

A-6



STATE OF NEW JERSEY

In the Matter of Kellie Martin
Burlington County,
Department of Public Safety

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2014-243
OAL DKT. NO. CSV 11478-13

ISSUED: AUGUST 22, 2017 BW

The appeal of Kellie Martin, Senior Public Safety Telecommunicator, Burlington County, Department of Public Safety, demotion to Public Safety Telecommunicator, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on July 6, 2017. 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 August 16, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

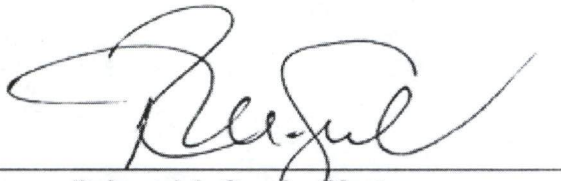
ORDER

The Civil Service Commission finds that the action of the appointing authority in demoting the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Kellie Martin.

Re: Kellie Martin

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
AUGUST 16, 2017

A handwritten signature in black ink, appearing to read 'R. Czedo', is written over a horizontal line.

Robert M. Czedo, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 11478-13

AGENCY DKT. NO. #2014-243

**IN THE MATTER OF KELLIE MARTIN,
BURLINGTON COUNTY DEPARTMENT OF
PUBLIC SAFETY.**

Kellie Martin, appellant, pro se

Laurel Peltzman, Esq., for respondent Burlington County Department of Public
Safety (Capehart & Scatchard, attorneys)

Record Closed: June 30, 2017

Decided: July 6, 2017

BEFORE JEFF S. MASIN, ALJ t/a:

Kellie Martin was a Senior Public Safety Tele-Communicator (SPST) for the Burlington County Department of Public Safety. Her employer demoted her to Public Safety Tele-Communicator (PST), effective July 23, 2013. According to a Final Notice of Disciplinary Action issued on June 24, 2013, her demotion was the result of a determination that she was unable to perform her duties, N.J.A.C. 4A:2-2.3(3). The basis for this was that Martin suffers from limitations affecting her hearing. According to the County, her position as a SPST required that she be able to utilize both ears simultaneously, which she could not do due to these auditory limitations. Ms. Martin appealed her demotion to the Civil Service Commission, which transferred the

contested case to the Office of Administrative Law (OAL) for hearing. The case was originally assigned to Judge Robert Bingham, II. Judge Bingham issued a Letter Order on April 2, 2015, following a March 31, 2015, telephone prehearing conference. After Judge Bingham's appointment to the Superior Court, the case was transferred to this judge, serving on recall, in November 2016.

In September 2015, the respondent moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. On January 12, 2017, this judge issued an Order, granting the motion in part and denying it in part. More specifically, I found that the parties had entered into a Joint Stipulation of Facts, J-1. In granting the County's motion in part, I found, based upon elements of that Stipulation, that "Kellie Martin cannot perform duties that necessitate the ability to hear in one ear while speaking, writing and listening with her other ear. As such, she cannot fulfill the duties purportedly required of a Senior Safety Tele-Communicator." That said, the Order addressed Ms. Martin's claim, in opposition to the motion, that with regard to the County's claim regarding the required elements of the Senior PST position, "[H]er claim that these duties have not been required of others holding the position and that she has been discriminated against due to her disability will abide further discovery and motion or hearing, as warranted." Thus, the denial in part of the motion.¹ A copy of the Order is included as an exhibit with this decision for convenient reference.

Following the issuance of the Order, the parties were permitted to engage in further discovery regarding Ms. Martin's claim that, despite her admitted physical limitation and inability to perform in tasks purportedly required for the Senior PST position, others similarly situated to her had been permitted to retain their position as a Senior PST despite their inability to perform the purported mandatory requirements of that position. She thus claimed to have suffered treatment that was disparate from such

¹ Based on exhibits presented by the County as part of an evidence book offered in support of its motion for summary decision, it appears that Ms. Martin filed a Complaint on August 23, with the Equal Employment Opportunity Commission (EEOC). The EEOC dismissed the Complaint on May 12, 2015, as "unable to conclude that the information obtained establishes violations of the statutes." The notice of this dismissal also contained a "Notice of Suit Rights." See Exhibits R-3 and R-4.

similarly situated employees. As the previous order noted, "Further discovery should proceed, during which the County can, if it chooses, use interrogatories to attempt to flesh out Ms. Martin's claim that she has been the victim of discrimination. Ms. Martin must understand that she will be required to provide detailed information to support her claim that others who were unable to perform in these subdivisions were allowed to retain their senior status. If she is unable to do so, the fact, as found here, that she cannot perform in the three subdivisions will result in her demotion being upheld." An Order respecting elements of the on-going discovery was issued on May 1, 2017.

On May 30, 2017, the respondent renewed its motion for summary decision, contending that as a result of further discovery, it was clear that Ms. Martin had failed to provide any meaningful support for her claim of discrimination and that, as a matter of law, her appeal should be dismissed and her demotion upheld. On June 22, Ms. Martin responded to the renewed motion.² The respondent replied to her submission on June 30.

According to the respondent's renewed motion, it served interrogatories upon Ms. Martin to which she responded on February 9, 2017. In those responses Ms. Martin identified numerous employees who, according to her, were "unable to perform the tasks required for the Police, Fire/EMS and Countywide subdivisions in the public safety center while holding the title of Senior PST." However an examination of her answers shows that in almost every case the claim is that the individuals identified have not been trained to work in a particular area and/or not asked to perform in other subdivisions. After identifying a series of names, Martin writes "they were all senior PST's at one time and were not trained or required to work in all four subdivisions of the public safety Center while still holding a senior PST title." Only in regard to one named employee, Meredith Bell, does Martin say, "He also had physical limitations that kept him from working police desk or any other area and was only required to work in the call-taking the last several years of his employment."

² Her response is dated June 10, but was not received by the OAL until June 22, 2017.

In support of the renewed motion, and in reply to Ms. Martin's assertions in her answers to its interrogatories, the respondent has supplied a Certification from Howard Black, Deputy Director of the Burlington County Department of Public Safety, Communications Center. Mr. Black states that he is "unaware of any senior PST, other than Ms. Martin, who is/was limited or unable to perform the duties attendant to another subdivision besides call-taking." He also addresses the situation of Bonnie Taylor, a Senior PST who, according to Ms. Martin's response to the January 25, 2017, interrogatory, was employed, "[W]hen the county decided my demotion was necessary," and who "was allowed to keep her title as a Senior PST even though she was unable to work in any other division other than call-taking. She wasn't required to train or work in any other area. It was only after I decided to bring a suit against Burlington County that she was required to train on police radio, in which she was not required to work once her training was done. She remained a Senior PST and only worked in the call-taking division." However, according to Mr. Black's Certification, he reviewed Ms. Taylor's file and "to my knowledge, Ms. Taylor was never limited or unable to perform the duties attendant to the other subdivisions besides call-taking. Indeed, Bonnie Taylor was trained on Police Desk and was able to work at the Police Desk if she was called upon to do so."

In her reply to the renewed motion, Ms. Martin first complains that she did not receive "any of the discovery I have asked for that would have proven my claim," discovery which she contends would have proven "that several senior public safety telecommunicators were only assigned to one division (call-taking) for all of or the last several years of their employment as a senior public safety telecommunicator." She argues that the expectations placed on her by the County were "obvious[ly] . . . more complex than those of other SPSTs." She next seems to contend that she was somehow disadvantaged at the time of a promotional Civil Service test for Senior PST. However, it is unclear exactly how this is related to her contention concerning the validity of her demotion from SPST. As for the discovery issue, it is again noted that an

Order was issued dealing with discovery on May 1, 2007, and it has not been shown that the respondent did not adhere to that Order.

In her reply, Ms. Martin iterates her contentions in her interrogatory responses concerning Bonnie Taylor and Meredith Bell. She claims that due to Howard Black's limited period of service in his position, he "would not be aware of Mr. Bell's limitations or inability to perform in any other division during the time of Mr. Bell's employment nor would he be aware of promotional requirements prior to taking his present position."

In addition to her letter response to the motion, Ms. Martin has supplied a memo, dated December 28, 2005, from Jeffrey Johnson, Chief PST to Kellie Howe (apparently this is another name by which Ms. Martin was then known) regarding "Senior Position" and a letter, dated February 7, 2017, from Helen Rumph, each of which will be discussed later in this decision.

The County's reply dismisses Ms. Martin's arguments and contentions as either irrelevant to the current appeal or insufficient to demonstrate the existence of genuine issues of material fact that would defeat its motion. In addition, the respondent offers additional Certifications, from Kevin Briggs, Supervising Public Safety Telecommunicator/911 Coordinator, and Christian Carroll, Chief Public Safety Telecommunicator.

Summary Decision

The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the

record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986) (Anderson).

In Judson, supra, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, supra, at 477 U.S. 251-52, 106 S. Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record

are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Discussion

Burlington County based its original motion for summary decision upon its contention that Ms. Martin is indisputably unable to perform tasks which are essential elements of the critical public-safety communicator position from which she is being demoted. The County, through the first Certification supplied by Kevin Briggs, Supervisor in the Department of Public Safety, Communications Center, supplied evidence respecting the mandatory requirement that a Senior PST must be able to perform duties in more subdivisions than solely in the call-taking division. She must be able to perform in at least one additional subdivision. The nature of the job responsibility requires her to be able to use both ears simultaneously and, according to the Joint Stipulation of Facts, Ms. Martin is unable to do so due to hearing loss, a deficiency which has been attested to by her own physician. Thus, it argued, her demotion, based upon her inability to perform, should be upheld and her appeal dismissed.

As has been stated, the evidence offered by the County as to Ms. Martin's auditory deficiency and its impact on her ability to perform her job as a SPST is now, and was previously, unopposed. Medical examination by an auditory specialist confirmed her hearing loss and noted that she herself had expressed her belief that her hearing loss hampered her ability to perform her job properly. Thus, the finding in the prior Order that the County had sustained its position that she could not perform her duties and that summary decision was warranted as to that contention. However, as also noted, Ms. Martin claims that, despite her acknowledged inability to perform and despite the supposedly mandatory requirement to be capable of performing in more than one subdivision, in fact other employees with her previous title as a SPST have not been required to perform in other divisions. Thus, she claims that while she may indeed be physically limited, she has suffered disparate treatment at the hands of the County,

as she is being discriminated against due to her disability. Given this, her demotion must be overturned.

As the County points out in its brief, to establish a prima facie case of disparate treatment, Ms. Martin must establish that (1) she belongs to a protected class; (2) she was performing her job at a level that met her employer's legitimate expectations; (3) she suffered an adverse employment action, and (4) others not within the protected class did not suffer similar adverse employment action. El-Sioufi v. St. Peter's Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005). In respect to the second of these elements, while an employer is generally required "to consider all reasonable accommodations that may be made in a job requirement so as to permit a person suffering from a disability the opportunity to remain in position . . . the employer is not required to change the reasonable requirements of a position in order to allow someone to remain in that position if the reasonable accommodation cannot be made while allowing the function to be properly performed." This is especially the case where the job involves matters related to the public safety and welfare. At the same time, an employer may not require a disabled employee to perform job tasks that others holding the same position are not capable of performing and then use the disabled employee's inability to perform such task(s) as the basis for claiming that the employee is unable to perform the job.

It is important to note that the examination respecting alleged disparate treatment must be made between individuals who are similarly situated. Thus, as Ms. Martin is physically incapable of performing the required task of using both ears during elements of the required work in other divisions, the meaningful comparison in her case is not with employees who are said to be "incapable" of performance simply due to their not having received training to perform in other divisions and/or because they have not been asked to perform in other divisions, but with other employees with similarly disabling physical or mental conditions that prevent them from actually being able to perform, even if they have received, or attempted to receive, the necessary training. The factor that limits, and indeed prevents, Ms. Martin, from performing tasks that a Senior PST must be capable of performing is not a lack of training or an opportunity to

perform in other subdivisions, but an actual physical disability to engage in such performance. As a result, the information provided by Ms. Martin in her answer to the supplemental discovery, in which she lists many present and past employees who were supposedly not required to perform in other subdivisions, or who had not received training to do so, is of no consequence. Indeed, as made clear in her letter responding to the renewed motion, her claim is not that Bonnie Taylor was physically or mentally incapable of performance in other divisions, only that she lacked training to do so, and was only re-trained to be able to perform work at the police desk after Martin noted her lack of training when Martin was demoted. And as Christian Carroll certifies in his June 28, 2017, Certification, Taylor was trained on Police Desk as well as on call-taking and was "never limited or unable to perform the duties attendant to other subdivisions besides call-taking."

The only individual Ms. Martin appears to identify as having a "physical limitation" is Meredith Bell. However, Martin provides no additional information whatsoever as to the nature of this supposed physical limitation, nor any indication that she had personal knowledge of his alleged limitations or how they impacted Mr. Bell's abilities, rather than perhaps indirect awareness through others. As for the letter from Helen Rumph, which is neither in the form of an affidavit or a certification, as such supporting documentation must be under N.J.A.C. 1:1-12.5(b), Rumph identifies herself as Martin's Senior Communications Operator and/or Supervisor from 1992 to 2014. In referring to Mr. Bell, Rumpf states that he had "limited physical capacity." She does not indicate the nature of this "incapacity" or how it limited Bell from performing in other divisions than call-taking.

A mere "bald" assertion that Mr. Bell had a physical limitation, much less one affecting his ability to perform a required job responsibility, unaccompanied by any form of proof as to the existence of the limitation and how it affected Mr. Bell in his ability to perform the requirements of the Senior PST position, other than an uncertified letter containing no significant additional information on this point, is insufficient by itself to raise a genuine issue of factual dispute. While Martin offers such "gauzy" claims, on behalf of the respondent, Mr. Black specifically states that Ms. Martin is the only Senior

PST of whom he is aware "who was limited or unable to perform the duties attendant to another subdivision besides call-taking." Additionally, in reply to her letter response, Kevin Briggs certifies that he supervised both Martin and Bell and that "Bell worked in the Call Center and was trained in Police Desk. He was capable of performing the duties of Police Desk if called upon to do so." He also notes that of all the Senior PSTs of whom he was aware, only Martin was limited or unable to perform "the duties attendant to at least one other subdivision besides call-taking."

While it is recognized that Ms. Martin would be unlikely to have any significant details concerning the alleged "physical limitation" supposedly affecting Mr. Bell, it must be assumed that if she asserts the existence of such a limitation she must have some sufficient familiarity with the general nature of that limitation so as to be able to at least describe it in regard to how she understood it affected and limited Mr. Bell. Yet, in her answer to the interrogatory and in her letter response, she refers to it only in this most general and unrevealing terminology. Such a "gauzy" assertion is the very "scintilla" of evidence that cannot stand to create a genuine dispute of material fact. Judson, supra, at 75. The claim is at best, "insubstantial," Brill, supra at 530.

As Ms. Martin is the party asserting that she was the subject of disparate treatment, the burden to, at the very least, identify with some specificity the individuals who were similarly situated and yet treated differently must rest with her. Based upon the submissions made in respect to the original motion for summary decision and its renewal, I **FIND** that Ms. Martin has failed to provide sufficient evidence to support a prima facie case that she was improperly treated as opposed to other individuals similarly situated to her. While no doubt as an individual suffering from the hearing loss she is a member of a protected class and she did suffer an adverse employment action, the evidence makes clear that she was not capable of performing required elements of the significant public safety position she held. There is no assertion, or any evidence to support any suggestion that the requirement she could not fulfill was unreasonable, particularly given the nature of these critical, public safety-related communications positions. Where it is certainly possible that were she capable of performing the job

fully, she might not be asked to perform in other subdivisions, or conceivably might not even receive training to permit her to do so, she would nevertheless be either capable of receiving such training or, if trained, of stepping in to do the work in other divisions at such time as the employer found it necessary for her to do so. But with the disability which she admittedly has, she cannot actually perform in these other subdivisions, and it must be presumed, could not be properly trained to do so due to her physical limitations.

I **CONCLUDE** that Ms. Martin has failed to present evidence necessary to establish the existence of a prima facie case of disparate treatment, as she is unable to fulfill the requirement to establish that others similarly situated to herself have not suffered the same adverse employment action as she did.³ As a result, and as she is, as stipulated, physically incapable of performing reasonable requirements of the Senior PST position, I **CONCLUDE** that there are no genuine issues of material fact in dispute and that the respondent's renewed motion for summary decision should be **GRANTED**. I **CONCLUDE** that the County has met its burden of supporting Ms. Martin's demotion, based upon N.J.A.C. 4:2-2.3(3). The appeal is therefore **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. 52:14B10.

³ The respondent notes that if Mr. Bell actually was physically or mentally limited such that he could not perform the duties attendant to one of the divisions other than call-taking, the County did not demote him, which suggests that it did not, as she claims, discriminate against Ms. Martin due to her disability. Of course, as has been discussed, her claim that Bell was affected by any such limitation has not been sustained by any competent and substantial proof, and the record thus is that only Martin was so limited.

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.



July 6, 2017

DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency:

7/6/17

Date Mailed to Parties:

7/6/17

mph

EXHIBITS:

Joint Exhibits:

Order dated January 12, 2017

J-9 Joint Stipulation of Facts, with attached exhibits as follows:

- J-1 January 29, 2013 letter from Robert Belafsky, M.D., F.A.C.S.
- J-2 February 5, 2013 letter from George Parks, III, to Kellie Martin
- J-3 February 26, 2013 letter to George Parks, III, from Robert Belafsky, M.D., F.A.C.S.
- J-4 Preliminary Notice of Disciplinary Action
- J-5 Final Notice of Disciplinary Action, dated August 24, 2013
- J-6 Patient Instructions for Kellie Martin printed on March 5, 2014
- J-7 Public Safety Telecommunicator Expectations
- J-8 List of employees and areas of training

For appellant:

- P-1 Memorandum from Jeffrey Johnson, dated December 28, 2005
- P-2 Letter from Helen Rumph, dated February 7, 2017

For respondent:

- C-1 Certification of Kevin Briggs, dated September 3, 2015,
Exhibit A: Letter dated February 9, 2017 from Kellie A. Martin to Laurel Peltzman, Esq.; letter dated March 6, 2017 to Kellie Martin from Laurel B. Peltzman, Esq.
Exhibit B: Certification of Howard Black
- C-2 Certification of Kevin Briggs, dated June 28, 2017
- C-3 Certification of Christian Carroll, dated June 28, 2017.

Exhibits presented in Burlington County Exhibit List designated as:

- R-1 Burlington County Policy: Requests for Reasonable Accommodations
- R-2 Kellie Martin's May 11, 2015, responses to interrogatories
- R-3 Equal Employment Opportunity Commission charge
- R-4 Equal Employment Opportunity Commission Dismissal and Notice of Rights