MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

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FROM THE COURT

OF PERSONNEL INTEREST

TO OUR READERS:

Following his appointment by Governor Whitman and confirmation by the Senate, Alan Dexter Bowman began his service as a member of the Merit System Board at the Board's July 19, 1999 meeting. Mr. Bowman is a graduate of Ohio State University and received his law degree from Rutgers-Newark School of Law. From 1976 to 1979, he was a Deputy Attorney General in the Division of Criminal Justice, Department of Law and Public Safety. He is currently in the private practice of law, with offices in Newark. Since 1990, he has served as a member of the Supreme Court's Criminal Practice Committee.

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WRITTEN RECORD APPEALS

Reinstatement and Back Pay Warranted for Termination Without Notice and an Opportunity for a Hearing

In the Matter of Ronald Cooks, Mercer County

(Merit System Board, decided July 7, 1998)

Ronald Cooks, County Correction Officer, Mercer County, requests reinstatement to his position and back pay, seniority and benefits from the date of his separation from employment. Petitioner alleges that the County, without affording him due process, placed him on resigned status effective December 19, 1997, contending that he was unfit for duty as a result of an injury at work on July 17, 1997. He argues that the County has failed to accede to his request for a functional capacity medical evaluation, which was recommended by two physicians, to determine his ability to perform his duties.

In support of the instant request, petitioner attests that he was not afforded a hearing or provided notice of any type of disciplinary action in regard to his involuntary resignation. In regard to the issue of his fitness for duty, he submits that on February 5, 1998, neurological surgeon Dr. Anthony Chiurco released him to return to full duty as a County Correction Officer with no restrictions. Additionally, on April 6, 1998, Dr. Harold Herman, who examined him for the County's insurance provider in his workers' compensation claim, reported that he had sufficiently recovered to be able to resume his previous job-related activities. Dr. Herman stated that the disability rating of 12.5 percent was not new; it was the same rating that petitioner had before the July 1997 injury as a result of a previous back problem and surgery, and concluded that he was not more disabled than he had been before the present injury.

Further medical documentation indicates that on October 3, 1997, Dr. Chiurco recommended that Mr. Cooks attempt to return to work. On October 17, 1997, Dr. Jeffrey Miller, Princeton Neck and Back Institute, reported that Mr. Cooks had not reached the maximum medical benefit of conservative intervention, and recommended a program of epidural injections in conjunction with physical therapy for four to six weeks. On November 17, 1997, Dr. Ronald Glick of Lawrence Orthopaedics reported that petitioner should be capable of returning to work, and recommended a complete functional capacity evaluation to assess the possible necessity for any limitations of his activities. On November 20, 1997, Dr. Miller reported that petitioner was not responding to treatment, and it appeared that he had reached maximum medical benefits of any conservative intervention. Dr. Miller also recommended a functional capacity examination. However, on December 5, 1997, the County physician, Dr. John Columbis, in referencing the November 1997 reports from Drs. Glick and Miller, stated that petitioner was not fit to return to work, and that he "did not expect his physical condition to improve significantly over the next few months or longer."

The record indicates that the appointing authority recorded petitioner as resigned effective December 19, 1997. Petitioner filed a grievance requesting that he be permitted to take a functional capacity test; however, the appointing authority denied the request, stating that since the matter is a workers' compensation issue, it was not subject to the grievance procedures of the union contract.

The appointing authority, represented by Andrew Schragger, Assistant County Counsel, argues that since Mr. Cooks refused to retire or resign, in consideration of the County's physician's determination that he was unfit to return to duty, it had no option but to terminate him from employment. However, it has provided no evidence that it has complied with merit system rules in regard to the termination. It encloses a report, dated February 22, 1998, from Dr. Armand L. Ruderman, a workers' compensation doctor. Dr. Ruderman opines that petitioner has a 52 percent permanent, partial disability that is causally related to the injuries incurred while working for the appointing authority.

Conclusion

> *N.J.S.A.* 11A:2-13 provides:
>
> Before any disciplinary action in subsection a.(1), (2) and (3) of *N.J.S.* 11A:2-6 is taken against a permanent employee in the career service or a person serving a working test period, the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated rep-

> resentative. The hearing shall be held within 30 days of the notice of disciplinary action unless waived by the employee. Both parties may consent to an adjournment to a later date.
>
> This section shall not prohibit the immediate suspension of an employee without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. . .

N.J.S.A. 11A:2-13 prohibits the imposition of a disciplinary action before the employee is notified in writing of the charges and has the opportunity for a hearing before the appointing authority. *N.J.A.C.* 4A:2-2.5 provides that an employee may be suspended immediately and prior to a hearing when the employee has been formally charged with certain crimes or where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. It must be noted that *N.J.A.C.* 4A:2-2.3(a)3 provides that "inability to perform duties" is a cause for disciplinary action.

The principal issue in this matter is not whether the County had a basis for removing petitioner based on his unfitness to perform the duties consistent with his position as a County Correction Officer. The issue is whether petitioner was afforded his merit system right of due process prior to the separation. In the instant matter, the record does not indicate that the appointing authority notified petitioner of its intention to separate him from his employment or that it was in compliance with merit system rules in regard to placing him on "resigned status" effective December 19, 1997.

In this regard, it is noted that public employers are often reluctant to characterize as "disciplinary" those actions taken to terminate or suspend the employment of an individual unable to perform his or her duties due to mental or physical unfitness. This reluctance stems from a perception that the employee has done nothing wrong. In such cases, the employers suggest that discipline is not appropriate to address questions of fitness, and that, under these circumstances, an employee can be barred from fulfilling the duties of his or her employment without recourse to the disciplinary process.

In fact, valid non-disciplinary options are available to the employer, such as requesting the employee to take a medical leave, or if the employee will not take a voluntary medical leave, to briefly suspend the employee with pay, pending expeditious scheduling and completion of appropriate expert evaluations. The employer may also impose an immediate suspension without pay under the circumstances that the employee is unfit for duty or a hazard to himself or others. If, however, the employer elects to bar a possibly unfit employee from working, involuntarily and without pay, the regulatory scheme in this State requires that prior to the withholding of wages, the employee must be afforded oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to review the charges and evidence and to respond. *N.J.A.C.* 4A:2-2.5(b). Although charges of physical unfitness may differ in nature from the typical disciplinary action, under current merit system law and rules, the safeguards of the disciplinary process must be utilized whenever an employer seeks to terminate or suspend a permanent merit system employee for cause, even when the charges do not arise as the result of any misconduct on the part of the employee.

This case in particular demonstrates that such protections are warranted. The record indicates that the appointing authority separated petitioner from his position without imposing disciplinary action or requesting that he take a leave of absence without pay, thus abrogating the due process rights afforded him through merit system rules. If the appointing authority has a genuine concern about petitioner's ability to perform his duties, formal charges must be filed and served upon petitioner and petitioner must be provided the opportunity for a hearing. In the absence of same, there is no legal justification for failing to restore petitioner to his duties. Therefore, it is appropriate for the appointing authority to reinstate Mr. Cooks to his position and, to make him whole for the clear violation of merit system law and rules, award him back pay, benefits and seniority from the date that he was placed on resigned status, December 19, 1997, through the date of his actual reinstatement.

Order

Therefore, it is ordered that Ronald Cooks be immediately reinstated to his position as a County Correction Officer pending the filing of formal charges. It should be further noted that if any immediate suspension is to be imposed, the provisions of *N.J.S.A.* 11A:2-13 must be followed. It is further ordered that Mr. Cooks be granted back pay, benefits and seniority from December 19, 1997 through the date of his actual reinstatement.

In the event this Order is not fully complied with within ten days of issuance of this decision, the Board orders that a fine be assessed against the appointing authority in the amount of one hundred dollars ($100) per day beginning on the eleventh day from the issuance of this decision, continuing for each day of continued violation, up to a maximum of ten thousand dollars ($10,000).

Minor Discipline Standard Interpreted as Five Working Days or Not More Than 40 Hours of Pay

In the Matter of William Brennan
(Merit System Board, decided July 7, 1998)

William Brennan, a Fire Fighter with the Teaneck Fire Department, appeals the imposition of discipline. Specifically, the appellant argues that said discipline was more than 40 hours which constituted major discipline affording him the right to a hearing

The appellant was charged with insubordination and conduct unbecoming a public employee on March 26, 1998 for his actions on March 2, 1998. On that date, it was alleged that the appellant picked up a chair and slammed it down in the vicinity of a superior officer and proceeded to sit and glare at the officer in a hostile, intimidating and menacing manner. After the officer left the room, the appellant allegedly followed and intentionally caused a loud and violent impact to occur within the immediate proximity of the officer. At a Departmental disciplinary hearing held on April 9, 1998, the appellant was found to have engaged in the conduct alleged and was suspended for five days without pay. The five- day suspension was on days when the appellant was scheduled to work a total of 66 hours; however, the appellant was only docked 40 hours of pay and given leave with pay for the remaining 26 hours.

The appellant argues that the appointing authority has violated *N.J.A.C.* 4A:2-2.2(a)3 which states that major discipline includes a "[s]uspension or fine for more than five working days at any one time." He specifically states that the suspension was scheduled for five days when he was to work four 14-hour night shifts and one 10-hour day shift, for a total of 66 hours. While the appellant admits that he was suspended for five days and was only docked 40 hours of pay, he alleges that the appointing authority only paid him for the 26 extra hours based on the fact that he was appealing the suspension.

The appointing authority, represented by Gregory Begg, Esq., states that the appellant was only docked for 40 hours pay over the imposed five-day suspension and, therefore, satisfied the requirements for the imposition of minor discipline pursuant to *N.J.A.C.* 4A:2-3.1, *et seq*.

Conclusion

The question before the Merit System Board (Board) is whether the appellant has been penalized with minor or major discipline for his actions on March 2, 1998. It is clear that the Board has no jurisdiction over questions regarding minor discipline imposed on local government employees. *See N.J.S.A.* 11A:2-6; *N.J.S.A.* 11A:2-14; *N.J.S.A.* 11A:2-16 and *N.J.A.C.* 4. A:2-3.1, *et seq*. Minor discipline is defined in *N.J.A.C.* 4A:2-3.1(a) as "a formal written reprimand or a suspension or fine of five working days or less." This standard has been interpreted to mean five working days or not more than 40 hours of pay. However, if the discipline is considered major discipline, the Board has jurisdiction and the appellant would be afforded the opportunity for a formal hearing at the Office of Administrative Law. *See N.J.A.C.* 4A:2-2.9(b).

Based on a thorough review of the record, it is clear that the appellant's penalty for his actions on March 2, 1998 constituted minor, not major discipline. Both sides are in agreement that the suspension spanned five working days. While these five days constituted 66 work hours, it is undisputed that the appellant was docked for 40 hours of pay and was given 26 hours of leave with pay. It is clear in the record that the appellant's penalty was only five working days and 40 hours of pay. Moreover, with regard to the appellant's record, this penalty will be recorded as minor, not major discipline. The appellant's contention that the appoint-

ing authority did not intend to pay him for the 26 additional work hours until after he appealed the suspension is unsubstantiated in the record. As such, the Board has no jurisdiction in this matter.

Order

Therefore, it is ordered that this appeal be denied.

Dual Unclassified/Career Service Title Incompatible with Merit System Law

In the Matter of Fire Director/Fire Chief, City of Perth Amboy
(Merit System Board, decided Dec. 22, 1998)

Rodney T. Hara, Esq., on behalf of the City of Perth Amboy, appeals the decision of the Division of Human Resource Management denying the appointing authority's request to create a dual title for Fire Director/Fire Chief.

A review of the record reveals that Ordinance No. 914-97, amending the Code of the City of Perth Amboy pertaining to the Fire Department, includes a section which creates the position of "Director who shall serve as the Fire Chief." This Director/Fire Chief will "head the Department and ultimately be responsible for the administration and all the operations of the department." The Division of Human Resource Management determined that there is no specific statute which exists to allow the position of Fire Director to be unclassified. However, since the individual will be functioning as the Department Head, such unclassified appointment is allowed under *N.J.A.C.* 4A:3-1.3(b). Fire Director is a civilian position whose functions are restricted to administrative tasks.

The Division of Human Resource Management further determined that the Legislature has made it clear that command at a fire scene rests only with the Fire Chief or other superior officer. *N.J.S.A.* 40A:14-54.1. A Fire Director may not assign firefighters or intrude on fire suppression activities, but rather has the policy making and administrative responsibilities for the department. The Division of Human Resource Management, therefore, determined that the positions of Fire Director and Fire Chief are not compatible. The title of Fire Director, as a Department Head, may be unclassified while the Fire Chief is a career service position, subject to merit system testing, certification and appointment processes. Therefore, the Division of Human Resource Management concluded that any request to appoint a Fire Director who shall also serve as the Fire Chief will not be approved by the Department of Personnel.

On appeal, appellant submits that the subject position should not be subject to the provisions of the Civil Service Act as the position qualifies as a Department Head under the Faulkner Act. *N.J.S.A.* 40:69A-43. Appellant argues that the provisions of both the Faulkner Act and the Civil Service Act mandate that the subject position be considered to be unclassified. Appellant also argues that the subject position must perform administrative and supervisory duties in directing the operation of the Fire Department under general policy direction.

In addition to directing, supervising and coordinating firefighting services for the City in order to ensure effective and efficient firefighting and other emergency services, appellant argues that the subject position must enforce compliance with laws and regulations, maintaining prescribed firefighting standards for the City. Therefore, appellant maintains that the subject position is a highly specialized position requiring not only a high level of technical skill and experience in fighting fires and other emergencies, but also administrative skills that a department head must possess in a municipality the size of Perth Amboy.

As to the matter of the incompatibility of the Fire Chief and Fire Director titles, appellant presents that the former New Jersey Supreme Court held that Fire Chief is not a position in the career service in *Ziegler v. City Manager*, 115 *N.J.L.* 328 (1935). Additionally, appellant presents that unlike municipal police departments where a claim of command is set by statute (*See N.J.S.A.* 40A:14-118), there is no claim of command designated by statute or case law for a municipal fire department.

Lastly, appellant notes that the Department of Personnel's Title Code Directory lists a Fire Chief title in the career service and a Fire Chief title in the unclassified service.

Conclusion

N.J.A.C. 4A:3-1.3(b) states that a department head in a municipality, where not otherwise set by a statute, is a person whose position has been created by ordinance or resolution, as appropriate, to perform substantial managerial duties, and who has the authority and powers of appointment, removal, selection for promotion, and control of the assignment and work of subordinates subject only to the legislative power of the governing body and applicable statutes. As an unclassified department head, a Fire Director shall be appointed by the Mayor with the advice and consent of the council. A Fire Director can also be removed at the discretion of the Mayor, upon filing written notice of intent with the council. *See N.J.S.A.* 40:69A-43. The Fire Director is not a uniform fire officer and has no statutory or other authority to command fire scenes *N.J.S.A.* 40A:14-54.1.

In contrast, based on the Department of Personnel job specification, the title of Fire Chief is a career service position which has charge of the fire department; does related work as required. Examples of this work include: gives assignments and instructions to subordinate members of the fire department; provides members with advice and assistance when difficult and unusual problems arise; checks members' work to see that proper procedures are followed, that reasonable standards of workmanship, conduct, and output are maintained, and that desired firefighting and prevention objectives are achieved; ensures that fire companies respond promptly to all alarms; supervises investigation and disposal of fire hazards and violations; supervises storing, safeguarding, and use of equipment, materials, and supplies; supervises establishment and maintenance of fire and personnel records and files. Appointments to the title of Fire Chief are subject to merit system testing, certification and appointment processes. Upon completion of a working test period, an incumbent acquires tenure which can only be rescinded through formal discipline or layoff mechanisms and an opportunity for hearing before the Merit System Board.

With regard to the argument that the Title Code Directory lists an unclassified Fire Chief title, it is noted that the Department of Personnel erroneously approved the appointment of an unclassified Fire Chief in the City of East Orange on June 2, 1981. This error was not discovered until almost 10 years later and the Department believed that it would be an injustice to take action at that time. *See In the Matter of Police Chief (PM1154M), City of East Orange* (Merit System Board, decided February 9, 1993). Since that time, the position was vacated and the current incumbent is serving in the career service title of Fire Chief. As to appellant's reliance on *Ziegler*, it is noted that this case involved the City of Hackensack, which did not adopt merit system coverage until 1946, 11 years after the Court's decision.

Thus, based on conflicting appointment and separation mechanisms alone, the unclassified Fire Director title and the career service Fire Chief title are clearly incompatible to an extent which precludes creation of a dual title. Additionally, there are many inherent conflicts in this dual position, for example: (1) a Fire Director can countermand any order of the Fire Chief; (2) a Fire Director may be involved in contract negotiations on behalf of management with the Fire Officer's Association, the union to which the Fire Chief belongs; (3) a Fire Director is responsible for evaluating the performance of the Fire Chief to determine whether the working test period in that title has been successfully completed; and (4) a Fire Director is responsible for reviewing and approving the overtime hours served by the Fire Chief.

For this reason, the common law "Doctrine of Incompatibility of Offices" does not permit appellant to hold the dual position of Fire Director/Fire Chief. This doctrine, as stated in *Belleville Township v. Fornarotto*, 228 *N.J. Super*. 412, 419 (Law Div. 1988) (citing *McQuillin, Municipal Corporations* (3rd ed. 1982, Section 12.67), is as follows:

The common law rule is that the acceptance by a public officer of another office which is incompatible with the first thereby vacates the first office; that is, the mere acceptance of the second (incompatible) office *per se* terminates the first office as effectively as a resignation. Public policy demands that an officeholder discharge his duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality, for inquiries of that kind would be too subtle to be rewarding. The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his talent.

The Court continued by defining the standard by which two positions would be considered "incompatible:"

The incompatibility standard applied by the courts does not depend upon the good faith or bad faith of the official. Rather, incompatibility is determined by

the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Offices are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if the respective offices might, or will, conflict, even on rare occasions, it is sufficient to declare them legally incompatible. Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second. *See* 228 *N.J. Super*. at 419-20.

From the outset, the civil service statutes have drawn a sharp distinction between the classified and the unclassified service. The dual title of Fire Director/Fire Chief is inconsistent with the statutory and regulatory scheme of the civil service. In addition, the duties of the two positions contain inherent conflicts making it impossible for them to be held simultaneously.

A thorough review of the record reveals that the decision of the Division of Human Resource Management is amply supported by the record and appellant has failed to support its burden of proof in this matter.

Order

Therefore, it is ordered that this appeal be denied.

No Entitlement to Appeal of Voluntary Demotion

In the Matter of James Luker
(Merit System Board, decided Aug. 4, 1998)

James Luker, a Police Sergeant with the Pemberton Township Police Department, appeals his demotion from Police Lieutenant to Police Sergeant.

The appellant was promoted to the position of Police Lieutenant and assigned to the Detective Division on July 12, 1994. The appellant alleged that Chief Paul Tuliano had a close personal relationship with then-Sergeant Stephen Emery, who was, at the time, the appellant's subordinate. The appellant contended that this relationship undermined his authority as a Lieutenant. Specifically, he alleged that Sgt. Emery was unable to handle his responsibilities in the Detective Division because Chief Tuliano assigned him to other projects. The appellant stated that as a result, he had to take on Sgt. Emery's duties as well as his own. To alleviate the situation, the appellant attempted to assign Sgt. Emery's duties to other members in the Detective Division until Chief Tuliano ordered him to cease that practice. In addition, the appellant maintained that Chief Tuliano gave him additional responsibilities by transferring a two-person narcotics unit to the Detective Division. Based on this transfer, the appellant assigned duty-call responsibilities to all the detectives in his unit in order to equally distribute the call duties. The appellant noted that he had previously removed. Sgt. Emery from call duty so that he could spend more time on his office duties, although this did not occur. Sgt. Emery objected to the appellant's reassignment of duty-call responsibilities. The appellant alleged that in a subsequent conversation with Chief Tuliano, the Chief implied that the appellant should remove Sgt. Emery from the call list. Specifically, the appellant stated that, "[t]he Chief's parting words to me that day were that he was not going to come out and tell me to change the schedule but that I should remember that we all need to get along." The appellant maintains that the Chief's statement was a threat that he would suffer retribution unless he removed Sgt. Emery from the call schedule. Two weeks later the Chief ordered the appellant to remove the Sergeants from the duty schedule, which he did.

Based on the Chief's decision, the appellant claimed that over the next few days he became very angry and slipped into a "deep depression." He asserted that he had always known that the Chief was capable of unethical behavior, but never believed he would be so blatant about it. A few days later, the Chief called the appellant into his office to discuss matters. The appellant told the Chief that he was very depressed and not in the proper frame of mind to problem solve. However, the Chief pressed the issue and the appellant told the Chief his feelings regarding the handling of Sgt. Emery's situation. He also told the Chief that he never asked for any special favors or preferential treatment. The appellant alleged that the Chief became very angry during this meeting.

The following day the appellant received a directive from the Chief reassigning him to the Administrative Division. The appellant stated that this action was too much for him to handle. He alleged that he had been going through a difficult time since his mother had died six months previously. Due to the accumulation of stress, the appellant visited a doctor who placed the appellant on medication and recommended that he seek counseling. The doctor also authorized the appellant to stay out of work for a couple of months. As the appellant's sick time became depleted, he began to feel pressed to return to work. To deal with the anxiety the appellant was feeling due to the alleged harassment he was receiving from Chief Tuliano, he decided to request a voluntary demotion to Sergeant and transfer to the night shift so he would no longer have to work directly under the Chief. He first suggested this idea to his physician who stated that the appellant should give the medication and counseling more time to change his perspectives on the situation. The appellant's July 31, 1997 demotion letter states in pertinent part, "[a]fter much thought, I have decided to resign my position as Lieutenant. As soon as possible, I would like to be reduced to the rank of Patrol Sergeant." This letter is signed by the appellant.

According to the appellant, he began having second thoughts about his request almost immediately. On August 4, 1997, the appellant's first day back to work after his absence, he delivered a letter to the Chief attempting to rescind his request for a voluntary demotion.

On appeal to the Merit System Board, the appellant argues that, since he provided a letter of rescission in a timely manner, that his request for a voluntary demotion was not voluntary. He maintains that he would have never requested the demotion if he had not been under emotional duress caused by the actions of Chief Tuliano. Further, he argues that his voluntary demotion request was invalid because he was incapacitated at the time due to his treatment for his depression. In this regard, he submits a list of his medications, but does not offer any medical documentation substantiating incapacity or impairment. He also contends that he has the right to rescind his voluntary demotion request pursuant to *N.J.A.C.* 4A:2-6.1(c), which states that "[a] request to rescind the resignation prior to its effective date may be consented to by the appointing authority." Finally, he asserts that he is entitled to be placed back on the Lieutenant's list pursuant to *N.J.A.C.* 4A:4-7.10(a), which states that an employee who has "resigned in good standing, retired or voluntarily demoted, may request consideration for reemployment by indicating availability to his or her appointing authority."

The appointing authority, represented by Thomas M. Barron, Esq., argues that the harassment and duress that the appellant alleges to have suffered at the hands of Chief Tuliano is unsubstantiated in the record. It argues that it is the appellant's personal reactions to his work situation that led him to request a voluntary demotion. The appointing authority also argues that the appellant clearly, without any input, influence or pressure from the appointing authority, typed, signed and delivered the letter requesting a demotion from the rank of Lieutenant to Sergeant. It contends that the appellant's decision to request a demotion was solely the product of his internal dissatisfaction with Chief Tuliano's management decisions and style.

Conclusion

Initially, it must be determined whether the rule governing resignations in good standing is applicable in this matter, as the appellant asserts. *N.J.A.C.* 4A:2-6.1(a) states that a permanent employee in the career service may resign in good standing by giving the appointing authority proper notice *N.J.A.C.* 4A:2-6.1(c) allows a request for resignation to be rescinded prior to the effective date to be accepted at the discretion of the appointing authority *N.J.A.C.* 4A:2-6.1(d) allows an employee to appeal a resignation in good standing if the resignation was the result of duress or coercion.

In the appellant's case, the record clearly shows that his movement from Lieutenant to Sergeant was not a resignation in good standing. For it to have been

a resignation, the appellant would have had to cease working as an employee in any capacity for Pemberton Township. What the appellant has done instead is taken a voluntary demotion from Lieutenant to Sergeant pursuant to *N.J.A.C.* 4A:4-7.8(a), which states that "[a] voluntary demotion is the voluntary movement of a permanent employee from his or her permanent title to a lower title in local service."

In this regard, *N.J.A.C.* 4A:4-7.8 does not provide an employee an avenue to appeal such a request. A prior Board decision discusses the difference between a resignation and a voluntary demotion, and the rights of an employee to rescind a resignation but not a voluntary demotion. *See In the Matter of William Loatman* (MSB, decided February 25, 1992). In *Loatman*, the Administrative Law Judge (ALJ) clearly delineates the difference between the appeal rights of an individual who requests a voluntary demotion as opposed to an individual who resigns. Regarding an employee who requests a voluntary demotion, the ALJ writes "[t]he rule [*N.J.A.C.*4A:4-7.8] does not speak to any right to rescind. In this respect, it is unlike the resignation rule." which allows an employee to rescind a resignation. The ALJ further writes

> [t]he Merit System Board could have adopted a similar provision with respect to voluntary demotion, but it did not. It seems likely that this is not an oversight, but is related to the rights of other workers who are displaced in the case of a voluntary demotion.

This decision was affirmed by the Board. As such, the appellant's argument that he is entitled to rescind his request under *N.J.A.C.* 4A:2-6.1(c) is unfounded. This right of rescission is only available to an employee who has resigned in good standing under *N.J.A.C.* 4A:2-6.1(a). This is not the appellant's case.

However, even if the Board is entitled to consider an appeal concerning a voluntary demotion, appellant's allegations do not support granting a hearing as to whether the appellant was coerced into requesting a demotion from his position of Lieutenant. All of the events described by the appellant, if true, only suggest that Chief Tuliano has, at worst, possibly misused his managerial discretion in certain instances. The events do not show that Chief Tuliano or any other representative of the appointing authority coerced the appellant to request a demotion to the rank of Sergeant. The facts show that had the appellant not made such a request, he would have continued as a Lieutenant in charge of the Administrative Division. Also, the appellant's argument that he was under duress or incapacitated when he requested his demotion thus rendering the request non-voluntary or invalid is unsupported in the record. The words chosen by the appellant in his request for a demotion are telling. He states, "*[a]fter much thought*, I have decided to resign my position as Lieutenant. *As soon as possible*, I would like to be reduced to the rank of Patrol Sergeant (emphasis added)." This note, which was signed by the appellant, clearly shows that the appellant carefully considered his decision and willingly and voluntarily requested the demotion.

Moreover, appellant's allegations do not demonstrate any impropriety or violation of merit system law and rules with regard to his attempt to rescind the voluntary demotion. Rather, the record simply shows that the Township exercised its discretion not to accept appellant's attempted rescission.

The appellant also contends that he is entitled to be placed back on the Lieutenant reemployment list pursuant to *N.J.A.C.* 4A:4-7.10(a), which allows individuals who have requested voluntary demotions to request consideration for reemployment, and pursuant to Pemberton Township's policy which incorporates this rule. The appellant's arguments in this regard are not persuasive. While *N.J.A.C.* 4A:4-7.10(a) allows an individual who has requested a voluntary demotion to request consideration for reemployment, *N.J.A.C.* 4A:4-7.10(b) states that consideration for reemployment is conditioned upon the "recommendation of the appointing authority that such reemployment is in the best interest of the service." Since Pemberton Township has not recommended the appellant for reemployment pursuant to this provision, and there is no evidence in the record showing that this lack of a recommendation is an abuse of discretion on Pemberton Township's part, the appellant is not entitled to be placed on the reemployment list.

Order

Therefore, it is ordered that this appeal be denied.

No Statutory Entitlement to Indefinite Leave of Absence

In the Matter of John T. Lyons, Jr.
(Merit System Board, decided August 4, 1998)

John T. Lyons, Jr. appeals the decision of the Division of Human Resource Management which found that he did not have rights to the position of Court Clerk Typing in Essex County upon termination of his unclassified appointment.

The Division of Human Resource Management found that Mr. Lyons resigned from his Court Clerk Typing position. On appeal, appellant states that on October 17, 1988, he began a three-month leave of absence from his regular appointment in the career service as a Court Clerk Typing to accept an unclassified appointment as Confidential Aide to the Criminal Presiding Judge. He notes, correctly, that this unclassified appointment was within the Judiciary and not within the Essex County Counsel's Office as stated in the decision below. Appellant received an extension of leave for three months on January 17, 1989. He resigned from the unclassified appointment as Confidential Aide to the Criminal Presiding Judge on March 24, 1989 and accepted an unclassified appointment as Assistant County Counsel on March 27, 1989. The Division of Human Resource Management explains that theoretically, appellant's leave of absence would have expired on April 17, 1989, except that it actually expired on March 24, 1989, the date of his resignation from the unclassified appointment for which his leave without pay was granted. Appellant asserts that he did, in fact, request a third leave of absence in April 1989 which was denied by the former Deputy County Clerk. He argues that his resignation on March 24, 1989 as Confidential Aide to the Criminal Presiding Judge should not have terminated his leave of absence as a Court Clerk Typing. He maintains that he did not resign as a Court Clerk Typing and that since no formal action was taken to terminate him from the position, he is in leave without pay status unless the appointing authority formally charges him with resignation not in good standing and he is provided with a hearing. In a separate letter, appellant wrote again to the Division of Human Resource Management stating that the Department of Personnel acted in bad faith in forwarding his personnel records which erroneously stated that he had resigned from the classified Court Clerk Typing position. In reply to appellant, the Division of Human Resource Management explains that all court employees were transferred to the Judiciary as State employees.

Conclusion

N.J.S.A. 11A:6-1 states, in pertinent part, that a leave of absence, with or without pay, shall not exceed a period of one year at any one time unless renewal or extension is granted upon written approval of the Commissioner. Therefore, the sole means of preserving a career service position while serving in an unclassified title, such as that at issue, is to maintain an inactive relationship with the career service title designation through a valid leave of absence. In the present matter, appellant was granted a leave of absence without pay to accept a specific appointment as an unclassified Confidential Aide to the Criminal Presiding Judge. Regardless of the jurisdiction that this appointment was in, appellant resigned from this appointment and accepted another unclassified appointment without requesting another leave of absence. Thus, he failed to maintain an inactive relationship with the career service title designation through a valid leave of absence. Even accepting appellant's argument that his March 24, 1989 resignation did not end his leave of absence, appellant's approved leave of absence without pay would have expired on April 17, 1989. Appellant does not claim, nor does the record show, that he obtained a leave of absence from his Court Clerk Typing title after April 17, 1989. In fact, he concedes that his request for an additional leave of absence was denied.

The New Jersey statutes make no provision for an indefinite leave of absence and appointing authorities have no authority to grant such leave. *See In the Matter of Richard D. Fox, Plainfield Housing Authority* (Merit System Board decided June 16, 1998). Given this particular situation, appellant's leave could not continue indefinitely and the appointing authority had no need to take disciplinary action in order to separate appellant from the career service position.

N.J.A.C. 4A:2-1.1 states that unless a different time period is stated, an appeal must be filed within 20 days after the appellant has notice or should reasonable have known of the decision, situation or action being appealed. Appellant should reasonably have known that his leave of absence expired on April 17,

1989 if he was not aware that it actually expired on March 24, 1989 when he resigned from the unclassified appointment which was the reason for his leave of absence. Appellant did not inquire with the Department of Personnel into his employment status as Court Clerk Typing until November 1996, more than seven years later. Even if it could be established that the appointing authority failed to follow procedures under *N.J.A.C.* 4A:2-6.2(d), which governs resignations not in good standing, appellant's appeal is clearly untimely since he first inquired about his employment status more than seven years after he reasonably should have known that he was separated from his career service position.

Thus, appellant has not established that he met the statutory criteria regarding leave of absence procedures and has not met his burden of proof in this matter.

Order

Therefore it is ordered that this appeal be denied.

Correction of Good Faith Layoff Rights Error Prospective in Its Effect

In the Matter of Rose Warok, Bergen County Utilities Authority
(Commissioner of Personnel, issued June 26, 1998)

Rose Warok, formerly with the Bergen County Utilities Authority, represented by Gabriel Ambrosio, Esq., appeals the determination of her layoff rights as made by the Division of Human Resource Management.

Appellant was displaced from her permanent appointment as a Principal Account Clerk in the October 1995 reduction in force. A letter dated October 3, 1995 by the Division of Human Resource Management to appellant indicates that effective October 6, 1995, should Kathleen Tria exercise her displacement rights, appellant's name would be placed on the special reemployment lists for Senior Account Clerk and Account Clerk. It indicated no lateral or demotional rights. For reasons unexplained, she was not afforded special reemployment rights to the title of Clerk, and her name was not placed on a special reemployment list for Clerk at that time. Appellant did not submit an appeal of her layoff rights at that time.

In April 1997, the Division of Human Resource Management forwarded a special reemployment certification containing the names of five eligibles for the title Clerk to the appointing authority. As a result, eligibles ranking 1 and 2 were appointed to positions on April 28, 1997, the date the list was certified, and the fifth ranking eligible, Noella Shepard, was appointed on May, 27, 1997. Eligibles ranking 3 and 4 were not interested.

On June 3, 1997, the Division of Human Resource Management wrote the appointing authority that Ms. Warok had contacted that office to inquire why she was not on the special reemployment list for the title of Clerk. It indicated that appellant should be placed on that list with a rank of 2. In a written reply dated June 5, 1997, the appointing authority indicated that, in order to accommodate this decision, it would have to displace the fifth ranking eligible, Ms. Shepard, who was permanently appointed in good faith in proper order from a certified list. On June 30, 1997, the Division of Human Resource Management wrote to appellant indicating that the appointing authority had hired Ms. Shepard who left other employment to accept the offered position. It noted that given the time that elapsed between the date of the certification, April 28, 1997, and the date appellant brought the error to its attention, June 2, 1997, it determined that the list would stand as processed. Thus, it concluded that appellant's name would remain on the special reemployment list for Clerk and she would be considered for future vacancies and, when appointed, would be given retroactive seniority to April 28, 1997 for record purposes only.

On appeal, appellant alleges that it was a mistake that appellant's name was not placed on the Special Reemployment list for Clerk, and that the Division of Human Resource Management concluded that she was not entitled to relief as she had not notified the Division of its own mistake.

Noella Shepard, represented by Jack Traina, Esq., was made a party to these proceedings as her employment could be impacted by this decision. In reply to appellant's arguments, Ms. Shepard argues that the

initial letter of October 3, 1995 provides appeal procedures and notes that appellant had 20 days from receipt of the letter to appeal her determination. In addition, Ms. Shepard stated that a General Layoff notice was posted on August 7, 1995, 58 days prior to the layoff, which included the list of affected titles. She concludes that appellant had ample time to determine her civil service rights. Further, Ms. Shepard states that she gave up her permanent position of Senior Account Clerk with the Bergen County Sheriff's Department to accept this position in good faith. She notes that, in her appeal, appellant states that in April 1997 she contacted the Division of Human Resource Management upon discovery that the appointing authority had hired off special reemployment lists. Thus, she notes that appellant should have notified the Division of Human Resource Management in April 1997 instead of waiting until June 2, 1997, several weeks after the list was disposed of and one week after Ms. Shepard was appointed. Lastly, Ms. Shepard argues that appellant received and is still receiving disability payments and is not eligible for employment while on disability.

Conclusion

The record establishes that due to error, the Division of Human Resource Management failed to advise appellant at the time of her layoff that her name would be placed on the special reemployment list for Clerk. Additionally, the record further establishes that appellant raised the matter of an error in her special reemployment rights approximately a month after the Clerk special reemployment list was certified. Under these circumstances, there is insufficient basis to deny this appeal solely on nonjurisdictional timeliness grounds. *See In the Matter of Allen*, 262 *N.J. Super*. 438 (App. Div. 1993). However, it is noted that appellant failed to take advantage of the opportunity to correct the erroneous layoff rights determination when notified of her layoff rights by letter dated October 3, 1995.

As to the merits, due to error, appellant was not afforded special reemployment rights to the title of Clerk, and her name was not placed on a special reemployment list for Clerk at the time she was affected by a layoff in October, 1995 at the Bergen County Utilities Authority. On April 28, 1997, the special reemployment list for Clerk was certified and the first and second ranking eligibles were permanently appointed. On May 28, 1997, the fifth-ranking eligible, Ms. Shepard, was permanently appointed. On June 2, 1997, appellant contacted the Division of Human Resource Management to inquire why she was not on the special reemployment list for the title of Clerk. The Division of Human Resource Management responded that appellant would be considered for the next available position and, when appointed, would be given a retroactive appointment date to April 28, 1997, the date that the eligibles ranking 1 and 2 were appointed.

The Division of Human Resource Management erred when it excluded the title of Clerk from appellant's layoff title rights from her permanent position as a Principal Account Clerk. No evidence was submitted by appellant that this error was in bad faith or motivated by invidious reason. Upon notification of the error, steps were immediately taken to rectify the error. However, during the time that had elapsed between the layoff notification to appellant and the time appellant notified the Division of the error, Ms. Shepard, the fifth-ranking eligible on the special reemployment list for Clerk, was offered and accepted a permanent appointment from this list in good faith, and gave up her permanent position of Senior Account Clerk with the Bergen County Sheriff's Department to accept this position to do so. Given the unique circumstances of this case, and in balancing the competing interests of the parties, recission of the tenured status of an otherwise innocent party to provide a remedy in this case is not warranted. Additionally, based on an established and uniform Departmental policy, correction of a good faith layoff rights error such as that at issue, is not retroactive in its effect. *See In the Matter of Marveinia Kitchen and the Department of Law and Public Safety*, Docket No. A-6402-91T1 (App. Div. February 7, 1994). Thus, sufficient cause has not been presented to upset the decision of the Division of Human Resource Management to place appellant on the list for consideration to the next available position in that title and to provide her a retroactive appointment date for record purposes only to April 28, 1997 should she accept a permanent appointment.

Order

Therefore, I have ordered that this appeal be denied.

HEARING MATTERS:

Disciplinary actions involving drug-related offenses may be imposed for many reasons. Positive results of a drug screening or refusal to submit to drug testing often results in the removal of employees in law enforcement or public safety positions. Use, possession or being under the influence of a controlled dangerous substance on the job can also result in severe disciplinary penalties for anyone, no matter the title. The first four decisions concern the imposition of discipline for drug-related offenses both on and off duty, and explore the role of individualized reasonable suspicion in requiring an employee to submit to a drug test.

Additionally, we have included two recent Merit System Board decisions which address the objective nature of public safety assessment examinations and the grounds for disqualification from a public safety examination.

Clear Admission of On-Duty Drug Use Constitutes Violation of City Substance Abuse Policy

In the Matter of Donald Ives
(Merit System Board, decided Sept. 29, 1998)

Appellant, a Water Reader Meter and Installer, Salem City, was removed on charges of deficient and unsafe performance, damage to City property, violation of the City drug policy and falsification of facts to a supervisor. The charges stemmed from an incident in which appellant was involved in a one-vehicle accident while on duty in a City truck. Appellant ran the truck up on a curb, hit a fire hydrant, careened 50 feet and came to rest back into the street. Based on appellant's explanation for the accident that he lost consciousness, the City asked him to undergo a medical evaluation and then, required him to submit the results of the examination before clearing him to return to work. Appellant subsequently submitted a hospital report which indicated the presence of cocaine in his system, and, on his own volition, he told his supervisor that he had been using cocaine for more than a year, on and off duty, and had purchased cocaine on duty. He further admitted that he had been "partying" all weekend prior to the accident which occurred on a Monday.

The City had in place a substance abuse policy which provided for rehabilitation without discipline for drug abusers who voluntarily came forward, but conversely, provided that those who were caught using drugs would be terminated. The policy also specified that, in order for a drug test to be valid, the chain of custody could not be breached. After a hearing before the Office of Administrative Law, Administrative Law Judge Edgar R. Holmes (ALJ) dismissed the charges of falsification and violation of the City drug policy, but sustained the charges of deficient and unsafe performance and damage to City property. The ALJ recommended that the penalty of removal be modified to a six-month suspension and that appellant be demoted to his former position as Laborer. In regard to the violation of the drug policy, the ALJ found that appellant did not "come forward" as defined in the City's drug policy, but that his termination was not mandated, since the drug test was performed for medical diagnosis only. It was not based on any suspicion of drug use, and was therefore not valid.

The Merit System Board agreed with the ALJ that the test was not valid, but did not agree with the ALJ's conclusion that appellant's admission of drug use did not cure this defect as to his violation of the City's drug policy. The Board believed that appellant's clear admission of on-duty drug use constituted evidence of a clear violation of the drug policy and provided a sufficient basis for sustaining the charges of violation of the policy. However, in regard to the charge of falsification, the Board agreed with the ALJ that there was no evidence that appellant failed to disclose the relevant facts surrounding the accident or made untruthful statements as to his drug use to his supervisor. Further, the Board, in utilizing the concept of progressive discipline, agreed that removal was not appropriate in this case, noting that appellant had a seven-year employment record with no prior instance of major discipline. The Board emphasized that the six-month suspension, the most severe penalty short of removal, was not meant to minimize the seriousness of the offense, and was intended to serve as a warning that any future offenses might result in removal. Finally, the Board did not accept the ALJ's recommendation that appellant be demoted to Laborer, noting that the City had not imposed a disciplinary demotion and the ALJ had not provided a basis for his determination that demotion was an appropriate penalty.

Drug Test Impermissible for Return to Work Physical Examinations for Non-Safety Sensitive Positions

In the Matter of John Rue
(Merit System Board, decided Sept. 16, 1997)

John Rue, a Supervising Maintenance Repairer for the Trenton Housing Authority, was removed from his position on charges of insubordination, absence without leave, conduct unbecoming a public employee and neglect of duty. Specifically, the appointing authority asserted that the appellant refused to submit to a complete physical examination, including a drug test, upon his return to work from sick leave.

The matter was transmitted to the Office of Administrative Law for a hearing. Administrative Law Judge Joseph F. Martone (ALJ), upon the appellant's request for summary judgment, granted partial summary judgment finding that the appointing authority's requirement that the appellant submit to drug testing as part of his return-to-work physical examination was an unlawful intrusion on his privacy without an individualized reasonable suspicion of drug usage. However, the factual issue as to whether the appellant refused to undergo the non-drug testing part of the return-to-work physical examination and, if so, whether this was sufficient to support the charges remained and a full hearing was held on this issue.

The appellant was absent from work for four work days and upon his return, was required to submit medical documentation regarding his absence. The appellant complied with this request and submitted medical documentation to the appointing authority relating to his absence. The appointing authority found this documentation unacceptable because the appellant could not satisfactorily explain the medical significance of the description of his condition in this documentation stating he had "RUQ pain," an abbreviation later found to mean right-upper quadrant pain. Based on this rejection of the medical documentation, the appointing authority ordered the appellant to undergo a return-to-work physical examination. It informed the appellant that he would not be allowed to return to work prior to the completion of this physical. This physical was to be completed by the appointing authority's physician and a drug screen test was to be included as part of this physical.

When the appellant showed up for the physical, he was told that he was scheduled for a drug test. The appellant stated that he was only scheduled for an examination to determine his fitness for work and that there was no basis for a drug test and refused to take the drug test. At that point he was sent home without taking any part of the physical and the note of the attending nurse regarding the visit stated "[r]efuses drug screen and blood work at this time." The next day, upon questioning from the Executive Assistant to the Director of the Housing Authority, the appellant stated that he was not out of work for anything drug related and did not feel he should take the drug test part of the examination. Approximately one week later, he was once again scheduled for a return-to-work physical examination. Upon arrival, the appellant was once again told that he would have to submit to a drug test. He again refused and was sent home without taking any part of the physical. According to testimony from the attending nurse, the appellant was loud and

argumentative and his voice could be heard throughout the building. The appellant testified that he was not loud and argumentative with the nurse. The notes from the appellant's second visit stated that the appellant "[r]efuses complete physical exam, blood work, drug screen, and complete head to toe physical. Mr. Rue will submit to exam of RUQ pain only."

The ALJ partially granted the appellant's request for summary judgment. Specifically, he found that case law supported drug testing without individualized reasonable suspicion only in situations where an individual works in a safety sensitive position. *See generally New Jersey Transit PBA v. Transit Corp.*, 290 *N.J. Super.* 406 (App. Div. 1996). In *New Jersey Transit*, the Court determined whether an intrusion such as a blood or urine test was unreasonable and indicated that in order to determine whether such a test is permissible, courts must balance the intrusion of that practice on the individual's Fourth Amendment interest against its promotion of a legitimate governmental interest. The Court indicated that where "special needs" for such testing exist, such testing may be warranted. *Id.* at 424. Ultimately, the Court determined that Transit Police Officers were members of a "highly-regulated industry" and that the special government need of protecting the public from the risk posed by officers who were impaired by drugs or alcohol could not be ignored. *Id.* at 432. In the appellant's case, the ALJ found that the appellant's position was not one of inherent risk and did not involve split-second decisions which could cause great human loss. The ALJ also found that the position held by the appellant was not one which is highly regulated or one where an individual in the appellant's position would have a diminished expectation of privacy due to the nature of his employment. Finally, the ALJ determined that there was no evidence showing that the appointing authority had any suspicion that the appellant was using drugs in any manner. Therefore, the ALJ concluded that the appointing authority's imposition of such a drug test was unlawful in this regard.

After the granting of partial summary judgment, the issues as to whether the appellant actually refused to take the entire physical examination, and whether he acted in an inappropriate manner in his interactions with the attending nurse were resolved by the ALJ. The ALJ found that, based on the testimony of all of the witnesses, the appellant had not refused to take the physical examination and was willing to undergo the examination not including a drug test. Based on this finding, the ALJ found the appellant not guilty of insubordination, absence without official leave, conduct unbecoming a public employee and neglect of duty. The ALJ also found that the appellant, while speaking in a loud and animated manner in both of his interactions with the attending nurse, was not disrespectful, discourteous or disruptive in his actions and that there was no indication that anyone felt threatened by his actions. Based on this finding, the ALJ found the appellant not guilty of conduct unbecoming a public employee in this regard. The ALJ's overall recommendation was to dismiss all of the charges against the appellant and to reinstate him to his position.

The Merit System Board affirmed the ALJ's initial decision in its entirety in this matter, reinstating the appellant to his position and awarding back pay and counsel fees. The Board added a specific admonition to the appointing authority that it immediately cease its practice of requiring employees in non-safety sensitive positions to undergo drug screening as part of routine return-to-work physical examination in the absence of individualized reasonable suspicion.

Poor Work Performance Constituted Individualized Reasonable Suspicion for a Drug Test

In the Matter of Darrel Armstrong
(Merit System Board, decided March 10, 1998)

Appellant, a Police Officer with the City of Newark, was removed on charges of illegal use of drugs based on an April 1994 drug test which revealed the presence of cocaine. The City based the drug test on appellant's history of chronic absenteeism. Appellant challenged the drug test contending that the City did not have the individualized reasonable suspicion required for the test, and also contended that his wife put cocaine in his juice without his knowledge. The record indicated that appellant had a record of 29 absences during 1994, 51 days in 1990, 34 days in 1991, 27 days in 1992 and 41 days in 1993. Of these ab-

sences, several were related to an injury sustained as a result of a February 1994 on-the-job motor vehicle accident and 15 absences were related to prior on-the-job injuries. The record also revealed that, about four months prior to his February 1994 injury, the City had imposed a seven-day suspension on charges of chronic absenteeism, insubordination and violation of the sick leave policy. After a hearing at the Office of Administrative Law (OAL), Administrative Law Judge Ken R. Springer (ALJ) dismissed the charges concluding that appellant's excessive absenteeism, without more, did not constitute individualized reasonable suspicion to require a drug test. The ALJ noted that several of the 1994 absences were related to the February injury, and the City had not demonstrated a basis to believe that the absences were not based on genuine illness or injury. The ALJ also determined that, since the City had failed to reject appellant's explanations for his absences, it was now precluded from utilizing his attendance record as a basis for individualized reasonable suspicion for the drug test. Further, the ALJ found that, apart from his absences, the City offered no other basis for requiring appellant to submit to a drug test.

Upon its *de novo* review, the Merit System Board concluded that the City's order for the test was not based only on his 1994 absences, but on his attendance record for a several-year period. That a number of his 1994 absences resulted from an on-the-job injury was not dispositive of the matter. Additionally, the Board disagreed with the ALJ that the City's acceptance of appellant's explanations for his absences precluded his record of excessive absenteeism, prior to the February 1994 injury, from constituting individualized reasonable suspicion. Therefore, the Board remanded the matter to OAL for further review of the foregoing factors.

On remand, the ALJ found that appellant's pattern of questionable absences, coupled with his poor job performance and violation of the sick leave policy, would have been sufficient to constitute individualized reasonable suspicion if the City had taken action during the time period when the absences occurred from 1991 to 1993. However, the circumstances of appellant's absenteeism at the time of the April 1994 drug test did not support individualized reasonable suspicion since appellant had just been injured and had a legitimate reason for loss of work. Additionally, in regard to the underlying merits of appellant's defense, the ALJ set forth that appellant admitted that he consumed cocaine, but contended that his wife spiked his orange juice without his knowledge. Appellant's wife testified that she secretly slipped in a small amount of cocaine to appellant's juice to ease his back pain. She had read that cocaine had a numbing effect and thought it might be helpful as a pain killer. The ALJ found this testimony not credible, and concluded that appellant's wife's story was false.

Upon review, the Board upheld the charge and penalty of removal, concluding that appellant's history of significant absenteeism without sufficient explanation and his erratic pattern of attendance for approximately three years prior to the on-the-job injury was germane and instructive to the issue of individualized reasonable suspicion. The Board noted that there was no gap in the record in which appellant demonstrated a consistent pattern of absenteeism. Therefore, the Board concluded that this pattern, coupled with a record of poor performance, constituted individualized reasonable suspicion to require appellant to submit to a drug test. The Board further concluded that the City's failure to order a drug test based on appellant's pattern of absenteeism prior to the on-the-job-injury did not bar it from taking action after the injury. Failure to take action at a certain time in regard to a set of circumstances for which action is clearly indicated does not preclude action from being taken at a later time when no significant change in the circumstances has occurred.

No Individualized Reasonable Suspicion to Support Drug Testing of Police Lieutenant

In the Matter of Paul Tamburelli
(Merit System Board, decided Sept. 29, 1998)

Appellant, a County Police Lieutenant with the Hudson County Police Department, was removed for the illegal use of drugs based on a March 1996 drug test which revealed the presence of cocaine. Police Chief Lawrence Jernstedt asserted that he ordered the drug test based on information received from: 1) the Hudson County Prosecutor's Office in November

1995, and again in March 1996, concerning alleged drug use by appellant, and 2) a March 1996 memorandum from Deputy Police Chief William Barbito as well as oral discussions with Barbito that appellant had displayed "erratic behavior." The record indicates that in November 1995, Lieutenant Pamela Kane of the County Prosecutor's Office received information from a "reliable" informant who alleged to have witnessed appellant using drugs at an apartment in Jersey City. The record further indicates that, although the allegation was reported to the Police Department, no investigation was initiated. Subsequently, in March 1996, Lieutenant Kane received information from a public defender who advised that a client had second-hand information which appeared to corroborate the first informant's allegation of drug use. Again, no investigation was initiated to corroborate the allegation. The March 1996 memorandum from Barbito dealt primarily with an incident involving a Police Officer under appellant's supervision, and concluded that appellant could profit by attendance at a sensitivity training session. At the hearing, Police Chief Jernstedt testified that, absent this memorandum, he would not have ordered the drug test.

Administrative Law Judge Stephen G. Weiss (ALJ) found that these proofs, in the absence of any corroborating evidence, did not rise to the level of individualized reasonable suspicion required for the drug test. The ALJ found that the information which prompted administration of the drug test was the product of hearsay from persons whose assertions were not corroborated by anyone else. The ALJ found that no eyewitness testimony in regard to the drug use was offered at the hearing. Conversely, testimony was provided that when the information was first brought to the attention of the Police Chief in November 1995, he took no immediate action and "conceded that, standing alone, the available evidence in November 1995, was inadequate to justify a test at that time." The ALJ noted that nothing took place in March 1996 to corroborate or otherwise provide a justifiable basis for ordering the test. Additionally, the ALJ noted that the County's reliance on a memorandum from Deputy Chief Barbito was grossly misplaced. The fact that appellant had a problem with the way he dealt with subordinates in no way raised reasonable suspicion as to drug use. Therefore, the ALJ dismissed the charges and vacated the removal.

The Board agreed with the ALJ. However, the Board could not reinstate appellant to his position since the Hudson County Police Department had been dissolved prior to the resolution of the instant appeal. Therefore, the Board awarded appellant back pay, benefits and seniority from the date of his removal through the date of the dissolution of the Department, and provided him with special reemployment rights for County Police Lieutenant and eligibility to the Special Statewide Law Enforcement Officer listing pursuant to *N.J.S.A.* 40A:14-180 (Rice Bill).

Validity Demonstrated for Police Sergeant Examination

In the Matter of Adelino Benavente, et al.
(Merit System Board, decided Sept. 10, 1998)

Appellants Adelino Benavente, Hector Corchado, Gregory Gilhooly, Antonio Perez and Devin Zamora challenged the conduct of the examination and validity of the results of the examination for Police Sergeant (PM4090R), Newark. The subject examination was an assessment process, an integrated system of simulations designed to generate behavior similar to that required on the job. It consisted of two parts, an in-basket exercise and an oral/video exercise. Candidates who attained a score of 14 or more on the in-basket exercise were permitted to take the oral/video exercise. Appellants took the in-basket exercise and were permitted to take the oral/video portion of the examination, Messrs. Benavente, Corchado and Zamora were advised that their final scores were below passing. Mr. Gilhooly ranked number 79 on the list and Mr. Perez ranked number 131 on the list.

Appellants challenged the use of and lack of uniformity between multiple assessors. They cited *Rox v. Department of Civil Service*, 141 *N.J. Super*. 463 (App. Div. 1976); *Herbert v. State*, 162 *N.J. Super*. 449 (App. Div. 1978); and *Burke v. Township of Franklin*, 261 *N.J. Super*. 592 (App. Div. 1993) which they alleged

supported their claim. They maintained that they were severely harmed by the different and nonuniform methods, particularly the interactive methods, which were arbitrarily and capriciously used by other examiners testing examinees. They claimed that they were not questioned, guided or otherwise prodded as to what issues the examiner may have wanted to elicit or test as were other candidates. Further, they alleged that the examiner's failure to interact and question them rendered the examination invalid because the examiner had no basis by which to measure the five subject dimensions. They contended that the Department of Personnel did not take necessary and reasonable preventive measures to ensure that the examinees other than the initial group would not gain prior access to the test material since examinees were permitted to come and go freely from the testing facilities throughout the day of testing. Messrs. Gilhooly, Perez and Zamora also challenged the scoring of their oral/video exercises. Moreover, Mr. Zamora challenged the computation of his score. They requested that they be appointed as Police Sergeants or in the alternative, that the oral examination be declared null and void. Appellants also requested a hearing on this matter.

The Board found that *Rox v. Department of Civil Service, supra,* was not dispositive of the issues presented in this appeal. *Rox* involved a situation in which it was alleged that cautionary measures were not taken to insure that unauthorized persons did not secure in advance questions or other materials to be used in a test. The Court held that differences in scores received by Police Captain candidates tested by different teams indicated that the same standard was not used in testing every candidate. The Court found that one of the teams applied evaluative guidelines and graded the candidates on a more stringent basis than the other teams. Subsequently, the test was found not to be fair and impartial as required by merit system rules. The test results of the oral examination were invalidated.

However, in the test at issue, all assessors participated in a multi-day training session for scoring this particular examination. These assessors were tested during the training session to ensure that they were applying the scoring criteria in the same framework. Assessors who consistently assigned scores outside this framework during the training session were not utilized during the scoring process. An inter-rater reliability study was done and only assessors with the highest reliability were chosen. Further, the format and administration of the examination was not similar to that in *Rox*. The subject examination was held in three test centers and was administered over a period of time that spanned one day. In contrast, the *Rox* examination was held on multiple days. Moreover, following the *Rox* decision, the Attorney General's Office stated that there should be an effort made to eliminate multiple night oral examinations wherever possible. If this was not possible, the Department of Personnel was to adhere to a variety of safeguards including the continuance of taping examinations, evaluating and grading candidates on the basis of the same guidelines and taking precautions to preclude communicating of test content. The Department has complied with all of the above. As to appellants' claim that the examination was invalid because all candidates were not questioned by the test assessors, assessors for this examination were trained specifically for the administration of this examination content. The examination format was designed to keep candidate assessor interaction controlled and minimized. However the format was not oriented toward inflexible automatism. That is, assessors were trained to provide limited probes of candidates under specific conditions. The probes used by examination assessors were designed to keep candidates focused in the specific issues involved in the examination to assess the candidates. This ensured that candidates were provided a fair opportunity to fully answer the examination questions. Under these circumstances, the Board found no material issue of disputed fact had been presented which would warrant a hearing and denied this appeal. Appellants thereafter sought further review of this matter in the Superior Court, Appellate Division.

Upon review, the Court did not uphold the appellants' contentions regarding examination security and found that the appellants failed to make a *prima facie* showing that the testing procedures utilized violated the security requirements addressed in *Rox*. The Court did conclude that it had insufficient information to determine whether objective criteria were used to score the video/oral examination or whether there was as much standardization in testing as there was in *Rox*. Specifically, the Court noted that there was nothing in the record to indicate that the examiners were given written instructions as to what the appropriate responses should have been, what points the candidate was expected to cover, how each individual response was to be weighed or how to evaluate the significance of specific omitted or erroneous responses. The Court remanded the matter for a hearing at the Office of Administrative Law and stated that the initial decision and final agency action respecting the viability of

the test shall be made upon specific findings in light of *Rox* and this opinion. It appears that the Court did not have certain confidential examination materials, which provided guidance to the assessors, because they were not included in the record due to security concerns. Nevertheless, in compliance with the decision, the Department of Personnel granted a hearing.

The matter was heard by Administrative Law Judge Maria Mancini La Fiandra (ALJ) who concluded that the Department of Personnel overcame appellants' *prima facie* showing of subjectivity and that the examination was accompanied by appropriate procedures to assure standardized objective evaluation.

As to the Court's specific areas of inquiry, the ALJ found that while assessors asked probing or redirecting questions in order to have a candidate clarify a statement or language peculiar to the law enforcement community, assessors did not ask probing questions or questions which suggested an answer when the candidate omitted information or responded with clearly erroneous information. The ALJ further found that as to the experience and expertise of assessors and whether they brought a degree of uniformity *inter se* to their respective individual expertise and experience, the ALJ found that assessors participated in an apprenticeship program and training sessions.

Assessors who consistently assigned scores outside of the consensus during the training session were not utilized during the scoring process. For this specific examination, only assessors with proven track records were employed, and these assessors were reevaluated and given training for each specific test they scored.

Turning to cross checking of scores by other examiners to see how close the assigned scores were, the ALJ found that assessors engaged in this practice while participating in "mock" examinations, and were required to justify their scoring of each candidate.

Lastly, as to any other factors which might have assured a modicum of uniform objective, standardized evaluation, the ALJ found that while some candidates were asked questions while others were not, one appellant's reflections in this regard were unreliable when measured against the certified transcript of her oral examination. The ALJ also found that assessor trainees were screened to eliminate those who were biased and assessors were told to ignore factors such as an accent, stutter, and cultural idiosyncrasies, such as avoiding eye contact. Assessors were given such training in law enforcement as might be required for the administration for the specific examination and were provided with assistance in scoring behaviors not listed on the possible courses of action.

The ALJ compared this examination to the one challenged in *Rox v. Dept. of Civil Service*, *supra*, and found that facial differences alone between the examinations eliminated much of the subjectivity in evaluating answers which the Appellate Division found objectionable in *Rox*. It was noted that the training, the elimination of biased and non-conforming assessors, the Orientation Guide/Background Information Booklet given to candidates, and assessors' manuals all served to heighten the objective nature of the examination. The ALJ concluded that the Department overcame appellants' *prima facie* showing of subjectivity and recommended that appellants' challenge to the conduct and validity of this examination be denied.

Upon review, the Merit System Board found that the conduct of the examination was psychometrically appropriate and that the results were valid. The Board therefore affirmed the initial decision of the ALJ and dismissed the appeals of Adelino Benavente, *et al*.

Make-up Candidate's Attendance at Study Group Results in Disqualification

In the Matter of Adrian Klige
(Merit System Board, decided Dec. 8, 1998)

Formal written promotional examinations for Police Sergeant were scheduled for, and held State-wide, on September 12, 1996. Adrian Klige requested a make-up examination for medical reasons. The make-up request was granted based on *N.J.A.C.* 4A:4-2.9(b) which authorizes such make-up tests in cases involving debilitating injury or illness requiring an extended convalescent period, provided that the candidate submits a doctor's certification containing a diagnosis and a statement showing that the candidate's physical condition precluded participation in the examination. In

this case, Klige provided the necessary documentation and was granted a make-up examination. In particular, Klige provided statements from Dr. Laurie Vogel and Dr. David Richmond attesting to his inability to participate in the original administration due to a medical disability.

Klige took the make-up examination on November 12, 1996 and achieved a final score of 77.500 with a rank of A2. Shortly thereafter, 46 Plainfield Police Sergeant test candidates filed a written complaint alleging misconduct on Klige's part. The complaint specifically alleged that Klige attended a Police Captain/Police Lieutenant study group following the original September 12, 1996 test administration at which time Police Sergeant test questions were "dissected." The complaint was further supplemented by several individually signed and notarized statements from Police Lieutenant test candidates.

Klige submitted a detailed response to the allegations which included an adamant denial that he had access to the test questions or heard test questions being "dissected" at a study group. Additionally, he alleged that several of the 46 Officers who signed the original complaint were coerced into doing so. Finally, he characterized several of the allegations as unsupported hearsay.

Based on the factual disputes evident, and in accordance with the provisions of *N.J.A.C.* 4A:2-1.1(d), the Merit System Board ordered that this matter be referred to the Office of Administrative Law (OAL) for a hearing.

At the hearing before the (OAL), Sergeant Michael Gilliam testified that he attended a Police Captain/Police Lieutenant examination preparation review course under the auspices of Dr. Jeffrey Bernstein and that on at least two occasions between September 12, 1996 and November 12, 1996 he recalled seeing Klige. Sergeant Gilliam also testified that attendees reviewed more than sixty questions which they were told came from the Police Sergeant examination held on September 12, 1996 and that under these circumstances, he believed Klige's presence unusual. Sergeant Gregory Turner also testified that he saw Klige at the Police Captain/Police Lieutenant review course on at least two occasions following the September 12, 1996 administration of the Police Sergeant examination. He felt that Klige's presence was unusual since the Police Sergeant examination had already been given. Similarly, Lieutenant Keith Pagusch testified that he observed Klige in attendance at the Police Captain/Police Lieutenant study group on at least one occasion following September 12, 1996. These three witnesses also testified that at this study group, they were advised that Police promotional make-up examinations are identical in content to the original administration.

A witness for Klige, Sergeant Dennis Makowski, and Klige also testified. Klige testified that he had attended Police Sergeant study group sessions prior to September 12, 1996 but had missed sessions immediately prior to that date due to an injury. After administration of the September 12, 1996 Police Sergeant examination, and upon his request, Police Sergeant study materials Klige was not able to obtain prior to the test date due to his injury were made available at Police Lieutenant/Police Captain study group sessions. Klige testified that each time he attended, he would pick up a study packet, take practice tests and then leave. Sergeant Makowski also attended the Police Lieutenant/Police Captain study group and testified that Klige had advised him that he was in attendance to make-up for regularly scheduled training courses. Both Sergeant Makowski and Klige testified that they were unaware that a make-up Police promotional examination is identical in content to the original examination.

Administrative Law Judge Stephen G. Weiss (ALJ) found that Klige attended at least two review sessions held after September 12, 1996 at which questions from the original Police Sergeant promotional examination were the subject of extensive review. While the ALJ recognized that there was some dispute with respect to what was actually taking place in the room at the time Klige was present, it was not disputed that Klige was present in the very room where questions identical or substantially identical to those posed on the original examination were reviewed openly, thereby providing him with an entirely unfair advantage over other test candidates. Under these circumstances, the ALJ recommended that Klige be disqualified from the subject examination. Upon review, the Merit System Board affirmed the recommendation that Klige be disqualified from the Police Sergeant, Plainfield examination.

OF PERSONNEL INTEREST

NEW JERSEY ANNOUNCES NEW FIRE FIGHTER EXAMINATION

By: Gilbert L. Johnson, Director, Selection Services

The New Jersey Department of Personnel announced a new entry-level fire fighter examination on June 21, 1999. As a part of the announcement process, the Department of Personnel is distributing 150,000 applications for the examination. The examination will consist of three parts: a written cognitive test which is designed to measure basic knowledge and ability needed by a fire fighter, such as reading comprehension and basic mathematics; a written teamwork component which is a survey of past performance and which asks questions similar to those on a job application or in a job interview; and a physical performance test which will consist of a series of events directly related to a variety of physical activities routinely performed by fire fighters on the job, such as climbing a ladder and dragging a hose.

The release of the applications was based on the approval of United States District Court Judge Nicholas H. Politan in a June 15, 1999 ruling. In making the decision, Judge Politan agreed with the Department of Personnel that each of the three components will be used to rank candidates and that each will be weighted as one third of a candidate's final score. The Department of Personnel, in conjunction with the United States Department of Justice and with the approval of the Court, will establish a minimum passing score for each component of the examination. Candidates will be required to achieve a passing score for each component. Failure to meet the minimum passing score for any of the three components will result in an overall failing score.

Concern about the fairness of the examination toward minority candidates dates back to 1977 when civil rights groups made it the subject of litigation against the Department of Personnel and twelve of the State's largest municipalities. This action resulted in the parties entering into a Consent Decree in 1980 which requires oversight by the United States Department of Justice. The Department of Personnel, along with a number of local jurisdictions, are involved in a recruiting campaign in order to attract the most qualified and diverse pool of candidates for the fire fighter examination. This effort will include outreach to minority communities and a statewide publicity campaign.

The written portions of the examination will be administered in the fall and the physical performance test will be scheduled shortly thereafter.

FROM THE COURT

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

Department of Personnel Determination of Title Rights Upheld

In the Matter of State Layoff Title Rights
A-5847-95T3 (App. Div., Dec. 9, 1997)

This appeal is taken by Locals 1032, 1033, 1037 and 1038 of the Communications Workers of America, AFL-CIO (jointly referred to hereafter as CWA) from a final administrative decision of the New Jersey Commissioner of Personnel dated July 7, 1995, and from the May 24, 1996 decision which denied its reconsideration. The July 7, 1995 decision responded to a CWA letter of June 5, 1995 appealing a determination by the Department of Personnel (DOP) of lateral, demotional and special reemployment title rights effective for the scheduled July 8, 1995 layoff of approximately 2,900 State workers from nine departments and commissions. DOP's title rights determinations had been communicated to CWA during a meeting held on May 12, 1995, during which it was also advised of appeal rights under *N.J.A.C.* 4A:8-2.6.[1] In its June 5, 1995 letter, CWA complained that as an elected bargaining representative "for thousands of workers affected by the 1995 layoff [it] was never given the opportunity to negotiate with the DOP concerning layoff rights," although management was allowed input respecting the layoff rights determination. The CWA appeal raised other challenges respecting the layoff rights determination process, including use by DOP of a *Dictionary of Occupational Titles* promulgated by the U.S. Department of Labor, or the *Occupational Code Dictionary,* without adopting an administrative rule. In addition, objection was taken to several specific title rights determinations. A hearing was requested.

As the disputes were not centered upon factual differences, the request for plenary hearing was denied. *See also N.J.A.C.* 4A:8-2.6(a)2 (providing only for review of the written record).

Save for reducing its challenge to specific title rights determinations to two titles, "Day Care Counselor Assistant" and "Customer Service Representative," CWA presents in this appeal substantially the same arguments rejected by the Commissioner in her decisions of July 7, 1995 and May 24, 1996. CWA argues that: (1) it was a violation of principles of administrative due process to allow appointing authorities to comment on proposed title rights determinations of the Division of Personnel Management, while denying similar input to employees and their organizations; and, (2) DOP should not have used the *Dictionary of Occupational Titles* or the *Occupational Code Dictionary* in the title rights process, absent their adoption by Rule.

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[1] *N.J.A.C.* 4A:8-2.6 provides:
(a) Permanent employees and employees in their working test period may file the following types of appeals:
1. Good faith appeals, based on a claim that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons. Such appeals shall be subject to hearing and final administrative determination by the Merit System Board (see *N.J.A.C.* 4A:2-2.9 et seq.); and/or

2. Determination of rights appeals, based on a claim that an employee's layoff rights or seniority were determined and/or applied incorrectly. Such appeals shall be subject to a review of the written record by the Department of Personnel, with a right to further appeal to the Commissioner (see *N.J.A.C.* 4A:2-1.1(d)).

(b) Good faith and determination of rights appeals shall be filed within 20 days of receipt of the final notice of status required by *N.J.A.C.* 4A:8-1.6(f). Appeals must specify what determination is being appealed, the reason(s) for the appeal, and the relief requested.

(c) The burden of proof is on the appellant.

We have considered carefully these arguments and the specific title rights challenges in light of the record, which is not in material dispute of fact, and affirm, substantially for the reasons set forth in the Commissioner's decisions of July 7, 1995 and May 24, 1996.

We add these comments. First, administrative agencies are granted wide latitude in selecting procedures appropriate to implementation of their legislative mandate. *Texter v. Dept. of Human Services*, 88 *N.J.* 376, 383-84 (1982). It is also of interest to recall that in *State v. Communications Workers of America, AFL-CIO,* 285 *N.J. Super.* 541 (App. Div. 1995), *certif. denied,* 143 *N.J.* 519 (1996), we said:

> The statute makes it clear that the employer may take layoff action and demotions in connection with a budgeting decision such as the present where the interests of economy and efficiency require it. *N.J.S.A.* 11A:8-1. The regulations mandate that the Commissioner shall, where demotional layoff is used, determine demotional and special reemployment rights for all career service titles prior to the effective date of the layoff. *N.J.A.C.* 4A:8-1.1(b). Thus, a comprehensive demotional layoff scheme was created by statute and regulations. We are convinced that the managerial decision as to whether to lay off or demote requires that it be carried out without the burden of mandatory negotiation.
>
> [*Id.* at 551.][2]

CWA's argument in this appeal has been tempered to complain of denial of "input" rather than, as in the appeal to the Commissioner, denial of "opportunity to negotiate . . . concerning layoff rights." Nonetheless, it is evident that, whether under the New Jersey Employer-Employee Relations Act (*N.J.S.A.* 34:13A-1 to -29) or otherwise, CWA believes that it is entitled to participate in the tasks committed to the Department of Personnel respecting the efficient and timely fixing of title rights when layoffs become necessary. Under the present statutory and regulatory scheme, DOP may fulfill adequately these obligations without being required to engage in rule-making like hearings, negotiations, or in hundreds or even thousands of subjective, individual pre-determination conferences during the brief period statutorily prescribed for effectuating layoffs. *N.J.S.A.* 11A:8-1.

Under authority delegated by the legislature, *N.J.S.A.* 11A:2-6d, the Merit System Board has adopted regulations which seek to minimize the impact of a layoff. These include charging *appointing authorities* with lessening the likelihood of layoffs by voluntary alternatives (*N.J.A.C.* 4A:8-1.2) and requiring *appointing authorities* to lessen the possibility, extent or impact of layoffs (*N.J.A.C.* 4A:8-1.3). In each of these steps, consultation by an *appointing authority* with affected negotiations representatives is required. Indeed, a summary of such consultations must be provided to the DOP at least thirty days prior to issuance of layoff notices. *N.J.A.C.* 4A:8-1.4(a)8 and (a)9. Moreover, negotiations representatives are given the right to be present at any meeting with individual employees where layoff rights are discussed. *N.J.A.C.* 4A:8-2.1(e).[3] Nonetheless, it is clear as to title rights that:

> The Commissioner or authorized representative of the Department of Personnel shall determine seniority and designate lateral, demotional and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to affected parties.
>
> [*N.J.A.C.* 4A:8-1.1(b).]

Lateral title comparability, demotional rights, and special reemployment rights are determined by the DOP based upon criteria set forth in *N.J.A.C.* 4A:8-2.1(a) - (c), while specialized credential variant title rights are subject to *N.J.A.C.* 4A:8-2.1(d).

Appeal remedies for dissatisfaction with layoff determinations have been divided into two categories: "good faith" appeals, which are committed for "hearing and final administrative determinations" to the Merit System Board; and "determination of rights" appeals, which are determined upon "review of the written record by the Department of Personnel, with a right to further appeal to the Commissioner. . . ." *N.J.A.C.* 4A:8-2.6. The present appeal falls into the latter category.

We believe that the process, as administered, is fair, particularly given the complexity and magnitude of the undertaking, and the time requirements under which it must be conducted.

As to use of the *Dictionary of Occupational Titles*

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[2] *Accord In re New Jersey Turnpike Authority,* 292 *N.J. Super.* 174, 177-79 (App. Div.), *certif. denied*, 147 *N.J.* 260 (1996); *see also State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54, 90 (1978)(title rights in layoffs not negotiable).

[3] No appointing authorities have been joined. If there have been violations of any of these regulations by appointing authorities, they are not before us.

or the *Occupational Code Dictionary* as aids in discharging the regulatory functions committed to DOP, it is not the function of the courts to tell an agency how to do its day-to-day job. A decision to use such reference authorities does not require rule-making or administrative adjudicatory procedures. *See In re Request for Solid Waste Util. Customer Lists*, 106 *N.J.* 508, 518-20 (1987). We find no formal agency action constituting a *de facto* rule. *See Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 331 (1984).

Finally, as to the determinations made respecting the two specific titles of "Day Care Counselor Assistant" and "Customer Service Representative", we are satisfied that the Commissioner's decision was supported by sufficient credible evidence in the record as a whole. *R.* 2:11-3(e)(1)(D).

Affirmed.

Seniority for Layoff Purposes Determined By Length of Permanent Service

In the Matter of Alfred Long, City of Plainfield

A-384-97T1 (App. Div., Nov. 10, 1998)

Alfred Long appeals from a decision rendered by the Merit System Board sustaining the action of the City of Plainfield terminating his employment as a part of a reduction in force. Long contends that he was denied his lateral and demotional title rights and that he was entitled to an evidentiary hearing. We reject these arguments and affirm the Board's determination.

I.

The facts are not in dispute. On July 6, 1992, the City provisionally appointed Long as a parking enforcement officer. Long thereafter applied to take the open examination, which rated applicants based upon their education and experience. An official eligible list was issued on December 17, 1992. Long and Levonia Patterson, another applicant, appeared on the roster. The list was certified on February 3, 1993. On March 30, 1993, both Long and Patterson received regular appointments. On October 14, 1994, Long's employment was terminated in a reduction in force.

During Long's tenure, the City hired Monica Thomas as a cashier. The Department of Personnel maintains separate job titles for the positions of parking enforcement officer and cashier. The job description for parking enforcement officer defines the duties of the position in the following terms:

> Under direction, patrols designated areas and issues summonses for motor vehicles to enforce state, county or municipal statutes, resolutions, and ordinances or regulations related to the parking of motor vehicles within the municipality; does related work as required.

The job description for cashier defines the duties of that position as follows:

> Under supervision performs varied assignments of limited complexity involved in the receipt and disbursement of money, answers routine inquiries, may issue receipts and post, bill, and/or maintain accounts, and adds and subtracts totals manually and/or uses a cash register, calculator, and/or other type (sic) of office machine[s]; does related duties as required.

Upon receiving his layoff notice, Long asserted that he had greater seniority than Patterson and was thus entitled to retain his position as parking enforcement officer. Long contended, alternatively, that he had the right to displace Thomas because the position of cashier was lower than that of parking enforcement officer but involved substantially similar duties. The City found no merit in these claims. Long appealed to the Board. On August 13, 1997, the Board issued its final decision sustaining the City's action. This appeal followed.

II.

We begin with the well-recognized principle that an administrative decision will not be reversed unless it was arbitrary or capricious or unsupported by substantial credible evidence contained in the record. *In re CAFRA Permit No. 87-0959-5*, 152 *N.J.* 287, 304 (1997); *Texter v. Department of Human Servs.*, 88 *N.J.* 376, 382 (1982); *Henry v. Rahway State Prison*, 81 *N.J.* 573, 579-80 (1980). Applying that standard, we perceive no sound basis to disturb the Board's decision.

A.

We first address Long's argument that the Board deprived him of his lateral title right to displace Patterson. Lateral title rights are defined in *N.J.A.C.* 4A:8-2.1(a) as follows:

> A lateral title right means the right of a permanent employee to exercise displacement rights . . . against an employee in the layoff unit holding a title determined to be the same or comparable to the affected title of the employee . . . . Title comparability shall be determined by the Department of Personnel based on the following criteria: (1) The titles shall have substantially similar duties and responsibilities and . . . class code . . . (2) educational and experience requirements for the titles are the same or similar . . . (3) no special skills, licenses certifications or registration requirements which are not also mandatory for the affected title; and (4) [a]ny employee in the affected title with minimal training and orientation could perform the duties of the designated title by virtue of having qualified for the affected title.

Resolution of the issue hinges upon which of the two employees had greater seniority. Seniority is defined as "the amount of continuous permanent service." *N.J.A.C.* 4A:8-2.4. It is determined by calculating the "total calendar years, months and days in continuous permanent service." *Ibid.* Permanent service is defined as the status of "an employee . . . who has acquired the tenure and rights resulting from regular appointment and successful completion of the working test period." *N.J.A.C.* 4A:1-1.3. The working test period begins on the date of regular appointment. *N.J.A.C.* 4A:4-5.2(a). It does not include any time served by an employee under provisional, temporary, interim or emergency appointment. *Ibid.* Regular appointment "means the employment of a person to fill a position in the competitive division of the career service upon examination and certification, or the employment of a person to a position in the noncompetitive division of the career service." *N.J.A.C.* 4A:1-1.3.

Within this regulatory framework, Long and Patterson received their regular appointments on the same date. Although Long argues that he completed his working test period during his provisional service, the regulations belie this conclusion. The working test periods for both Long and Patterson began on the date of their regular appointments, March 30, 1993.

Long's attack upon Patterson's completion of the working test period was without merit and did not require an evidentiary hearing. We do not believe that a public employee should be permitted to challenge whether another public employee properly completed his or her working test period so long after the fact, and in the context of purporting to exercise lateral title rights.

Cipriano v. Department of Civil Service, 151 *N.J. Super.* 86 (App. Div. 1977), is clearly inapposite because there, the Civil Service Commission, the administrative agency charged with enforcing personnel regulations, voided an employee's permanent appointment based upon the employee's failure to complete his working test period. *Id.* at 89. Moreover, in *Cipriano*, it was undisputed that the employee was "working out of title" during his working test period, contrary to former *N.J.A.C.* 4:1-6.4, now *N.J.A.C.* 4A:3-3.4. Whether Patterson successfully completed his working test period was within the special administrative competence of the appointive authority and ultimately the Merit System Board. Long's belated expression of dissatisfaction with the manner in which Patterson performed his duties during the probationary period, a dissatisfaction not harbored by the appointive authority, cannot be the basis for upsetting the Board's calculation of seniority.

The two individuals were thus in the same position with respect to seniority rights, with one critical difference. Long was suspended from his position for two days because of disciplinary reasons. Therefore, Patterson had greater seniority rights than Long when the reduction in force went into effect. The City and the Board were thus correct in retaining Patterson and terminating Long. *N.J.A.C.* 4A:8-2.4(e).

B.

We next consider whether Long had demotional title rights to the position of cashier. Demotional title rights are defined in *N.J.A.C.* 4A:8-2.1(b), as follows:

> A demotional title right means the right of a permanent employee to exercise displacement rights . . . against an employee in the layoff unit holding a title determined to be lower than but related to the affected title of the employee . . . . Demotional title rights shall be determined by the Department of Personnel based on the following criteria: (1) The titles shall have **lower** but substantially similar duties and responsibilities and a **lower** class code . . . (2) [t]he educational and

> experience requirements for the titles are the same or similar . . . (3) [s]pecial skills, licenses certifications or registration requirements shall be similar and not exceed those which are mandatory for the affected title; and (4) [a]ny employee in the affected title with minimal training and orientation could perform the duties of the designated title by virtue of having qualified for the affected title.

Long's claim of demotional title rights turns on whether the position of cashier is "related" to that of parking enforcement officer. Based upon the job descriptions quoted previously, the City and the Board could reasonably have found that the duties and responsibilities encompassed in the two positions are substantially different. We are satisfied that Long was not entitled to an evidentiary hearing respecting whether the two positions were "related." The job descriptions disclosed that the duties of the two titles were not "substantially similar." Unlike *Cunningham v. Department of Civil Service*, 69 *N.J.* 13 (1975), where "a large number of the duties described in the [job] specifications [were] similar or identical," *id.* at 25, the descriptions of the titles in issue in this case revealed that the position entailed entirely different duties and responsibilities. If a parking enforcement officer were asked to perform the duties of a cashier, he or she could legitimately object on the basis that he or she would be working outside his or her title. *See N.J.A.C.* 4A:3-3.4. Because the responsibilities of the two titles are so dissimilar, no adjudicative facts were in issue. We thus defer to the administrative agency's expertise and hold that no hearing was required.

We cannot fairly say that the conclusion reached went so wide of the mark a mistake must have been made. The finding made was not so plainly unwarranted that the interests of justice demand intervention and correction.

Affirmed.

School District Takeover Act Provides for Immediate Termination and No Layoff Rights for Auditors

I/M/O Howard Johnson, Norman Jeffries, Virginia Devane, Concetta Caponegro and Bessie White v. State Operated School District of Newark
A-2289-96T3 (App. Div., April 17, 1998)

Howard Johnson appeals[1] from a final decision of the Merit System Board challenging his termination as Chief Auditor of the school district of the City of Newark and the refusal by the State-operated school district, created pursuant to *N.J.S.A.* 18A:7A-14 to -52 (the Takeover Act), to afford him reemployment rights in accordance with the Civil Service Act, *N.J.S.A.* 11A:1-1 to 11A:12-6.

Johnson's employment was terminated in July 1995 when the State assumed control of the district. Prior to the takeover, Johnson had served as the Chief Auditor of the Newark School District since May 31, 1990. From 1984 to 1990, he had served as the Senior Auditor. Johnson alleged that although his employment as an auditor had been "immediately terminated" pursuant to *N.J.S.A.* 18A:7A-42a(3), he had permanent status as an auditor entitling him to layoff rights under the Civil Service Act and regulations promulgated thereunder.

The Merit System Board determined that by virtue of the express language of *N.J.S.A.* 18A:7A-42(a)3, when considered together with the other statutory provisions dealing with employment rights after a State takeover of a school district, it had no jurisdiction to review Johnson's challenges. Relying on the interpretation of the Takeover Act by the Attorney General's Office, the Board essentially concluded that only employees whose positions were abolished pursuant to *N.J.S.A.* 18A:7a-44(a) and (c) are "entitled, by virtue of tenure or seniority, to assert a claim to any position or to placement upon a preferred eligibility list for any position which has not been abolished." Accordingly, the Merit System Board refused to further consider Johnson's claim. We agree with that determination and affirm.

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[1] The notice of appeal lists Norman Jeffries, Virginia Devane, Concetta Caponegro and Bessie White as additional appellants. However, no arguments were made on behalf of these appellants and, therefore, we consider their appeals abandoned.

N.J.S.A. 18A:7A-42(a)(1) provides:

> a. In a State-operated school district, *all officers, employees and consultants, professional and nonprofessional ...shall be employed or retained, transferred and removed as provided below*:
>
> (1) The State district superintendent may appoint, transfer and remove clerks, pursuant to the provisions of Title 11A (Civil Service) of the New Jersey Statutes and the provisions of *N.J.S.A.* 18A:17-1 *et seq*. (emphasis added).

N.J.S.A. 18A:7A-42(a)(3) provides:

> (3) The State district superintendent of schools shall, subject to the approval of the commissioner or his designee, make all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and nonprofessional, except that *the services of the district auditor or auditors and attorney or attorneys shall be immediately terminated by creation of a State-operated school district* pursuant to section 15 of P.L.1975, c. 212 (C. 18A:7A-15). (emphasis added).

N.J.S.A. 18A:7A-43 provides:

> *Except as otherwise provided in this amendatory and supplementary act*, any person serving under tenure or permanent civil service status shall retain all tenure rights and may continue to serve in the district pursuant to the provisions of this section. However, they shall perform only such duties as prescribed or delegated by the State district superintendant and for which they may be appropriately certified. (emphasis added).

N.J.S.A. 18A:7A-44(a) provides:

> a. Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. *Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the individual may be entitled by virtue of tenure or seniority within the district.* No individual whose position is abolished by operation of the subsection shall retain any right to tenure or seniority in the positions abolished herein (emphasis added).

N.J.S.A. 18A:7A-44(c) provides, in pertinent part:

> (c) Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and non-instructional, other than those positions abolished pursuant to section a. of this section, shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganization district staff....*Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein* (emphasis added).

In construing these provisions of the Takeover Act, our goal is to effectuate the legislative intent. *See AMN, Inc. v. South Bruns. Tp. Rent Leveling Bd.*, 93 *N.J.* 518, 525 (1983). That intent can be determined by reviewing the language of the law, the legislative scheme, the policies underlying the law, and the legislative history. *Paramus Substantive Certification No. 47*, 249 *N.J. Super*. 1, 8 (App. Div. 1991); *King by King v. Brown*, 221 *N.J. Super*. 270, 275 (App. Div. 1987). We also must consider other laws which are *in pari materia*. *Probst v. Board of Education of Borough of Haddonfield*, 249 *N.J. Super*. 222, 228 (App. Div. 1991),

rev'd on other grounds, 127 *N.J.* 518 (1992). Statutory construction must consider the breadth of the objectives of the legislation as well as the common sense of the situation. *Riccio v. New Jersey Mfrs. Ins. Co.,* 179 *N.J. Super.* 65, 70 (App. Div. 1981). Application of the concept of reasonableness is an additional step which assists a court in ascertaining legislative intent. *County of Essex v. Waldman*, 244 *N.J. Super.* 647 (App. Div. 1990), *certif. denied*, 126 *N.J.* 332 (1991). Finally, statutory language which is plain and clear should be interpreted according to its plain meaning. *In re Jamesburg High School Closing*, 83 *N.J.* 540, 548 (1980); *Sheeran v. Nationwide Mutual Ins. Co.*, 80 *N.J.* 548, 552 (1979).

Here, the Legislature's purpose in enacting the Takeover Act is clear from the language of the statute, which vests broad authority in the State Superintendent to take all necessary actions to correct the operational deficiencies of local school districts. The language of the statute initially directs the State to monitor school districts and to intervene in the district's operation when severe deficiencies exist. Once intervention is implemented, the State Superintendent assumes total control of all facets of the district's operation, including personnel management, fiscal and educational functions. *N.J.S.A.* 18A:7A-15.1. This is a statutory grant of power bestowed to correct an extraordinary circumstance, the utter failure of the local board to educate its children.

A reading of all of the foregoing statutory sections together, all of which are part of the same statutory framework, evinces that the Legislature expressed itself clearly regarding the employment rights to be retained by particular employees within the school district upon a takeover by the State. Indeed, reading each of those provisions, the Legislature expressly stated which senior or tenured school board employees would continue to be employed by the district after their positions were abolished. *N.J.S.A.* 18A:7A-42(a)(1); *N.J.S.A.* 18A:7A-44(a) and (c). By contrast, *N.J.S.A.* 18A:7A-42(a)(3) expresses the Legislature's intent regarding auditors and attorneys employed in the district. That provision states plainly that the services of individuals employed in the district as auditors and attorneys are to be immediately and completely terminated upon the takeover of the school district. Unlike the other provisions within the statutory framework, *N.J.S.A.* 18A:7A-42(a)(3) does not at all provide for a retention of employment rights. Simply put, when the Legislature wanted individuals to retain tenure or seniority rights to reemployment, it expressly provided for those rights. Its silence in this regard in *N.J.S.A.* 18A:7A-42(a)(3) is a plain and clear expression of its intent that attorneys and auditors who are terminated pursuant to that law do not retain reemployment rights to other positions in the district.

Johnson contends, nonetheless, that *N.J.S.A.* 18A:7A-42(a)(3) is only applicable to "outside" or external auditors who provide services as consultants and not to auditor-employees of the district. However, nothing in the statute supports that argument; indeed, reference to termination of district auditors appears in the same subsection that references the "removal of all officers and employees." We are satisfied that the provision applies to employee-auditors like Johnson.

Moreover, we must accept the Merit System Board's determination that it did not have further jurisdiction over the matter in the absence of any showing that its determination "violate[s] legislative policies expressed or implicit in the civil service act." *Campbell v. Department of Civil Serv.*, 39 *N.J.* 556, 562 (1963). Lastly, we note that the Merit System Board had the authority to interpret and apply the Takeover Act in these circumstances. As we stated in *In re Allen,* 262 *N.J. Super.* 438, 444 (App. Div. 1993), "[t]he Board is required to act in accordance with all the laws of the State, not just those contained in the Civil Service Act."

Affirmed.

Board May Increase Penalty Imposed by Appointing Authority

Paul T. Dunn and Jacquie L. Shogeke v. Merit System Board, New Jersey Department of Corrections, Northern State Prison
A-4645-96T1 (App. Div., March 20, 1998)

Petitioners, Paul Dunn and Jacquie Shogeke, both corrections officers at Northern State Prison, appeal from a decision of the Merit System Board which im-

posed a four-month suspension upon each officer. Initially each officer was suspended for a period of thirty days by the Department of Corrections for conduct unbecoming a law enforcement officer. Each officer filed a separate appeal and each matter was referred to an Administrative Law Judge (ALJ) for a hearing. The appeals were then consolidated. The ALJ issued an initial decision recommending that each officer be suspended for a period of six months. The Merit System Board accepted and adopted the findings of fact as contained within the initial decision of the ALJ. The Board, however, did not adopt the conclusion and recommendation that the penalty be modified to a six-month suspension. The Board concluded that the appropriate penalty would be a four-month suspension. We affirm.

Each petitioner had been indicted in Union County for aggravated assault on a police officer, contrary to *N.J.S.A.* 2C:12-1(b)(5)(a), and resisting arrest, contrary to *N.J.S.A.* 2C:29-2(a). Each petitioner entered a negotiated plea of guilty to disorderly persons offenses: assault, contrary to *N.J.S.A.* 2C:12-1(a)(1), and resisting arrest, contrary to *N.J.S.A.* 2C:29-2, and each was fined $200 and placed on probation for one year for resisting arrest. The simple assault charge was merged with the resisting arrest conviction. Probation was terminated upon the payment of the fines.

Subsequent to their convictions, a Preliminary Notice of Disciplinary Action was served on each officer charging each with conduct unbecoming an employee. After separate departmental hearings, the charges against each officer were sustained and thirty-day suspensions were imposed. Each petitioner appealed their suspension to the Board.

The Board is statutorily authorized, pursuant to *N.J.S.A.* 11A:2-19, to increase or decrease a penalty imposed by an appointing authority, but removal may not be substituted for a lesser penalty. Although most of our reported decisions relate to instances where a suspension is reduced, there is precedent affirming an increase in penalty. *See Sabia v. City of Elizabeth*, 132 *N.J. Super.* 6, 16 (App. Div. 1974).

In reviewing a decision of an administrative agency, we will only reverse if we determine from our review of the record that the decision is "arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980) (citing *Campbell v. Department of Civil Service*, 39 *N.J.* 556, 562 (1963)).

We have reviewed the well-reasoned initial decision of the ALJ and find that the findings of fact enunciated therein could reasonably have been reached. *Close v. Kordulak Bros.,* 44 *N.J.* 589, 599 (1965). This case does not involve conduct incident to appellants' work as corrections officers, and we find no reason to interfere with the Board's decision in this matter.

Affirmed.

Removal Not Warranted Where Candidate Failed to Disclose Expunged Arrest to Police Academy

In the Matter of James Falkowski
A-3211-97T3 (App. Div., October 27, 1998)

Long Beach Township appeals from the final administrative action of the Merit System Board ordering the Township to reinstate James Falkowski to employment as a police officer, adjusted for back pay, benefits and seniority; counsel fees were also awarded. The Board determined that Falkowski's removal from employment, based upon charges that he misrepresented and falsified information regarding an expunged arrest, was not justified. We affirm.

Falkowski had been a police officer in Long Beach Township from 1977 to 1982. Thereafter he became a policeman in Dover Township. In 1986 he was indicted for an alleged assault against a motorist who was in his custody. He was admitted to a PTI program, conditioned upon his resignation as a police officer. Thereafter the record of the indictment and related matters was expunged.

In 1994, Falkowski reapplied to Long Beach Township to become a police officer. He had an interview with Police Chief Kircher in which he disclosed the Dover Township incident. In fact, the Dover incident seemed to have been common knowledge in the area and Chief Kircher, and just about everyone else involved, knew of it. The Board found that Falkowski spoke directly to the Chief and asked him whether the Dover incident would be a problem. He said if it would be a problem, he would rather not take the position, but the Chief assured him it would not be a problem.

On May 20, 1994, Falkowski was hired by Long Beach Township and appointed to be a probationary police officer, conditioned upon his completing training at the Ocean County Police Academy. In February 1995, he applied to the academy and completed an academy application which, among other things, asked if he had ever been arrested or charged with any violation. He answered "no." He says, and the Board credited his explanation, that he believed he was entitled to answer "no" because the record had been expunged.

On April 3, 1995, Chief Kircher met with the Ocean County Prosecutor, who provided him with further details about the Dover Township incident. The Prosecutor suggested it had been a mistake to hire him, given his prior record. By letter dated April 10, the Prosecutor memorialized this discussion, stressing that it was the Township's decision, not his, on whether to hire Falkowski. But, his opinion was that Falkowski's prior acts "constitute[d] as disqualification from employment as a sworn law enforcement officer."

Chief Kircher met with Falkowski at the academy, and advised him that his employment as a Long Beach police officer was terminated. Although no written reasons were provided to Falkowski, the Chief wrote a letter on April 4, 1995, to the Township's Public Safety Commissioner stating that he recommended Falkowski be dismissed due to the Prosecutor's concerns about the earlier incident in Dover Township.

When Falkowski sought reinstatement to the Long Beach police department, the Merit System Board transferred the matter to the Office of Administrative Law as a contested case. In June 1996, a plenary trial was conducted before ALJ Metzger.

On June 18, ALJ Metzger issued his decision ordering Falkowski's reinstatement. He framed the issue as whether Falkowski "provided false or misleading information when he applied for a position as a Long Beach Township police officer" and ruled that the township had not met its burden of proving this, given Falkowski's statement on the departmental application and in the departmental interview, that he had expunged criminal records from a 1986 incident. Turning to the omission in the police academy application, the judge said that although Falkowski had an obligation to disclose the 1986 matter, his failure to do so was neither intentional nor material in that it arose from an "erroneous understanding" of the law and in any event, little would be gained by "covering up a fact that was well known to the very employer sponsoring his application."

In September 1996, the Board remanded the matter to the ALJ for further proceedings, but made a ruling that Falkowski "was required to present a complete account of his arrest for review by the Police Academy on his application." While believing that his negative answer on the Academy's application arose from an "erroneous understanding" of the applicable law, the Board held that even his omission was not excusable:

> A candidate for employment must be held accountable for the accuracy of the information submitted on an application, whether one for employment or enrollment in a police training academy, and risk omitting particular information, or determining that it is not required to be reported, at his peril.

Before the ALJ could act, both Falkowski and the Township petitioned the Merit System Board for reconsideration. The Board's response explained that it had "dismissed the charges alleging that [Falkowski] provided false or misleading information on his application or during his pre-employment interview." Turning to the police academy application, it stated that the purpose of the remand was to determine whether Falkowski was required "to reveal his criminal history on his Police Academy application." In other words, the Board stated that it had not meant to decide that issue in its September 4, 1996 decision.

On September 30, 1997, Judge Metzger ruled on the issue, holding that Falkowski was not required to disclose his arrest on the police academy application. He ruled that although applicants for law enforcement jobs did have to disclose expunged arrests,

> [t]he public policy underlying expungement is to relieve the one-time offender from the ongoing obligations of answering stigmatizing questions. *N.J.S.A.* 2C:52-32. The Legislature carved limited exceptions to this rule, which includes persons "seeking employment" in the judicial branch, law enforcement, or corrections agencies. The MSB has already affirmed the finding that [Falkowski] did disclose appropriately to respondent, his prospective employer. He was hired and then sent to the [Ocean County Police Academy] for mandatory training; the [Academy] was not appellant's employer. I see nothing in either the spirit or language of this statute that encourages an expansive reading.

On December 31, 1997, the Merit System Board rendered its final decision in the case, adopting Judge Metzger's conclusion that since Falkowski had no obligation to disclose the arrests on the police academy application, it was error to fire him for this nondisclosure. Accordingly, it ordered him reinstated with back pay and benefits.

It is well settled that a decision by the Board will not be upset unless it is arbitrary, capricious or unreasonable, or that it lacks fair support in the record. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980). In reviewing the evidence presented, it is for the agency as the ultimate decision maker to decide what force to accord the testimony of witnesses or other evidence in respect to both credibility and weight, and it is the agency's choice as to which evidence shall be accepted or rejected. Where the choice is reasonable, it is conclusive on appeal. *In re Application of Howard Savings Bank,* 143 *N.J.Super*. 1,9 (App. Div. 1976); *In re Tenure Hearing of Grossman,* 127 *N.J.Super.* 13, 26 (App. Div.), *certif. denied* 65 *N.J.* 292 (1974).

In the instant matter, a review of the record that was before the Board demonstrates that the agency's decision is reasonable. There was an extensive hearing process including a remand to the ALJ, in part to permit further submissions on the issue of whether Falkowski was obligated to even disclose his prior arrest on the police academy application. The ALJ, who had the opportunity to observe Falkowski, found that Falkowski's omission was not intended to deceive and therefore did not justify discipline; his decision was neither arbitrary, capricious nor unreasonable. Disclosure to a non-employer is not necessary under these circumstances, in which Falkowski had already disclosed the information to his employer. Accordingly, substantial credible evidence existed in the record for the Board to conclude that Falkowski's removal was not merited under the circumstances.

Affirmed.

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