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STATE OF NEW JERSEY

In the Matter of Montsho Edu
Mercer County
Department of Corrections

CSC DKT. NO. 2014-1172
OAL DKT. NO. CSV 16976

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 20, 2015

The appeal of Montsho Edu, Counselor Penal Institution, Mercer County, Department of Corrections, release at the end of the working test period effective October 29, 2013, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on April 24, 2015. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 20, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Montsho Edu.

Re: Montsho Edu

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 20, 2015

Robert M. Czech
Chairperson
Civil Service Commission

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and
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attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16976-13
AGENCY REF. NO. 2014-1172

IN THE MATTER OF MONTSHO EDU,
MERCER COUNTY CORRECTIONS CENTER.

Lawrence Popp, Esq., for appellant (Gaylord & Popp, attorneys)

Stephanie Ruggieri D'Amico, Assistant County Counsel, for respondent (Arthur R. Sypek, Jr., County Counsel)

Record Closed: March 10, 2015 Decided: April 24, 2015

BEFORE **JOHN S. KENNEDY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Montsho Edu (appellant) contests the decision by the Mercer County Corrections Center (MCCC) to release him at the end of the working test period effective October 29, 2013. Specifically, he asserts that his performance was not unsatisfactory and his termination was the result of conduct constituting bad faith by certain county officials.

Appellant requested a hearing from his termination and the matter was transmitted to the Office of Administrative Law (OAL) on November 22, 2013, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-

1 to -13. The hearing was held on December 19, 2014 and February 5, 2015, and the record closed on March 10, 2015.

FACTUAL DISCUSSION

Linda Rogers was the program service coordinator for MCCC for sixteen years. She retired in May 2014. Appellant was hired as a counselor and worked at MCCC from July to August 2013. Rogers previously worked with appellant at the Mercer County Youth Detention Center (Youth Detention Center) where she was his supervisor. Appellant changed his name between the time they worked together at the Youth Detention Center and when he applied for the position at MCCC. Rogers could not recall when or why appellant left the Youth Detention Center. She interviewed him for the position with the MCCC in April 2013 and he told her that he left the Youth Detention Center to further his career. As part of the interview process appellant was given an application which he completed and returned along with a resume. Both the application and the resume were given to the Warden who hands it over to the internal affairs department for a background check. Rogers recommended appellant for the position because of his work experience and because he was a dedicated worker when he was at the Youth Detention Center.

During the first two weeks at MCCC, appellant was provided training by Rogers and she went over the procedures for time and attendance with him. MCCC uses an automated timekeeping system called Kronos. She advised appellant to "punch in" each morning with Kronos but also sign the sign in log that is kept at the guard station. The Kronos system records an employee's start time for payroll, but the sign in log is easier for her to view if she needs to know whether an employee is in the building.

On September 23, 2013, Rogers prepared appellant's two-month probationary progress report (A-1). She indicated that his performance had been unsatisfactory because he had been late twelve times between August 20, 2013 and September 20, 2013. Eleven times appellant was late no more than seven minutes and once he was eleven minutes late (A-2). When Rogers discussed this with appellant, he was upset and stated that he did not know it was that serious. During the time appellant worked at

MCCC he had a good work ethic and worked well with the inmates and his colleagues. She was satisfied with his work performance other than the lateness issue.

On October 29, 2013, Rogers prepared appellant's three-month probationary progress report (A-5). In this report, she indicated that his performance had been unsatisfactory because he had been late twelve times and because he failed to disclose that he was terminated from Mercer County Youth Detention Center. Appellant was not late again after the September 23, 2013 progress report. She reviewed his employment application but it does not reference his employment at the Youth Detention Center or why he left that employment (A-4). Although they worked together at the Youth Detention Center, Rogers has no recollection of why he was terminated. Had she recalled that appellant was terminated from the Youth Detention Center, Rogers would not have recommended him to be hired.

On October 25, 2015, a memo was distributed to all program services staff providing them with several standard operational procedures (SOP) including one for lateness and one for the Kronos timekeeping system (A-3). Appellant acknowledged receipt of the memo on the same date, but Rogers went over these SOPs with him during the first two weeks of his employment.

Montsho Edu legally changed his name from Aaron Evans in 2006. He has a Masters degree in human services and a Bachelor's degree in psychology. He worked at the Mercer County Youth Detention Center from 1993 to 1996 when he was terminated for using too many sick days due to his son's illness. He appealed his termination and a hearing was held before an Administrative Law Judge in 1997. Rogers testified at the hearing in 1997 and appellant is surprised that she does not remember as they were friends. Appellant was also friends with Warden Ellis, the Warden at MCCC, and has been to his home on many occasions. Warden Ellis was the Warden at the Youth Detention Center when appellant worked there. He and the Warden know each other very well and have had many conversations about his termination from the Youth Detention Center. Rogers was also aware of his termination and advised him that it would not affect his getting hired at MCCC. He had many e-mail

correspondences with both Ellis and Rogers prior to being hired.[1]

Appellant originally applied for the position at MCCC in December 2011 after taking the Civil Service test in October 2011. At the time he applied, appellant was required to provide detailed information on an Employee Applicant Background Progress form (A-6). He listed his complete employment history on this form which included his employment at the Youth Detention Center and the reason for leaving. He has had an extensive employment history since graduating high school in 1988 and added two additional pages of employment history after page 14 of the form. He was not provided with a copy of the form. A-6 is not a full and complete copy of the one he originally prepared as it only has one additional page of employment history.

Appellant was hired at MCCC when the position became available in 2013 and he started work on July 29, 2013. He disputes that he was ever trained by Rogers during the first few weeks of his employment. Because of his close, friendly relationship with both Rogers and Ellis, appellant choose not to shadow or be trained by either of them. He never discussed the Kronos system with Rogers and only received a four or five minute training of the system from a personnel employee. The first time he became aware of the Kronos policy was when he received his two-month progress report on September 23, 2013. Prior to then, appellant thought the Kronos policy only applied to the corrections officers. No one told him until he received the Kronos SOP on October 25, 2013 that logging into that system was so important.

It is appellant's opinion that the real reason for his termination was in response to a letter he wrote to Lt. Oliver. Lt. Oliver is in charge of the Internal Affairs department and was involved with his original application process in 2011. On August 26, 2013, he met with Lt. Oliver and she asked him why he did not disclose his termination from the Youth Detention Center. He explained that he did disclose it and that both the Warden and Ms. Rogers were friends of his and knew about the termination. Lt. Oliver became irate and started yelling at him. He remained calm but responded to her in an e-mail dated August 27, 2013 (A-8). The e-mail listed ten occasions when he disclosed his

[1] No evidence of e-mails between appellant and either Warden Ellis or Ms. Rogers was provided.

complete employment history either to the Warden, Ms. Rogers or on the application. The e-mail described how Lt. Oliver had disrespected him and it was copied to the Warden, Ms. Rogers, the County Administrator, the County Division of Personnel and two attorneys.

LT. Phyllis Oliver is employed by MCCC and is the head of the Internal Affairs Department. Her department conducts background checks on all new employees. Upon being hired, a new employee is required to fill out an application listing their entire employment history. The internal affairs officer will check prior employment and may call one or two of the previous employers to confirm the prior history. Lt. Oliver was involved with the appellant's background check and received the background application from him in December 2011 (A-6). She assigned the investigation to Officer Chinese. The additional page that is attached after page 14 of A-6 was actually a copy of the information appellant provided on the back of page 14. A-6 is a complete document and no pages are missing. Appellant does not list prior employment past 1998. Appellant's resume was not attached to the application he prepared for the background check. Lt. Oliver only reviewed A-6 and never saw his resume. She did not go over the application page by page with appellant to assure that it was complete. If she knew of his prior employment and termination from the Youth Detention Center, appellant's application would have been rejected and he would not have been hired.

When Lt. Oliver met with appellant on August 26, 2013, he stated that he thought he had disclosed the prior employment on his application. He never told her there was an additional page that was missing. She was not offended by the e-mail he sent the next day. Lateness charges do not go through Internal Affairs and she had no involvement with the creation of the probationary reports. She was not appellant's supervisor and she only met him twice, once in December 2011 and when they met on August 26, 2013.

Warden Charles Ellis has been the Warden at MCCC since 2008. He was generally familiar with appellant prior to his employment at MCCC but would not consider him a friend. Appellant was friends with his son when they were in high school. The Warden had to ask his son to remind him how he knew the appellant.

Appellant has not been to the warden's home since he and the warden's son graduated high school. He does recall seeing appellant in passing and speaking to him briefly. As a result of that one meeting, appellant sent the warden his resume which was forwarded to Rogers. It is not uncommon for the Warden to receive resumes and he always forwards them to the appropriate person. He was not involved in the process of hiring appellant and only signed the paperwork that is forwarded to the county personnel department after Rogers recommended hiring him. He had a brief conversation with Rogers prior to appellant being hired but only stated that he was fine with the hire if it was acceptable to her. Rogers did not tell him that she worked with appellant at the Youth Detention Center or that he was terminated from that position. Ellis does not conduct the background check and did not recall working with appellant at the Youth Detention Center. He does not recall reviewing appellant's employment application prior to his hiring. He did review appellant's resume when it was first sent to him by appellant. On his resume, appellant lists his affiliation with the Youth Detention Center under the heading "Additional Contributions" and only lists the dates 1993-1997 (A-4). The warden did not consider this as employment which was listed on his resume as "Performance Contributions" and included a synopsis of each job appellant had from 1998 to present (A-4). The Warden did not know why appellant was fired from the Youth Detention Center but he would not have hired him if he knew he was terminated from that position.

Appellant testified again as a rebuttal witness. He acknowledged that the Warden knows a lot of people but insists that their families are closely connected. Appellant has been close friends with the Warden's son for thirty-five years and his parents were close friends with the Warden when appellant was a small child. He understands that the Warden may not have remembered appellant working at the Youth Detention Center, but he was made aware of that fact after appellant began his employment at MCCC. Both the Warden and Rogers knew of his employment history prior to his hire at MCCC, and he was hired at MCCC on the Warden's recommendation.

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of

the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, I **FIND** that the testimony offered by the appellant is not credible. He insists that he is close personal friends with both Warden Ellis and Ms. Rogers; however, neither the Warden nor Ms. Rogers have specific recollection of him or his employment at the Youth Detention Center and the circumstances surrounding his termination. I **FIND** Warden Ellis' testimony to be more credible in that he only knew appellant in passing and merely forwarded his resume onto Ms. Rogers without recommendation. All three of the other witnesses testified that they had no knowledge of appellant's termination from the Mercer County Youth Detention Center, and no one other than appellant recalls seeing an additional page to his background check application listing that employment or the reason for leaving. Therefore, I **FIND** as **FACT** that petitioner failed to disclose his employment at the Mercer County Youth Detention Center and the reason for leaving on his application for employment at MCCC (A-4) and the employee applicant background progress submission (A-6).

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional **FACTS**:

Appellant was late for work twelve times between August 20, 2013 and September 20, 2013. Eleven times appellant was late no more than seven minutes and once he was eleven minutes late. In both his two-month probationary progress report and his three-month probationary progress report, appellant's performance was found to be unsatisfactory due, in part, to excessive lateness.

Appellant worked for the Mercer County Youth Detention Center from 1993 to 1996 when he was terminated for using too many sick days due to his son's illness. While employed at the Youth Detention Center, Ellis was the Warden and Rogers was his supervisor. Neither Ellis nor Rogers recall the circumstances surrounding his termination from the Youth Detention Center. In appellant's three-month probationary progress report, appellant's performance was found to be unsatisfactory because he failed to disclose that he had previously worked for Mercer County and had been terminated from that employment. Appellant was terminated at the end of his working test period as a result of the unsatisfactory probationary reports.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex MVC Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

The primary working test period regulation is N.J.A.C. 4A:4-5.3, which requires the employer or appointing authority to prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period, with a copy of all reports being furnished to the employee. The purpose of the working test period under the merit system is to enable the appointing authority to evaluate an employee's fitness through observed job performance under actual working conditions. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 89 (App. Div. 1977).

On appeal of an unsatisfactory working test period, the only issue is whether the appointing authority exercised good faith in determining that the employee was not

competent to perform satisfactorily the duties of that position. Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351 (App. Div. 1960). Thus, it is up to the employee to demonstrate that the appointing authority acted in bad faith. N.J.A.C. 4A:2-4.3(b); Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966).

Pursuant to N.J.A.C. 4A:2-4.3(b), the appellant has the burden of establishing by a preponderance of the competent and credible evidence that the action terminating him at the end of her working test period was done in bad faith. Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966). If bad faith is found, the employee shall be entitled to a new full or shortened working test period and other appropriate remedies. N.J.A.C. 4A:2-4.3(c); see also N.J.A.C. 4A:2-1.5. Bad faith has been defined as:

> Generally implying . . . a design to mislead or deceive another . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith is not simply bad judgment or negligence, but implies the conscious doing of a wrong because of dishonest purpose . . . .
>
> [Brown v. State Dep't of Educ., 97 N.J.A.R.2d (CSV) 537, 541]

This is a high hurdle for a probationary employee to overcome. Appellant challenges the decision of the MCCC and asserts that the decision to terminate him was done in bad faith. His arguments on this appeal are that he disclosed his prior employment and termination from the Youth Detention Center during the application process, and that he was not adequately trained on the Kronos system and did not know how important it was to log into that system on time. Appellant asserts that the termination was actually the result of his August 27, 2013 e-mail in response to his conversation with Lt. Oliver. Other than his bare assertion that the training of the Kronos system was cursory and condensed, appellant provided no substantiation of any claim that could be construed as bad faith on the part of the MCCC as his employer. His initial application for employment (A-4) does not list his employment with the Youth Detention Center and his resume that was attached describes his association with the Youth Detention Center as

an "Additional Contribution." Likewise the employee applicant background progress submission (A-6) did not list his employment at the youth detention center.

I **CONCLUDE** that the appellant has not established by a preponderance of the competent and credible evidence that there was any bad faith or conscious wrongdoing involved in his termination or in the evaluation of his performance as unsatisfactory.

ORDER

Accordingly, the action of the respondent in terminating appellant at the end of the working test period is **AFFIRMED**. It is so **ORDERED**.

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 24, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: April 24, 2015

Date Mailed to Parties: April 24, 2015

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APPENDIX
LIST OF WITNESSES

For Appellant:

Linda Rogers, Program Service Coordinator
Motsho Edu, Appellant

For Respondent:

Phyllis Oliver, Lt. Mercer County Corrections Center
Charles Ellis, Warden Mercer County Corrections Center

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Two-month Probationary Progress Report dated 9/23/13
A-2 Kronos Log
A-3 10/23/13 memo forwarding SOP for program services
A-4 Application for Employment and Resume
A-5 Three-month Probationary Progress Report dated 10/29/13
A-6 Employee Applicant Background Progress
A-7 Master Control Log Book
A-8 8/27/13 e-mail from Appellant to Lt. Oliver
A-9 Preliminary Notice of Disciplinary Action for lateness

For Respondent:

None