

A-10



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Malik Massey, City of Atlantic City

CSC Docket No. 2015-2329 OAL Docket No. CSV 2594-15

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ISSUED: NOV 16 2016 (EG)

The appeal of Malik Massey, a Keyboarding Clerk 1 with the City of Atlantic City, Department of Planning and Development, of his removal effective January 26, 2015, on charges, was heard by Administrative Law Judge Bruce M. Gorman, (ALJ), who rendered his initial decision on April 27, 2016. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 19, 2016, did not adopt the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the Commission ordered that the matter be remanded to the Office of Administrative Law (OAL).

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant was arrested and charged with two third-degree crimes of forgery and altering the writing of a drug prescription with purpose to defraud. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

The ALJ set forth the following findings in his initial decision. The appellant had been employed as a Keyboarding Clerk 1 with the City of Atlantic

City, Department of Planning and Development. On April 26, 2013, the appellant was arrested on two counts of forgery and altering the writing of a drug prescription with purpose to defraud. When arrested, the appellant acknowledged that he had altered the prescription and did not have the doctor's permission to add promethazine with codeine to the prescription, but then tried to fill the prescription. The appellant was admitted to a Pre-trial Intervention (PTI) Program, which he successfully completed and the charges against him were dismissed on July 2, 2014.

The appellant testified that he had suffered from recurrent kidney stones and underwent surgeries for the problem in August 2012 and October 2012. The appellant had been prescribed Promethazine Syrup to help him with the pain resulting from the kidney stones. The appellant submitted the prescription log from his pharmacy which indicated that his physician, members of his physician's practice, and emergency room physicians had prescribed promethazine with codeine in various forms on 26 occasions for the period of July 1, 2012 through April 20, 2013. On April 26, 2013, the appellant suffered an attack that left him in a great deal of pain. When he was unable to get an appointment with his physician he went to the emergency room. He was given medication for vomiting but was not prescribed promethazine with codeine. The appellant admitted adding promethazine with codeine to the prescription he received from the emergency room and tried to fill the prescription.

Keith B. Mills, a former Director of the Division of Planning and Development for Atlantic City, testified that the appellant was a good, diligent and hard-working employee. Mills indicated that the appellant came from the "inner city" and that the transition from the inner city to the mainstream was never easy.

The ALJ indicated that the appellant acknowledged that he was guilty of the charges and that the only issue was the penalty. In this regard, the ALJ stated that while ordinarily the forging of a prescription script would be immediate cause for dismissal, there were three mitigating factors against that penalty. The first was that kidney stones cause terrible pain, and that such pain can make people do strange things. The second factor was that the appellant was admitted into and completed a PTI program. This indicates that he had no prior criminal history. Finally, the ALJ found that the testimony from Mills weighed heavily in this matter, as he had been a prominent civil servant in Atlantic City. Based on the foregoing, the ALJ found that while the appellant's conduct was extraordinarily foolish, his misconduct was unrelated to his public employment. Therefore, the ALJ determined that removal was too harsh a penalty, and found that a six-month suspension was appropriate.

In its exceptions, the appointing authority argues that the appellant never presented medical records to support his claims. It contends that the appellant merely submitted the prescription log from his pharmacy which did not indicate

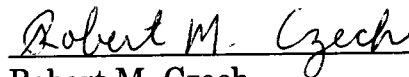
what was actually prescribed or if the appellant had actually been seen by his physician. In this regard, the appointing authority asserts that while the appellant received promethazine with codeine in various forms on 26 occasions for the period of July 1, 2012 through April 20, 2013, there is no evidence that he was prescribed such medication. Additionally, it argues that there was no evidence provided that the appellant was seen at the emergency room on April 26, 2013, or that he was prescribed any medication.

Upon its *de novo* review of the record, the Commission finds that this matter needs to be remanded to the OAL. The appellant's assertions that he suffered from severe kidney pain and that he was prescribed promethazine with codeine by his physicians for this pain does not appear to be supported by any evidence or testimony other than the appellant's testimony. It appears that the ALJ's initial decision relied heavily upon the appellant's alleged medical condition and the medicine he was prescribed. Without further specific and substantive evidence as the appellant's medical condition and the actual medicine he was prescribed, there does not appear to be any basis to lessen the penalty of removal. Therefore, the appellant should be provided the opportunity to present testimonial or documentary evidence regarding his medical condition as indicated above. Accordingly, the Commission remands the matter to the Office of Administrative Law.

ORDER

The Civil Service Commission orders that this matter be remanded to the Office of Administrative Law for further proceedings as set forth above.

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



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 2594-15

AGENCY DKT. NO. 2015-2329

IN THE MATTER OF **MASSEY MALIK**,
ATLANTIC CITY DEPARTMENT OF
PLANNING AND DEVELOPMENT.

Robert O'Brien, Esq for appellant (O'Brien, Belland & Bushinsky, LLC,
attorneys)

John R. Dominy, Esq., for respondent Blaney & Karavan, P.A., attorneys)

Record Closed: April 6, 2016

Decided: April 27, 2016

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Appellant appealed respondent's action terminating his employment for conduct unbecoming that of a public employee and other sufficient cause.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the Office of Administrative Law on February 20, 2015, to be heard as a contested case pursuant to

N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on November 2, 2015 and March 28, 2016, and the record closed.

FACTUAL SUMMARY

Appellant was employed by the Atlantic City Department of Planning (City) as a Keyboarding Clerk 1. On April 26, 2013, he was arrested and charged with two counts of a violation of N.J.S.A 2C:21-1.1a, forgery and altering the writing of a drug prescription issued by Atlantic Care Regional Medical Center with purpose to defraud (R-3). At the time of his arrest, he admitted that he had taken a prescription for a different medication, run it through his printer, and added promethazine with codeine. He then submitted the forged prescription slip the Rite Aid pharmacy located at 1101 Atlantic Avenue in Atlantic City.

Appellant was admitted to the Pre-Trial Intervention Program. On July 2, 2014 he successfully completed the program, and the charges against him were dismissed (R-4).

On December 17, 2014, the City charged him with Conduct Unbecoming a Public Employee and other sufficient cause. On January 26, 2015 he was removed from his employment. At trial the parties stipulated that the two charges against appellant were merged.

Appellant testified on his own behalf. He was originally employed by the City in April of 2006 at the age of sixteen through a work program at his local high school, the Viking Academy. He was placed in Planning and Development in 2007 where his duties included typing, filing, and answering phones. After nine months, he was transferred to the director's office where he was supervised by the Director of the Division of Planning, Keith Mills.

Although still a young man, appellant began suffering from kidney stones. He underwent surgery for the problem in August of 2012, and a stint was inserted. In

October of 2012 he underwent a second surgery. On this occasion, a large stone that would not pass was crushed, and the stint was removed. On August 21, 2012, the Atlantic Care Regional Medical Center diagnosed appellant as suffering from:

- 1 Recurrent kidney stones with failure of outpatient therapy;
- 2 Complicated urinary tract infection second to the above;
- 3 History of renal stents, still in place.

Atlantic Care developed the following plan (P-2):

The patient will be admitted to the medical floor, placed on aggressive IV fluid hydration. We will treat him supportively with antibiotics, with Rocephin -1 G IV daily. We will treat him with morphine for pain.

Appellant's physician, William Berlin, prescribed Promethazine Syrup to help him with the pain resulting from the kidney stones. Appellant submitted the prescription log from Rite Aid pharmacy for the period July 1, 2012 through April 30, 2013 (P-3). The prescription log shows that Dr. Berlin, members of his medical practice, and sundry emergency room physicians prescribed promethazine codeine in various forms on twenty six occasions during that time period. On several occasions he was also prescribed the stronger narcotic oxycodone and the lesser medication ibuprofen. Most of the prescriptions listed on the log indicate limited dosage to deal with short term pain issues.

On April 26, 2013, appellant suffered an attack that left him in a great deal of pain. April 26 was a Friday, and appellant could not obtain an appointment with Dr. Berlin. Unable to consult with his general practitioner, appellant went to the Atlantic City Medical Center Emergency Room. There the attending Emergency Room physician provided him with a prescription for the vomiting that accompanied the kidney stone attack, but declined to prescribe the promethazine with codeine. Confronted with the prospect with a weekend of continuous pain, appellant went home, added the promethazine with codeine to the prescription from the Emergency Room ran it through

his printer, and submitted it to the Rite Aid on Atlantic Avenue. Shortly thereafter, the police arrived. Appellant immediately admitted that he had altered the prescription. On the stand appellant acknowledged that he had made a mistake and expressed regret for what he had done.

On cross-examination, appellant acknowledged that he did not have the doctor's permission to add promethazine with codeine to the prescription. He agreed that he know what he was doing was wrong, but that he needed the medication to deal with the pain.

Keith B. Mills (Mills) testified for the appellant. Mills was employed by the City from 1986 until his retirement in January of 2015. He culminated his career by serving as the Director of the Division of Planning for the City.

Mills was appellant's supervisor at the Department of Planning. Appellant was originally referred to the City by a program at the Viking Academy. Mills explained that the Viking Academy is an Alternative High School for students who did not do well in the traditional high school system. Initially, appellant worked part-time, but when he performed at a positive level, Mills hired him full-time as a clerk and receptionist. Prior to his retirement, Mills was training appellant to work in the fields of planning and zoning.

Mills stated that appellant was a good employee. He was diligent and hard working. Mills noted that appellant came from what he termed the "inner city", and that the transition from the inner city to the mainstream was never easy.

The parties stipulated that appellant's disciplinary history at the City indicates no prior discipline.

LEGAL DISCUSSION

Appellant acknowledged at the outset that he was guilty of the charge. The only issued in this case in penalty. Ordinarily, forging a prescription script would be

immediate cause for dismissal. However, in this case, three factors militate against that penalty.

First, the uncontroverted proofs in this case demonstrate that appellant suffers from kidney stones. It is well settled that kidney stones cause some of the worst pain a human body can suffer. Anyone one who has ever had kidney stones or who knows someone who suffered from kidney stones understands that they cause excruciating pain. Accordingly, I take official notice that kidney stones cause terrible pain. The fact that appellant was in terrible pain on April 26, 2013 does not excuse his conduct. But it does explain how an otherwise honest young man could commit such a stupid act. Pain can make people do strange things.

Second, although appellant was charged with a crime, he was never convicted of that crime. Instead, he successfully completed the Pre Trial Intervention Program. At the conclusion of the program, the charges against him were dismissed.

Appellant had no prior criminal history, or he would not have been admitted the PTI program. Nothing in the proofs indicated that he is engaged in the use of sale of illegal drugs. The incident that caused his arrest was isolated in nature, and was disposed of by the Superior Court. The closing document from the PTI program states clearly that appellant can have the record of his arrest expunged.

In short, there exists no conviction in this case to support the charge of unbecoming conduct.

Finally, the testimony of Keith B. Mills weighs heavily in his case. Prior to his retirement, Mills was a prominent civil servant in Atlantic City. His willingness to testify on appellant's behalf and his testimony regarding appellant's character must be considered when imposing the penalty in this case.

Appellant's conduct on April 26, 2013 was extraordinarily foolish. But his misconduct was unrelated to his public employment. In balance, termination is too harsh a penalty. Accordingly, I **MODIFY** the penalty to a suspension for six months.

ORDER

I **ORDER** that the charge of Unbecoming Conduct against appellant be **SUSTAINED**.

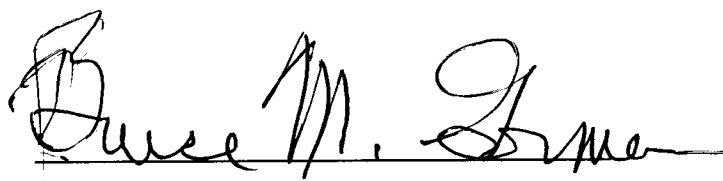
I **ORDER** that the penalty be **MODIFIED** to a suspension of six months duration.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B 10.

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

April 27, 2016
DATE


BRUCE M. GORMAN, ALJ

Date Received at Agency:

April 27, 2016

Date Mailed to Parties:

4/27/16

/jb

WITNESSES

For appellant:

Massey Malik
Keith Mills

For respondent:

None

EXHIBITS

For appellant:

- P-1 PTI Order of Dismissal
- P-2 Final Report Atlanticare Regional Medical Center
- P-3 Rite Aid Pharmacy Customer Profile Report

For respondent:

- R-1 Preliminary Notice of Disciplinary Action (31A)
- R-2 Final Notice of Disciplinary Action (31B)
- R-3 Documents for Atlantic County Prosecutor's Office
- R-4 PTI Order of Dismissal