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STATE OF NEW JERSEY

In the Matter of Tomory Boyer
New Jersey State Parole Board

CSC DKT. NO. 2015-2245
OAL DKT. NO. CSV 1572-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 30, 2015

BW

The appeal of Tomory Boyer, Parole Officer Recruit, New Jersey State Parole Board, removal effective February 25, 2014, on charges, was heard by Administrative Law Judge Robert Bingham II, who rendered his initial decision on June 26, 2015. Exceptions and cross 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 July 29, 2015, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

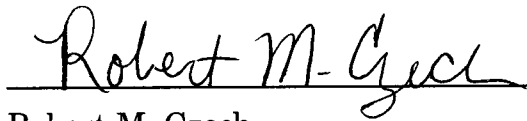
ORDER

The Civil Service Commission therefore grants the motion for summary decision and dismisses the appeal of Tomory Boyer.

Re: Tomory Boyer

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
JULY 29, 2015

A handwritten signature in black ink, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. CSV 1572-15

AGENCY DKT. NO. 2015-2245

**IN THE MATTER OF TOMORY BOYER,
NEW JERSEY STATE PAROLE BOARD.**

Wolodymyr Tyshchenko, Esq., for appellant (Caruso, Smith Picini, L.L.C.,
attorneys)

Andrew J. Sarrol, Deputy Attorney General, for respondent (John J. Hoffman,
Acting Attorney General of New Jersey, attorney)

Record Closed: May 12, 2015

Decided: June 26, 2015

BEFORE ROBERT BINGHAM II, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Tomory Boyer appeals a removal from employment by respondent, the New Jersey State Parole Board (respondent or the Board), based upon an alleged violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, due to his failure to complete a required training program.¹ On or about March 4, 2014, Boyer was served

¹ Boyer was charged with violation of "Disciplinary Process Policy 02.007.F. Parole Officer Recruit (1) Failure of a Parole Officer Recruit to complete Police Training Academy requirements due to conduct

with a Revised Preliminary Notice of Disciplinary Action (PNDA), issuing the above charges and suspending him without pay, effective February 25, 2014. Appellant waived a departmental hearing, and on January 14, 2015, a Final Notice of Disciplinary Action (FNDA) sustained the charges and imposed a penalty of removal from employment. Boyer appealed and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 3, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. Respondent filed a motion for summary decision on March 30, 2015, and Boyer filed his opposition to the motion on April 13, 2015. On May 1, 2015, respondent filed an addendum to include a final decision in a related matter.² After a thorough review of the submissions on behalf of both parties, and extensive research into their respective legal arguments, the record closed on May 12, 2015.

FACTUAL DISCUSSION

Based upon the parties' submissions, and for purposes of deciding only respondent's motion for summary decision, I **FIND** as **FACT** the following:

In January 2014, the Board hired Boyer as a parole officer recruit and conditioned his appointment to a permanent position on his successful completion of Parole Officer Recruit Training ("the training program") at the Division of Criminal Justice (DCJ) Training Academy (PTC). (R-E.) The Civil Service Commission job specification for Parole Officer Recruit also requires successful completion of Parole Officer Recruit Training as a part of the one-year recruit period. (R-F.) And the Board's disciplinary policy requires the penalty of removal for failure to complete the training academy. (R-G.)

By notice dated February 14, 2014, Boyer was dismissed from the PTC training program because he (1) failed to report to the training program on time on February 14,

which results in dismissal of a recruit from the Academy." The charge was written as "N.J.A.C. 4A:2-2.3(a)(11)"; however, that regulation was re-codified as N.J.A.C. 4A:2-2.3(a)(12), effective March 5, 2012.

² Boyer v. Div. of Criminal Justice Training Acad., PTC 3714-14, Final Decision (April 8, 2015).

2014, (2) failed to follow the written procedures for notification of emergent circumstances, and, (3) failed to follow the written procedures for reporting back to the training program. (R-B, R-K.) Boyer appealed the PTC dismissal to the OAL, where his challenge to the dismissal was heard in a plenary hearing on November 24, 2014. On January 28, 2015, the Honorable Joseph Ascione, ALJ, rendered an initial decision sustaining the charges and affirming Boyer's dismissal from the training program. Boyer v. Div. of Criminal Justice Training Acad., PTC 3714-14, Initial Decision (January 28, 2015). (R-K.) On April 8, 2015, the Police Training Commission issued a final decision adopting ALJ Ascione's findings of fact and conclusions of law, and upholding Boyer's dismissal. (C-1.)

By FNDA dated January 14, 2015, before the initial decision in Boyer's PTC appeal, the Board sought to remove Boyer from his employment, effective February 25, 2014, for other sufficient cause, specifically: violation of "Disciplinary Process Policy 02.007.F. Parole Officer Recruit (1) Failure of a Parole Officer Recruit to complete Police Training Academy requirements due to conduct which results in dismissal of a recruit from the Academy." (R-A.) Boyer appealed his removal and, on February 3, 2015, the Civil Service Commission transmitted this matter to the OAL as a contested case. (Ibid.)

On March 30, 2015, prior to the PTC's final decision, the Board filed its motion for summary decision in the instant matter, asserting that there is no genuine issue as to the sole material fact, namely, whether Boyer successfully completed the training academy. According to the Board, Boyer's "removal action is simply premised on whether a recruit completed the required . . . training or not" and "it is impossible for him to legitimately dispute that he was dismissed from [the Training Program] due to a rules infraction." (Respondent's Brief, March 30, 2015, p. 11.) The Board submits that Boyer is collaterally estopped from re-litigating his dismissal from the training program because he fully litigated his dismissal and ALJ Ascione issued a decision on the merits.

On April 13, 2015, apparently prior to receiving the PTC's April 8, 2015, final decision, Boyer filed his opposition to the Board's instant motion, arguing that collateral estoppel should not apply here because ALJ Ascione's "ruling is not final" and that,

even if the PTC were to render a final decision upholding the initial decision, Boyer intends to file an appeal with the Appellate Division. (Appellant's Brief, April 13, 2015, p. 1.) Thus, according to Boyer, it is currently unknown whether he was properly removed from the training program and he urges that "[e]ntering a summary disposition on the premise that he was would not, respectfully, be an exercise of judgment, but a leap of faith." (Id. at p. 2.)

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). If "a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (citation omitted):

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

A review of statutory, regulatory, and administrative case law supports the conclusion that the Board properly disciplined Boyer with removal from employment due to his failure to complete the training program. In the 1960s, in response to the "serious need for improvement in the administration of local and county law enforcement," the

New Jersey State Legislature required “the creation of a compulsory educational and training program for persons who seek to become permanent law enforcement officers wherein such persons will be required, while serving in a probationary capacity prior to permanent appointment, to receive efficient training in this profession provided at facilities selected, approved and inspected by [the PTC] created for such purpose.”³ N.J.S.A. 52:17B-66. As part of this requirement, “[p]arole officers of the Division of Parole in the State Parole Board must complete a basic course of training approved by the [PTC] prior to permanent appointment.” See Preamble to L. 2009, c. 30 (adding the chairman of the Parole Board to the PTC).

The PTC shall certify that a trainee “has successfully completed the training required.” N.J.A.C. 13:1-5.1. However, the PTC may “dismiss a trainee who has demonstrated that he or she will be ineligible for [PTC] certification, for unacceptable behavior or for other good cause.” N.J.A.C. 13:1-7.2(a)(8). A trainee who is dismissed from a training program may appeal the decision to the PTC. See N.J.A.C. 13:1-9.1 to -9.6 (setting forth appeal procedures).

An appointing authority may remove an employee for various reasons, including “other sufficient cause.” N.J.A.C. 4A:2-2.3(a)(12). If the employee is a law enforcement officer, including a parole officer, he or she may file an appeal of the removal action in accordance with N.J.A.C. 4A:2-2.13.⁴ An appellant shall have the opportunity for a hearing before the OAL, after which the administrative law judge (ALJ) shall render, and transmit to the Civil Service Commission, an initial decision. N.J.A.C. 4A:2-2.13(e). The Civil Service Commission shall timely complete its review of the initial decision and issue its final administrative determination regarding the appellant’s removal appeal.

³ According to N.J.S.A. 52:17B-67, a “permanent appointment” is “an appointment having permanent status as a police officer in a law enforcement unit as prescribed by Title 11A of the New Jersey Statutes, Civil Service Commission Rules and Regulations, or of any other law of this State, municipal ordinance, or rules and regulations adopted thereunder.”

⁴ “Law enforcement officer” is “an individual employed as a permanent, full-time member of a State, county, or municipal law enforcement agency who is statutorily empowered to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State and statutorily required to successfully complete a training course approved by, or certified as substantially equivalent to such an approved course, by the Police Training Commission.” N.J.A.C. 4A:2-2.13(a).

N.J.A.C. 4A:2-2.13(f). If the Civil Service Commission “does not issue its final administrative determination within 45 days, the administrative law judge’s initial decision shall be deemed the final administrative determination.” Ibid. An appellant may appeal a Civil Service Commission decision upholding his or her removal to the Superior Court, Appellate Division. N.J.A.C. 4A:2-2.13(i)(5). Also, “[f]ollowing a final administrative decision by the [Civil Service Commission], and upon the filing of an appeal from that decision to the Appellate Division of Superior Court, a party to the appeal may petition the Commissioner for a stay or other relief pending a decision by the Court.” N.J.A.C. 4A:2-1.2(f).

In an appeal of an appointing authority’s removal of a law enforcement officer for his failure to complete his basic-training requirements, the only question is “the fact, or not, of course completion.” Gottlieb v. Monmouth Cnty. Sheriff’s Office, 95 N.J.A.R.2d (CSV) 573. Thus, the fact that a law enforcement officer was dismissed from a training program before successfully completing the program is sufficient to remove the officer from his employment. See, e.g., In re McGorty, CSV 9567-05, Initial Decision (March 14, 2006), adopted, Merit Sys. Bd. (May 12, 2006), <<http://njlaw.rutgers.edu/collections/oal/>> (finding that the appointing authority was entitled to terminate the appellant from employment due to her dismissal from a training program, but ordering that separation be recorded as a “resignation in good standing” because failure to complete the training program was due to an injury, not willful misconduct); Smith v. Juvenile Justice Comm’n Training Acad., OAL Dkt. Nos. PTC 1581-11 & CSV 11658-09 (consolidated), Initial Decision (April 17, 2013), adopted, Police Training Comm’n (June 20, 2013), adopted, Civil Serv. Comm’n (July 22, 2013) (finding that a juvenile detention officer was properly removed from employment after dismissal from the training academy).⁵

In this matter, the Board is entitled to summary decision because there is no genuine issue with respect to whether Boyer failed to complete the training program, and, based on the fact of his dismissal from the training program, the Board was legally entitled to remove Boyer from his employment. The Board persuasively argues that

⁵ None of the decisions in Smith are available on the Rutgers’ website.

Boyer is collaterally estopped, in this appeal, from challenging his dismissal from the training program.

As the Court has explained, collateral estoppel, or issue preclusion, is,

[a]n equitable principle that arises

[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

To forestall future litigation,

the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85 (2012) (citing Restatement (Second) of Judgments § 27 (1982); Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006)).]

Here, the issue regarding whether Boyer was properly dismissed from the training program is precluded because that issue is identical to the issue decided by ALJ Ascione and the PTC in Boyer's PTC appeal. In that matter, the issue was actually litigated in a plenary hearing in which Boyer challenged, and offered testimony in opposition to, his dismissal; the ALJ rendered an initial decision, and the PTC a final decision, on the merits of Boyer's dismissal; the determination of the propriety of Boyer's dismissal was essential to that final judgment; and, Boyer was a party to the earlier proceeding. Thus, the application of collateral estoppel is appropriate here.

Boyer incorrectly argues that collateral estoppel should not be applied because he may appeal the PTC decision to the Appellate Division. First, the Court has recognized that “[a]dministrative tribunals can and do provide a full and fair opportunity for litigation of an issue’ . . . and their judgments on identical issues may form the basis for application of the doctrine of collateral estoppel so long as they are ‘rendered in proceedings . . . [that] provide significant procedural and substantive safeguards,’ similar to those that are provided to litigants in courts of law.” Winters, supra, 212 N.J. at 87 (citations omitted).

Boyer has not challenged the procedural sufficiency of his prior hearing before the OAL, and there is no indication that the hearing was not conducted in accordance with the strict procedural requirements under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -14. Second, in New Jersey, regardless of whether Boyer appeals the PTC’s decision, “a judgment is final even pending an appeal” for purposes of collateral estoppel. Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 426 (App. Div. 2011) (citing Gregory Mktg. Corp. v. Wakefern Food Corp., 207 N.J. Super. 607, 624 (Law Div.1986)), certif. denied, 210 N.J. 478 (2012). The application of collateral estoppel is appropriate here, despite Boyer’s right to appeal his dismissal to the Appellate Division, because both the fact and propriety of Boyer’s dismissal were determined in the prior administrative proceeding.

Based upon all of the above, I **CONCLUDE** that there is no genuine issue of material fact and, the Board having removed appellant for sufficient cause, the Board is entitled to summary decision as a matter of law.

DECISION AND ORDER

Accordingly, the Board properly removed appellant for sufficient cause, and I hereby **ORDER** that respondent’s motion for summary decision is **GRANTED**. Therefore, I further **ORDER** that appellant’s appeal is hereby dismissed.

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



June 26, 2015
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency:

June 26, 2015

Date Mailed to Parties:

June 26, 2015

/lam/bdt

APPENDIX

EXHIBITS

Court:

C-1 Final Decision, PTC 3714-14, decided April 8, 2015

Appellant:

Certification of Wolodymyr Tyshchenko, Esq., dated April 15, 2015

Respondent:

Certification of Andrew J. Sarrol, DAG, dated April 15, 2015

R-A Appeal letter dated January 23, 2015, and supporting documents

R-B PTC Dismissal Notice, dated February 14, 2014

R-C OAL Notice of Filing (PTC Dismissal), Docket No. PTC 03714-2014, dated March 31, 2014

R-D PNDA, dated February 18, 2014

R-E Offer of Employment with the State Parole Board, dated January 8, 2014

R-F Civil Service Commission job specification for Parole Officer Recruit

R-G Parole Board's policy for disciplinary sanctions, and New Employee Orientation Checklist signed by appellant on January 27, 2014

R-H Correspondence between appellant and the Board regarding scheduling, in this appeal, given the posture of the PTC appeal

R-I Letter from appellant's attorney to the Board, dated November 14, 2014, requesting either a dismissal of charges or a hearing

R-J Letter from appellant's attorney to the Board, dated January 13, 2015, waiving a departmental hearing

R-K Initial Decision, PTC 3714-14, dated January 27, 2015

R-L Letter of inquiry from the Board to appellant's attorney, dated January 30, 2015

- R-M Letter from appellant's attorney, dated January 30, 2015, replying to Board's inquiry
- R-N Letter of from the Board to appellant's attorney, dated February 2, 2015
- R-O Letter from appellant's attorney, dated February 2, 2015, replying to the Board's correspondence of that date