohibited.”

<sup>10</sup> According to Flora, in 2008 the Internal Affairs department conducted an investigation to determine whether C.J. had violated any Internal Affairs policies. Flora did not know whether C.J. was found to have violated Internal Affairs policies. He also did not know whether the 2008 incident had “cleared up” before the second domestic-violence charge in 2011, or whether C.J. had ever been subjected to discipline. C.J. has had at least five evaluations, and had been on medical leave for most of 2014.

<sup>11</sup> At this point, C.V. was identified as “V.C.” (first name first), rather than “C.V.” (last name first).

<sup>12</sup> At this point, K.Z. was identified as “Z.K.” (first name first), rather than “K.Z.” (last name first).

or, six range periods. This individual was terminated by the agency for a domestic-violence incident, but regained his job on appeal. (T50:3–19.) And Pr.Ja.,<sup>13</sup> at the Johnstone Campus, is listed as “prohibited” from the fall of 2011 through the spring of 2013. (T50:20–24.)

According to Flora, the JJC follows the Attorney General Guidelines in conducting its internal investigation. However, he knows of no policy that puts a time restriction on how long a person can be placed on temporary prohibition without being restored (ability to carry) or disciplined. (T54:10–23.) These individuals on temporary prohibited status go to work, but cannot work any armed post where they would be required to carry a weapon. So, ultimately, there is a “management distinction” that is made to allow those individuals to work at jobs that do not require carrying a firearm. (T54:24 to T55:9.)

**John Moore**, an officer employed with the JJC since January 1997, was presented by appellant. Moore testified that his assignment involves range instruction at the training academy in Sea Girt, New Jersey, and he has worked in that capacity since September 2000. He oversees the range for requalification and maintains records indicating who has passed or failed qualification requirements, and who is prohibited from carrying firearms. A semi-annual qualification report is compiled twice each year, in the spring and in the fall.

Referring to the Spring 2011 report (J-2), Moore explained the various terms used in those semi-annual reports. The qualification status indicates “expired” if someone did not attend; for example, not completing qualification due to medical leave. So, “expired” would indicate an excused absence. Individuals listed as “expired” do not have the ability to carry until the next qualification period, but no disciplinary action is taken against them. Moore did not know how long an individual could remain on expired status without being terminated. (T66:22 to 68:7.)

<sup>13</sup> Pr.Ja. was identified as “J.P.” (first name first). The officer is referred to herein as Pr.Ja. because there are two officers with the initials P.J. (last name first) on the same Johnstone Campus.



A “range date” is the date the individual qualified. If the individual did not qualify, his or her last qualification date remains in that column.<sup>14</sup> (T68:8 to 69:3.) When an individual is listed as “prohibited,” such as “A.R.F.” (Spring 2011 list, J-2 at 10), the chief of investigations sends a memo to both Moore and the director of custody operations at each facility, stating that the individual is prohibited from carrying firearms within the JJC. The memo states the reason why the person is prohibited, and in the majority of cases it is due to a domestic-violence charge. (T69:10 to 71:3.)

As for disciplinary action against an individual who fails to qualify during a semi-annual qualification period, Moore testified that termination will result under the JJC’s firearms-requalification policy for those not meeting the minimum requirement during the qualification process. (T71:8 to 72:1.) He explained that if an individual fails to qualify at the range after two attempts, he or she is rescheduled for two additional attempts (in other words, a third and fourth try) and, if failing again, then for remediation. Following remediation instruction, there are two more attempts. If all cycles are failed, the result is termination, but only if that failure includes the remediation period. (T75:12–20, 76:2–25.) Moore does not recall anyone who has failed twice, such as in the fall and following spring, and has been able to keep his or her employment.

According to Moore, record-keeping practices changed over time. Initially, it was the practice to mark someone as “failed” for each unsuccessful attempt (T78:2–7), or as “general terminology,” even if, say, the person attended the range once and shot only twice. Later, however, the designation “DMR” (did not meet requirements) was used when an individual did not complete qualification, but did not fail all the rounds—for instance, when an individual went out on medical leave before completing the course. (T83:7–15.) So, “DMR” was used “up until the time they completed remediation class, at which time it would be—it would state, ‘Failed.’” (T87:14–19.) An individual in “DMR” status is unable to carry a weapon. As to whether such an individual remains employed, if he or she did not return for qualification but “went out for some reason,” the individual is then “not in a working status.” (T84:9-13.)

<sup>14</sup> For example, a “B.C.” appears on the first page of the Spring 2011 list as last having qualified on October 4, 2010.

The Compilation (J-1) lists C.D., with whom Moore is familiar. He previously worked at the Johnstone Campus but is now retired from the JJC. C.D. failed qualification in the fall of 2011 and spring of 2012. As Moore recalls, C.D. failed, took medical leave, returned, failed again, and then took medical leave again.<sup>15</sup> (T73:14 to 75:1.) To Moore's best recollection, without documentation other than the Fall 2011 list (J-4 at 2), C.D. failed a first time, but went out on medical leave before completing the remediation. On the other hand, appellant Baker failed during the same qualification period as C.D. (J-4 at 10), yet she was terminated after remediation. (T77:21 to 79:11.) And whereas Baker was terminated, C.D. came back for the next (Spring 2012) qualification period and failed a second opportunity to requalify, as reflected in the Spring 2012 list (J-7 at 2). (T81:8.)

The Compilation indicates that an individual named H.J. (J-1 at 1, third from bottom) has a code, "DMR 5-16-2014," entered next to her name, meaning that she "didn't meet requirements" at the range on that date. (T81:22 to 82:2.)<sup>16</sup> If H.J. had been given a second opportunity to qualify, a second date would be indicated, as with H.M. (J-1 at 1, ninth from bottom), who did not meet requirements on October 23, 2013, and again on June 16, 2014. (T82:8–23.) She did not meet the Fall 2013 qualification requirements on the first date and she never returned for her second opportunity, for whatever reason.<sup>17</sup> The same occurred for the Spring 2014 period. In other words, for both the Fall 2013 and Spring 2014 qualification cycles, she attended once, did not qualify, and did not return. (T83:16 to 84:8.)

An individual named H.R. did not meet the requirements on October 24 and October 29, 2014. He failed to qualify during both rounds and was scheduled for a

<sup>15</sup> Moore stated that he would have to look at other documents from the range cycle to be sure.

<sup>16</sup> A minimum of 80 percent is required, pursuant to the Attorney General Guidelines.

<sup>17</sup> At this point in the testimony, this individual was referred to as M.H. (first name first), rather than H.M. (last name first). (T83:17.) The report does not state the reason why she never came back for her second attempt.

remedial session. But he went out on medical leave between the last qualification attempt and the remedial class. (T84:23 to 86:2.)

Also, an individual named O.Z. is marked as “failed” (rather than as “DMR”) in the fall of 2012 and the spring of 2013. (J-1 at 2.) Moore believes that the individual likely went out on medical leave (in the interim). (T86:3 to 87:1.) Nonetheless, one who takes medical leave before having the opportunity to finish the training block has not met the requirements. (T87:6.)

Another individual named M.R. (SCO at NJTS) failed in the fall of 2011, just like appellant Baker. (J-1 at 2.) As to whether M.R., however, had an opportunity to return in the spring to requalify, Moore’s best recollection is that M.R. “came and qualified and then went out on medical leave.” (T88:14.) The individual “didn’t fail the remediation class because [the individual] went out on medical after the first time [the individual] came out to qualify.” (T88:25 to 89:2.) According to Moore, at that time (Fall 2011) there was no distinction between someone who failed all three cycles, namely, the first and second cycle and remediation, and someone failing the first and second cycle and who then took medical leave. (T89:20 to 90:2.)

Finally, an individual named Wi.Jo. “failed” in the fall of 2012 and the spring of 2013 but, without termination, was able to later return and qualify in the fall of 2013. (J-1 at 3, fourth from the bottom.)<sup>18</sup> By comparison, Baker was terminated after failing the Fall 2011 session and its remediation class. (T90:3–19.)

Based upon the testimony and exhibits, as well as the opportunity to observe the appearance and demeanor of the witnesses, I further **FIND AS FACT**:

1. JJC officers who are not qualified to carry firearms are generally classified by the JJC as being in one of four categories: (1) “expired”—failed to qualify in the required time period, but had an excused absence;

<sup>18</sup> The officer referenced in the testimony is referred to here as Wi.Jo. because there are two officers with the initials W.J. on the same Johnstone Campus.

(2) “prohibited”—cannot carry a firearm, due to either a pending domestic-violence charge (most often), or a failure to qualify at the range; (3) “failed”—first used for each unsuccessful attempt or as “general terminology” for not meeting necessary requirements; and (4) “DMR” (more recent)—an incomplete qualification attempt that did not convert to “failed” unless unsuccessful after remediation.

2. Reasons for the continued employment of the officers vary depending on their status. If expired, the officer has an excused absence, but is supposed to qualify immediately upon return. If the officer has DMR status, he or she may be out from work for some reason, but not separated from employment.
3. If on prohibited status due to a domestic-violence issue, the officer's employment continues indefinitely, while the Office monitors the DV case, unless and until there is an FRO or criminal conviction. Officers who have been issued a TRO retain their employment, despite the inability to carry, because the outcome of the charges is then unknown. If the domestic-violence charge is dismissed, the Office undertakes its own investigation and the results are sent to the Bureau for its decision regarding the ability of the officer to carry a firearm. The Office normally concludes its internal investigation within approximately a year, but in some cases the officer has remained employed for years despite the inability to carry firearms.
4. The JJC's requalification policy is applied similarly among some JJC officers in the sense that officers on expired, prohibited, and DMR status do not generally face disciplinary charges by virtue of that status alone.
5. However, the JJC does not have a policy that puts a time restriction on how long an officer can be placed on expired or prohibited status without being restored, insofar as the officer's ability to carry, or otherwise subject to discipline for failure to complete firearms qualification.

6. JJC officers on prohibited status actively work within the JJC and receive pay, but they cannot work any armed post where they would be required to carry a weapon. Admittedly, there is a “management distinction” that is made to allow those individuals to work at jobs that do not require carrying a firearm. (T:55:4–12.)
7. On the other hand, Policy 11H-3.2 and the JJC Custody Discipline Policy 11H-319.7 (R-8) impose termination of employment for officers who “fail” to qualify after remediation. Even so, there have been cases where an officer’s employment continued after a “failed” qualification attempt.
8. Treatment of a number of JJC officers who did not requalify in the use of firearms between 2011 and 2014 is evidenced as follows:
  - a. C.V. was prohibited from carrying for a year and a half.
  - b. K.Z. was prohibited for three years, or six range periods, before passing. He was terminated by the agency for a domestic-violence incident, but was vindicated on appeal.
  - c. Pr.Ja. (Johnstone Campus) was prohibited from the fall of 2011 through the spring of 2013, and was later expired for one year (Spring and Fall 2014).
  - d. C.J. was prohibited since October 2008 when he first had a domestic-violence matter. In 2011 he had a second domestic-violence incident. Although criminal charges in one of the cases were resolved, C.J. underwent the JJC’s internal investigation, including five or six inconsistent fitness-for-duty evaluations. He finally reached an agreement in 2013 wherein he could regain his ability to carry if stipulated conditions were met. However, he took medical leave between January and the fall

of 2014, preventing satisfaction of the stipulated conditions. C.J. returned to active employment in the fall of 2014. There is still an open domestic-violence investigation pending against him, and he still has not qualified with his weapon.

e. R.R. (Parole) and P.J. (NJTS) were both prohibited for a year (Spring and Fall 2011).

f. A.R.F. was expired (Spring 2011) and prohibited (Fall 2011) for a total of one year.

g. H.J., O.J., P.B., P.J. (Johnstone Campus), Po.St., S.P., and T.J. were all expired for one year.

h. C.D. failed qualification in the fall of 2011 and spring of 2012. It is possible, but not certain, that C.D. failed, took medical leave, returned and failed again, and then took medical leave again.

i. O.Z. failed in the fall of 2012 and the spring of 2013. It is possible, but not certain, that O.Z. had taken medical leave.

j. M.R. failed in the fall of 2011, just like appellant Baker, but passed in the spring of 2012.

k. Wi.Jo. failed in the fall of 2012 and the spring of 2013 but, without termination, was able to later return and qualify in the fall of 2013.

l. H.M. did not meet requirements (DMR) on October 23, 2013, and again on June 16, 2014, but took and passed the qualification trial in the fall of 2014.

- m. H.R. did not meet requirements (DMR) during both rounds on October 24 and October 29, 2014, but he went out on medical leave between the last qualification attempt and a scheduled remedial session.
9. None of the above officers faced termination, or other discipline, based upon their disqualification from carrying firearms.
  10. By comparison, Baker was terminated after failing the Fall 2011 session and its remediation class. Baker was thus treated less favorably than other JJC officers who were not qualified to carry firearms but who remained employed without discipline.
  11. The JJC administers its firearms-requalification program pursuant to JJC Policy 11H-3.2, whereby it is a job requirement for JJC law-enforcement personnel to achieve and maintain an active firearms-qualification status, and any officer who does not so qualify as required, under the direction of the JJC Training Academy, cannot fully meet the job requirements of a JJC law-enforcement officer. (R-7.) Under Policy 11H-3.2, and JJC Custody Discipline Policy 11H-319.7 (R-8), the JJC imposes termination of employment for officers who fail to qualify after remediation, although Policy 11H-3.2 states that management may seek appropriate action “up to and including removal.” However, the New Jersey Attorney General’s Semi-Annual Qualification and Requalification Standards for New Jersey Law Enforcement (Attorney General’s Standard) (R-6) provides for remedial instruction for unsuccessful candidates, but it does not require termination from employment, or any specific sanction, for an officer who fails to qualify after remediation. Further, the Attorney General’s Departmental Policy for the Handling of Domestic Violence Incidents Involving Law Enforcement Officers (J-21) was prepared by the DCJ as a model for law-enforcement agencies and it addresses response protocol and surrender of firearms in domestic-violence cases. However, as stated by the Appellate Division, it does not require any indefinite

accommodation of employment for officers charged with domestic violence.

### **LEGAL ANALYSIS AND CONCLUSIONS**

The issue presented on remand is whether the JJC's application of its firearms requalification policy, Policy 11H-3.2, resulted in the disparate treatment of appellant Baker as compared to other JJC officers who were not allowed to possess firearms.

Black's Law Dictionary defines "disparate treatment" as "[t]he practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability." This definition captures the meaning of "disparate treatment" when used as a term of art, involving claims of discrimination based on one's membership in a protected class. See Victor v. State, 203 N.J. 383, 408–09 (2010); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 597 (1988). "Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005) (citations omitted). However, the term "disparate treatment" can be used in a more generic sense where dissimilar penalties are applied to similar employees.<sup>19</sup> Such is the case where an employer arbitrarily and capriciously applies a more severe penalty to one employee than to others who are similarly situated. See, e.g., In re Reed, CSV 10080-97 & CSV 935-98, Final Decision (Oct. 15, 1998), <<http://njlaw.rutgers.edu/collections/oal/>>.<sup>20</sup>

<sup>19</sup> This interpretation may be similar to some degree to the related theory of "disparate impact." "Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory." Gerety, supra, 184 N.J. at 399 (citations omitted).

<sup>20</sup> Often, when disparate treatment is raised as a defense, the ALJ is unable to draw the conclusion that any disparate treatment occurred, because the discipline records of other employees are not before the court. See, e.g., In re Michelson, City of Union, CSV 5839-06, Initial Decision (December 18, 2007), adopted, Merit System Bd. (February 14, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>, aff'd, In re Michelson, No. A-3523-07T3 (App. Div. July 28, 2009), <<http://njlaw.rutgers.edu/collections/courts/>>.



I. Sergeant Baker was subject to disparate treatment by the JJC's application of its firearms requalification policy.

Here, there is no suggestion that the JJC engaged in disparate treatment on the basis of a protected class. Rather, appellant's argument is that the JJC arbitrarily applied its firearms-qualification policy to employees, such that officers who were disqualified from carrying a firearm (or participation in semi-annual qualifications) due to pending domestic-violence cases, as well as those who did not otherwise complete firearms requalification, were not disciplined, but appellant Baker, who was disqualified for failing to achieve a sufficient score, was terminated.

- A. *Distinction between appellant Baker, who is unable to carry firearms by virtue of an insufficient score to qualify, and officers who are unable to carry firearms by virtue of a pending domestic-violence allegation.*

The JJC has maintained that there is a distinction between these two categories of officers, and, like apples and oranges, a true comparison cannot be drawn between the two. According to the JJC, officers on the “do not carry” list pending domestic-violence charges should not be subject to discipline because the charges against them have not been substantiated. Therefore, these officers should be placed on a temporary restriction from carrying firearms pending resolution of the charges. On the other hand, when an officer such as Baker fails to qualify with a weapon, it is a final determination resulting in the conclusion that that officer must be terminated because she is unable to fulfill her job requirements. However, the Appellate Division suggests a broader view when comparing the status of an officer who fails to qualify due to insufficient scoring with that of an officer who cannot qualify due to domestic-violence charges. With respect to those officers with domestic-violence charges, the court stated:

We cannot discern why these JJC law enforcement officers have been afforded extended periods of weapons disqualification without employment discipline or how the extended periods could possibly be considered “temporary.” The only justification suggested . . . was the prohibited status resulted because of domestic violence and an

accommodation was mandated by the Attorney General's guidelines.

.....

. . . Further, we have difficulty reconciling the JJC's expressed need for rigid application of the re-qualification policy, with the notion that, other than the brief approximately ten-day span from issuance of a temporary restraining order to the date of the final hearing, special treatment should be extended for years to putative batterers. An officer prohibited from carrying a firearm after an adjudication of domestic violence cannot participate in semi-annual re-qualification as mandated by 11H-3.2. Accordingly, these officers cannot meet the requirements of a Corrections Sergeant's position and also should face discipline. The fact that their impediment arises by operation of law rather than from an inability to achieve the minimum passing score is not a distinction which can support disparate application of the policy.

[In re Baker, Juvenile Justice Comm'n, No. A-5340-12T1 (App. Div. Nov. 10, 2014), at 19, 22.]

Critical to the analysis is the fact that, even aside from officers who may have been terminated following an adverse adjudication of domestic violence, rather than continually employed, there are those who have not been so adjudicated but remain employed while prohibited for an indefinite period of time. In the face of clear evidence that some of these officers have remained employed for years, it indeed strains credulity to posit that their status was "temporary." C.J. has been prohibited from carrying since October 2008 and, though criminal charges were dismissed, a DV investigation from 2011 is pending. R.R. and P.J. (NJTS) were both prohibited for a year. A.R.F. was prohibited and expired, for a total of one year. C.V. was prohibited for a year and a half. K.Z. was prohibited for three years, or six range periods, before passing. Pr.Ja. (Johnstone Campus) was prohibited for two years, from the fall of 2011 through the spring of 2013, and was later expired for a year. Moreover, this accommodation or "management distinction" made by the JJC, affording these officers work assignments

that did not require a firearm, is a discretionary action, despite the JJC's claim that it has no discretion in their employment.<sup>21</sup>

The JJC has maintained throughout these proceedings that it was constrained by the Attorney General Guidelines, which required it to prohibit those with pending domestic-violence charges from carrying weapons while retaining them on employment. However, the Appellate Division pointed out that

[t]he specific Attorney General guidelines relied upon by Officer Moore and the JJC are not identified. We have located and reviewed the "Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers" prepared by the Division of Criminal Justice. See Office of the Attorney General, Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers, <http://www.state.nj.us/lps/dcj/agguide/DV-Model-Policy-Final-12-11-09.pdf> (last viewed October 20, 2014). However, we do not find a provision in that policy mandating indefinite special employment treatment of officers prosecuted for domestic violence. To the contrary, in such instance, the policy directs disciplinary consequences should result.

[Id. at 19–20.]

Based upon the record in this remand proceeding, there remains a lack of evidence as to any policy authorizing or mandating the JJC to maintain the employment of officers pending the outcome of domestic-violence charges. Indeed, the Attorney General's Departmental Policy for the Handling of Domestic Violence Incidents Involving Law Enforcement Officers (J-21), upon which the JJC relies, does not require any indefinite accommodation of employment for officers charged with domestic violence.

<sup>21</sup> As stated above, the Appellate Division voiced concern that putative batterers were permitted to maintain employment, while "temporarily" prohibited from carrying a weapon, whereas those who fail to qualify are terminated. Flora testified that, pursuant to Office procedure, first the TRO must be resolved, then, if there is a criminal matter, it must be adjudicated, and if the criminal matter is dismissed, then the Office's internal investigation begins, which usually takes about a year to complete. After reviewing the testimony, the crux of the problem appears to be that the internal investigation period might stretch on indefinitely without any justification, allowing an officer who has been alleged to have engaged in domestic violence to retain his or her employment indefinitely. It is troubling that JJC policy does not limit how long an Internal Affairs investigation may go on in such a case.

*B. Distinction between appellant Baker and other officers who are or have been unable to carry by virtue of inability to qualify.*

There is also a distinction between the treatment of Baker and that of other officers who are or have been unable to carry by virtue of inability to successfully complete firearms qualification. H.M. did not meet requirements (DMR) in October 2013 and again in June 2014, but took and passed the qualification trial in the fall of 2014. H.R. had DMR status for both rounds on October 24 and October 29, 2014, but he took medical leave between the last qualification attempt and a scheduled remedial session. H.J., O.J., P.B., P.J. (Johnstone Campus), Po.St., S.P., and T.J. were all expired for one year.

C.D. failed qualification in the fall of 2011 and spring of 2012. O.Z. failed in the fall of 2012 and the spring of 2013. It is merely speculative whether they had taken medical leave. But even if they had, they still were not qualified with a firearm during that time. M.R. failed in the fall of 2011, just like appellant Baker, but passed in the spring of 2012. Perhaps most notably, Wi.Jo. failed in the fall of 2012 and again in the spring of 2013, but, without termination, was able to later return and qualify in the fall of 2013. On the other hand, Baker was terminated after failing only the Fall 2011 qualification cycle.

In summary, there is now clear evidence that Baker was treated less favorably than other JJC officers who also were not qualified to carry firearms but who remained employed without discipline. Thus, the evidence demonstrates disparate treatment in the application of the JJC's firearms-requalification policy. Not only is the policy itself troubling, insofar as those embroiled in domestic-violence matters may retain their jobs indefinitely, but also, there are problems in the execution of the policy. The record shows that Wi.Jo. failed to qualify (without a domestic-violence incident) on two occasions, yet retained employment. Further, C.J. initially disqualified for domestic violence in 2008, has remained employed, even since returning from extended medical leave in the fall of 2014 but not qualifying to date. There is no satisfactory explanation

why he has not returned to the range to qualify, or why the internal investigation remains pending since 2011.

Just as it would be unfair to prematurely discipline those officers who lack firearms requalification due to a pending TRO, it is fundamentally unfair to apply the firearms requalification policy in such a manner as to terminate a model veteran officer for failure to qualify after one cycle while maintaining the employment of officers who are also firearms unqualified, whether for their DV status or for incompleteness or failure at the range, and indefinitely affording them positions not requiring firearms. On this record, it is inescapable that the JJC arbitrarily imposed discipline against appellant Baker. I therefore **CONCLUDE** that, as instructed by the Appellate Division, the discipline imposed upon appellant must be **VACATED**.

## II. Assessment of appellant's circumstances

Appellant submits that the penalty of removal is excessive. Respondent contends that removal is the only appropriate penalty. Generally, consideration must be given to the concept of progressive discipline, involving penalties of increasing severity. West New York v. Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well established that when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011). It has been held that termination without progressive discipline is appropriate in circumstances where an employee cannot competently perform the work required of the position. Klusaritz v. Cape May Cnty., 387 N.J. Super. 305, 317 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007).

A distinction can be made, however, where the inability is merely temporary or has been rectified. In In re Krawczyk, CSR 10047-12, Initial Decision (March 14, 2013), adopted, CSC (April 17, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>, a senior correction officer appealed his termination by the JJC on grounds that he was unable to

properly perform his duties because he failed to complete a fitness-for-duty evaluation, without which he had not been able to carry a firearm. The requirement of an evaluation came after a domestic-violence incident—although the timing of the referral for an evaluation was more closely linked to a DUI charge—and loss of his weapons privilege. By the time of the hearing, the officer had submitted documentation verifying that he had attended the required counseling and had passed a fitness-for-duty exam. Having determined that the core concern was fitness for duty, which the officer had established, the ALJ concluded that a 120-day suspension was warranted.

Appellant cites In re Warren, No. A-5092-09T3 (App. Div. Aug. 3, 2012), <<http://njlaw.rutgers.edu/collections/courts/>>, where a seventeen-year Department of Corrections employee with a virtually unblemished record appealed a removal by the Civil Service Commission from her position as a senior correction officer. The Appellate Division reversed and remanded for reconsideration of the penalty. The court found that in light of her nearly unblemished seventeen-year career, the penalty of removal was disproportionate to the offense and vacated the decision. Similarly, Officer Baker has an unblemished twenty-two-year record of employment with the JJC. The JJC responds that Warren is inapposite because in that case an alternate means of discipline could have been available, whereas JJC policies forbid Baker from maintaining employment as a correction sergeant because she did not qualify with her weapon.

However, the Appellate Division has directed that

[i]f the disparate treatment as discussed in our opinion is verified, Sergeant Baker must be given the same opportunities as others who have also not re-qualified, because they too are legally barred from carrying a firearm.

If disparate treatment in the application of 11H-3.2 has occurred as discussed, the CSC's determination of discipline must be vacated. Thereafter, Sergeant Baker's circumstances must be assessed in light of the past practice of allowing other enforcement officers who failed to complete semi-annual weapons re-qualification, to continue employment.

[In re Baker, Juvenile Justice Comm'n, No. A-5340-12T1  
(App. Div. Nov. 10, 2014), at 25.]

The JJC cannot maintain that there is no alternate recourse, when it has permitted officers accused of domestic violence, and others, to “temporarily” work designated assignments without the ability to carry a weapon, and later attempt to qualify. Fundamental fairness requires that the same opportunity should be afforded to appellant Baker. As to the average length of time officers have remained employed while unable to carry, the range spans from one year up to seven years (the exceptional case of C.J.). C.V. was prohibited for a year and a half. K.Z. was prohibited for three years, or six range periods, before passing. Pr.Ja. (Johnstone Campus) was prohibited for two years and was later expired for a year. O.Z., C.D., R.R., P.J. (NJTS), A.R.F., H.J., O.J., P.B., P.J. (Johnstone Campus), Po.St., S.P., T.J. and Wi.Jo. were all unable to carry for one year.

It appears that the appropriate remedy would be to place Sergeant Baker, who cannot carry by virtue of a failure to qualify, on par with those individuals accused of domestic violence, by allowing her to maintain employment, while placing her on temporary prohibited status, and then permitting her to attempt requalification beginning with the next semi-annual session.<sup>22</sup>

Therefore, I **CONCLUDE** that appellant Annie Baker should be reinstated for one year, afforded an adequate opportunity with proper training, and permitted to attempt requalification for use of firearms.

### **DECISION AND ORDER**

Accordingly, and consistent with the directive of the Appellate Division, I **ORDER** that the CSC's imposition of discipline against appellant Annie Baker is hereby **VACATED**. I further **ORDER** that the charges against her are hereby **DISMISSED** and that she be restored to her employment as correction sergeant at the JJC for a period of

<sup>22</sup> The practical effect would be somewhat similar to “DMR” status, as appellant would yet have to meet the requirements, but within one year's time.

one year, during which time she shall be afforded adequate training and opportunity to requalify for use of firearms.

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

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

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

June 5, 2015  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
**ROBERT BINGHAM II, ALJ**

Date Received at Agency:

6/5/15  
\_\_\_\_\_

Date Mailed to Parties:

6/5/15  
\_\_\_\_\_

/lam



**APPENDIX**

**WITNESSES**

**For Appellant:**

John Moore

**For Respondent:**

Jeffrey Flora

**EXHIBITS**

**Joint:**

- J-1 Compilation of Range Qualification Information for the Juvenile Justice Commission, 2011–2014
- J-2 Firearms In-service Semi-Annual Qualification—Spring 2011
- J-3 Correspondence from SCO Moore to Michael Cleary 6/23/2011
- J-4 Firearms In-service Semi-Annual Qualification—Fall 2011
- J-5 Correspondence from Sgt. B. Moore to Shift Commanders 8/29/2011
- J-6 Correspondence from Sgt. B. Moore to Shift Commanders 1/3/2012
- J-7 Firearms In-service Semi-Annual Qualification—Spring 2012
- J-8 Correspondence from Sgt. B. Moore to Shift Commanders 7/10/2012
- J-9 Firearms In-service Semi-Annual Qualification—Fall 2012
- J-10 Correspondence from Sgt. B. Moore to Shift Commanders 2/22/2013
- J-11 Firearms In-service Semi-Annual Qualification—Spring 2013
- J-12 Correspondence from Sgt. B. Moore to Shift Commanders 7/2/2013
- J-13 Firearms In-service Semi-Annual Qualification—Fall 2013
- J-14 Firearms In-service Semi-Annual Qualification—Spring 2014
- J-15 Correspondence from Sgt. B. Moore to Shift Commanders 6/23/2014
- J-16 Firearms In-service Semi-Annual Qualification—Fall 2014
- J-17 Correspondence from Sgt. B. Moore to Shift Commanders 12/12/2014

- J-18 Electronic Correspondence from Cindy Badger to SCO John Moore  
12/16/2014
- J-19 Correspondence from Sgt. B. Moore to Supervisors 2/23/2015
- J-20 Joint Stipulation of Facts
- J-21 Departmental Policy for Handling of Domestic Violence Incidents Involving  
Law Enforcement Officers

**For Appellant:**

- A-1 "Do Not Carry" list of JJC officers, dated July 24, 2012

**For Respondent:**

- R-1 Preliminary Notice of Disciplinary Action, February 10, 2012
- R-3 Final Notice of Disciplinary Action, May 3, 2012
- R-4 Job Specifications, Correction Sergeant, JJC
- R-6 Firearm Qualification Standards
- R-7 JJC Policy & Procedure—Firearms Requalification
- R-8 JJC Policy & Procedure—Custody Discipline Policy
- R-26 JJC Semi-Annual Firearms Qualification and Requalification Report,  
December 12, 2011
- R-42 JJC Memo, dated January 31, 2012, re: Firearms Requalification



STATE OF NEW JERSEY

DECISION OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Annie Baker,  
Juvenile Justice Commission

CSC Docket No. 2015-1286

Court Remand

ISSUED:

(DASV)

The Superior Court of New Jersey, Appellate Division, has remanded the April 24, 2012 removal of Annie Baker, a Correction Sergeant, Juvenile Justice, with the Juvenile Justice Commission (JJC), to the Civil Service Commission (Commission). See *In the Matter of Annie Baker, Juvenile Justice Commission*, Docket No. A-5340-12T1 (App. Div. November 10, 2014). The Court did not retain jurisdiction. A copy of the Appellate Division's decision and the Commission's decision, *In the Matter of Annie Baker, Juvenile Justice Commission* (CSC, decided June 5, 2013) are attached.

By way of background, the appellant was removed from employment, effective April 24, 2012,<sup>1</sup> on charges of inability to perform duties and other sufficient cause: violation of the firearms re-qualification policy. The appellant failed to re-qualify in the use of firearms during a semi-annual re-qualification session. The appellant appealed her removal, which was transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ). In reviewing the job specification for Correction Sergeant, Juvenile Justice, the Attorney General's Semi-Annual Qualification and Re-qualification Standards for New Jersey Law Enforcement (AG Standards), and the JJC's policy on firearms re-qualification, the ALJ found that the appellant was required to re-qualify in the use of firearms. The ALJ also found that the appellant was given multiple opportunities to remedy her failing scores, which included participation in a remedial re-qualification program, but she could not meet the minimum

<sup>1</sup> The appellant was initially immediately suspended without pay, effective February 15, 2012, to maintain safety, order, and the effective direction of public service.

requirements to pass. Additionally, the ALJ set forth the testimony of several witnesses, one of whom testified that despite restrictions in carrying a weapon and appearing on a "Do Not Carry List," several officers had remained employed with the JJC. Further, the witness reported that not all JJC officers needed to carry a weapon in order to perform the essential functions of the job. While the ALJ acknowledged that JJC custody staff do not carry a firearm within the perimeter of the facility, that fact did not invalidate the requirement that JJC custody staff must have the ability to qualify with a JJC duty weapon. Therefore, the ALJ concluded that the appointing authority proved by the preponderance of the evidence that the appellant lacked the ability to fully perform her duties and violated the JJC policy regarding firearms re-qualification. Accordingly, the ALJ recommended sustaining the appellant's removal.

Upon its *de novo* review, the Commission agreed with the ALJ's assessment of the charges, emphasizing that the appellant was given multiple opportunities to re-qualify. Further, although the appellant alleged that the re-qualification program and instructor were somehow deficient, the Commission dismissed her argument, indicating that the basic fundamentals of shooting were covered in the program and the instructors worked with the participants. The Commission stated that it was clear that the appellant violated the JJC's policy on firearms re-qualification in not meeting the minimum score for qualification, and it was required of a Correction Sergeant, Juvenile Justice to have the ability to carry a firearm. The Commission found that the fact that the JJC permitted other employees who could not carry a weapon to be placed on the "Do Not Carry List" and remain employed did not demonstrate that the ability to carry a weapon was not required for the appellant to perform the full duties of her position. Therefore, notwithstanding the appellant's unblemished employment record of 22 years, the Commission concluded that the only appropriate course of action was to remove the appellant from employment. However, the Commission noted its concern with the application of the "Do Not Carry List" and suggested that the JJC revisit its policy. The Commission stated that, while it was not unreasonable to allow officers with temporary restrictions to be accommodated, it was troublesome to permit continued employment of officers who are unable to carry a weapon for extended periods of time.

Thereafter, the appellant pursued an appeal with the Appellate Division. On appeal, she maintained that she was able to perform the functions of her position, which did not require her to be qualified in the use of a firearm. Alternatively, if a firearm was required for her position, the appellant requested the same accommodation afforded to other officers who were legally prohibited from carrying a weapon but were still employed. The appellant also challenged the penalty of removal as unwarranted given her circumstances. Upon its review, the Court found that, while the AG Standards dictated the semi-annual firearms re-qualification standards for State law enforcement, it did not limit the number of attempts an individual is given "prior to the imposition of a consequence for failure to meet the

required minimum score." Therefore, the Court determined that "the consequence attached to not re-qualifying rests in the discretion of the appointing authority, here the JJC." Nevertheless, the Court could not agree with the appellant's assertion that, although some of her duties did not require the use of a weapon, re-qualification in the use of firearms was unreasonable or that JJC's limitation to re-qualify in six attempts prior to removal from employment was arbitrary or capricious. Further, the evidence established the necessity for the re-qualification program and that the appellant was treated fairly in the program. Additionally, the Court could not conclude that carrying a firearm was not an essential function of the appellant's position. Thus, the Court noted that "[w]ere the evidence in this matter limited to [the appellant's] failed attempts after adequate opportunities to re-qualify, we would determine this record contains adequate factual support to uphold the [Commission's] decision." However, the Court indicated that "questions of fundamental fairness and the possibility of arbitrary conduct" were raised in this matter given the evidence showing that other JJC officers failed to meet the re-qualification requirements and were still employed. The Court identified JJC officers who had been disqualified since 2008 and stated that:

We cannot discern why these JJC law enforcement officers have been afforded extended periods of weapons disqualification without employment discipline or how the extended periods could possibly be considered "temporary." The only justification suggested, but not clearly explained or even linked to the specified officers, was the "prohibited" status resulted because of domestic violence and an accommodation was mandated by the Attorney General's guidelines. *Slip Opinion* at 19.

However, the Court did not find that such an accommodation existed. Rather, the "Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers" prepared by the Division of Criminal Justice directed that disciplinary consequences should result. The Court also noted that:

An officer prohibited from carrying a firearm after an adjudication of domestic violence cannot participate in semi-annual re-qualification as mandated by [the JJC policy]. Accordingly, these officers cannot meet the requirements of [the] position and also should face discipline. The fact that their impediment arises by operation of law rather than from an inability to achieve the minimum passing score is not a distinction which can support disparate application of the policy. *Slip Opinion* at 22.

Thus, the Court determined that the record was unclear as to the reasoning for the continued employment of the disqualified employees. Consequently, it remanded the matter to the Commission to clarify the application of the re-qualification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC

officers who failed to re-qualify in the use of firearms. The Court indicated that the JJC's policy "must be revised to achieve uniform treatment." The Court further directed that "[i]f the disparate treatment . . . is verified, [the appellant] must be given the same opportunities as others who have also not re-qualified, because they too are legally barred from carrying a firearm. . . . Thereafter, [the appellant's] circumstances must be assessed in light of the past practice of allowing other enforcement officers who failed to complete semi-annual weapons re-qualification, to continue employment." *Id* at 24-25.

In response, the appellant requests that this matter be remanded to the OAL to uncover pertinent facts as instructed by the Appellate Division. The appellant submits that in accordance with the Court's decision, an additional hearing should explore whether the JJC has created categories of officers who are permitted to work despite their inability to carry a firearm and whether she was subjected to disparate treatment as compared to those employees prohibited from carrying a firearm due to domestic violence charges.

It is noted that despite the opportunity, the appointing authority did not submit additional information or arguments.

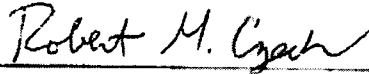
### CONCLUSION

The Appellate Division affirmed in part and reversed and remanded in part the Commission's decision, which upheld the removal of the appellant from her position as a Correction Sergeant, Juvenile Justice for her failure to qualify during the semi-annual firearms re-qualification. The Court rejected the appellant's argument that the re-qualification requirement was arbitrary or unreasonable. Moreover, the Court found that the appellant was treated fairly in the re-qualification program and that limiting re-qualification attempts to six was not arbitrary or capricious. However, the Court found evidence that several other JJC officers remained employed despite being prohibited from carrying firearms due to domestic violence incidents. There was not an adequate explanation by the JJC for this differential treatment. Therefore, in accordance with the Appellate Division's decision, the matter of the appellant's removal is remanded to the OAL for additional hearings to clarify the application of the re-qualification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC officers who failed to re-qualify in the use of firearms. Should either party wish to present testimonial or other evidence regarding the treatment of all JJC officers who failed to complete the firearms re-qualification, they should be afforded the opportunity. Upon his evaluation of the evidence on remand, the ALJ should assess whether the appellant was subject to disparate treatment and whether the disciplinary action is warranted.

**ORDER**

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

**DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 17<sup>TH</sup> DAY OF DECEMBER, 2014**



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