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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 15120-19
AGENCY DKT. NO. 2020-985

**IN THE MATTER OF RICHARD FRASCATI,
FREEHOLD BORO POLICE DEPARTMENT,**

AND

RICHARD FRASCATI,

Petitioner,

v.

**OCEAN COUNTY POLICE
ACADEMY,**

Respondent.

OAL DKT. NO. PTC 8404-19
AGENCY DKT. NO. N/A
(CONSOLIDATED)

Lori Dvorak, Esq. for Richard Frascati, appellant/petitioner, (Dvorak and Associates, attorneys)

Matthew B. Thompson, Esq., for respondent, Ocean County Police Academy (Berry, Sahradnik, Kotzas & Benson, attorneys)

Edward Washburn, Esq., for respondent, Freehold Boro Police Department, (McKenna, Dupont, Stone and Washburn, attorneys).

Record Closed: August 7, 2021

Decided: September 16, 2021

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 11, 2019, the Ocean County Police Academy (OCPA) dismissed the appellant/petitioner, Richard Frascati, (Frascati) from the OCPA for failure to meet the physical fitness training requirements, specifically for performing only twenty-five approved sit-ups, not the twenty-eight approved sit-ups required during the one-minute time allotted on his second physical re-assessment. The parties have a limited dispute regarding the factual count. Rather the issue is predominately legal in the interpretation of whether on the re-assessment, Frascati should have been only required to retake the sit-up portion of the testing.

Appellant/petitioner requested and was afforded a departmental hearing on April 12, 2019, that hearing confirmed the dismissal. Appellant/petitioner filed a notice of appeal, and the matter was transmitted by the Police Training Commission (PTC) to the Office of Administrative Law (OAL), where it was filed on June 20, 2019, for determination 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.

By Preliminary Notice of Disciplinary Action (PNDA), dated May 23, 2019, and Final Notice of Disciplinary Action (FNDA), dated July 24, 2019, Freehold Boro Police Department (FBPD) charged appellant/petitioner with violation of N.J.A.C. 4A2:2-2.3(a)(3), Inability to perform duties. All related to the dismissal of appellant/petitioner from the Ocean County Police Academy (OCPA) for cause. On July 24, 2019, the FBPD removed Frascati from his employment effective retroactively to April 11, 2019, as being unable to satisfy the requirements of being a Freehold Boro Police Officer.

On October 3, 2019, appellant/petitioner filed a notice of appeal, and the matter was transmitted by the Civil Service Commission (CSC) to the OAL, where it was filed on October 24, 2019, for determination 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.

On June 8, 2020, the undersigned issued an Order of Consolidation-Predominant Interest, and Placement on the Inactive List. The tribunal found the Police Training Commission had the predominant interest. The tribunal placed the matter on the inactive-list for six-months, due to the implications of Covid-19 on attempting to resolve the matter. The matter came off the inactive list in December 2020. The hearing in this matter occurred on May 5, 2021, the parties were afforded thirty-days after receipt of the transcript to submit closing memoranda, and if responsive memoranda were required the parties had additional two weeks to submit any additional response. The record closed on August 7, 2021.

FACTUAL DISCUSSIONS

Frascati became employed by the Freehold Boro Police Department, in the process of being hired, Frascati had been directed to attend the OCPA which he did, becoming part of class 107, which commenced on March 22, 2019. After three days of physical training, Frascati had his initial physical assessment. On March 28, 2019. Frascati failed the physical assessment for not performing sufficient appropriate sit-ups in the one-minute time allotted. Pursuant to procedure, Frascati attended an additional nine workdays of physical training. On April 11, 2019, Frascati performed his physical re-assessment. Again, he failed the number of appropriate sit-ups in the time allotted.

Lt. K. James Cooney (Lt. Cooney)

Lt. Cooney is a twenty-three plus years employee of the OCPA. His responsibilities at the time of the incident included directing the physical training and testing portion of the police officer basic course. He possesses a certificate for training, which required a forty-hour course, he also has an Associates Degree. He identified his training certificate from January 2018 (Exhibit J-9). He also identified his power point presentation (Exhibit J-14) which explained the required State Physical Testing Exam. The exam is a timed exam with a series of performance requirements, there is an initial warm up period followed by five exam protocols with breaks in between the various testing protocols. If one fails any of the five protocols, the recruit fails the test. Lt.

Cooney did not observe Frascati fail the sit-up protocol on March 28. He identified the initial physical assessment (Exhibit J-2) signed by another employee of the OCPA, and confirmed J-2 as an ordinary and customary business record. Frascati, subsequent to the failure did attend physical training for nine work-days and took a re-assessment on the tenth work day. Lt. Cooney did attend to the re-assessment of eight recruits on April 11, 2019. Frascati was one of the recruits. While he did not observe Frascati full performance of the failed test, a Detective Brook Joaquin observed Frascati fail the test, and she reported the failure to Lt. Cooney. He signed the re-assessment failure of Frascati (Exhibit J-3). Lt. Cooney did observe Frascati's struggle during the test. Lt. Cooney stated no recruit complained about the scoring at the time of the testing. Lt. Cooney then identified the dismissal handed to Frascati after failing the re-assessment (Exhibit J-4).

There began questioning of the appropriateness of OCPA's custom and practice of requiring a recruit who failed the physical examination on the initial attempt to be required to retake the entire test. Exhibit J-10 and J-7 were introduced as the Physical Condition Testing Procedure and the Basic Law Enforcement Course Training Manual, attached to the respondent's answer to the petition, respectively. The procedure provided,

"Trainees who fail to meet the minimum requirement of any one of the events will be given nine (9) physical conditioning sessions to improve. Following the ninth (9th) physical conditioning session they will be retested.

The physical conditioning retest to be administered will be just the event/s the trainee failed during the initial physical conditioning test."

Lt. Cooney claimed the OCPA did not follow that protocol, but did require the reexamined recruit to complete the entire testing procedure. In Frascati's case he failed the second protocol of sit-ups, after having completed the fifteen-inch vertical jump successfully, and taking a two-minute recovery. See J-3.

Det. Brook Joaquin (Det. Joaquin)

Det. Joaquin is a fourteen plus years employee of the OCPA. She possesses an A.A. and B.A degree in Criminal Justice, and a certificate as a Physical Training Instructor. She completed the forty-hour course to obtain the Training Certificate (Exhibit J-8). She observed Frascati during his physical re-assessment testing. She observed on the mat next to Frascati, while another recruit held his legs. Frascati had difficulty in properly performing the sit-up which requires the hands to be placed on the chest cross-wise and the sit-up to be executed by bringing the elbows to the knees. Frascati had difficulty reaching the knees, he would contact the thighs. She did not keep a written record of the failed attempts, only the successful attempts did she count. Frascati only performed twenty-five successful sit-ups in the time allotted. The requirement is twenty-eight. She advised Lt. Cooney of the failure and the test concluded. Frascati had not been successful on that portion of the test, therefore, the determination, there was no need to continue the test.

Under Sheriff Brian Klimakowski (U.S. Klimakowski)

U.S. Klimakowski is the director of the OCPA, he possesses a M.S. degree from Fairleigh Dickenson University. He is a fitness specialist. He previously served as the Chief of Police in Manchester, New Jersey. He began his employment with the OCPA in 2007. He identified his certificate as Law Enforcement Fitness Specialist (Exhibit J-12). He discussed the Cooper Institute Standard for the battery of tests, and that while he was at the OCPA, the recruits were always required to complete the entire test. He testified to the certification by the Police Training Commission of the OCPA. He could not reflect the date of the current certification from his memory, but offered to supply same if requested. He denied any issues with the recertification of the OCPA. He maintains the PTC knows they require the full test on re-examination, and the PTC has never questioned this or requested they change that policy. He claimed OCPA has never changed its policy. He disputes that Exhibit J-7 requires any change to the OCPA policy.

The petitioner did not testify nor did appellant/petitioner produce any witnesses.

I understand the argument raised by Exhibit J-7. It appears that Frascati was afforded warm up time, successfully completed the vertical jump of fifteen-inches, but failed to perform sufficient appropriate sit-ups during the re-assessment. This tribunal cannot find that a vertical jump followed by a two minute rest period had any effect on the performance of the sit-up test. Frascati's counsel challenges the instructor's actions during the re-examination period, arguing, Frascati did not receive notification when sit-ups were unsuccessful; the person who held Frascati's legs during the re-examination; did not testify; and the OCPA failed to video the re-examination. The tribunal so notes counsel's arguments, and finds them without merit. Petitioner is obliged to show bad faith, discrimination or insidious behavior. None of those items are present. Petitioner made no protest at the time of the re-examination, or if so, he chose not to testify to same. Petitioner choose to present testimonial evidence and relies on an alleged failure in the testing procedure.

FACTUAL FINDINGS

After consideration of the documentary evidence and testimony of the respondent's witnesses, I **FIND** as **FACT** the following:

1. Frascati became employed by the Freehold Boro Police Department, in or about early 2019, as a temporary employee, during his working test period.
2. In the process of being hired, Frascati had been directed to attend the OCPA which he did, becoming part of class 107, which commenced on March 22, 2019.
3. After three days of physical training, Frascati had his initial physical assessment. On March 28, 2019, Frascati failed the physical assessment for not performing twenty-eight appropriate sit-ups in the one-minute time allotted.
4. Pursuant to procedure, Frascati attended an additional nine workdays of physical training.

5. On April 11, 2019, Frascati performed his physical re-assessment. Again, he failed the number of appropriate sit-ups in the time allotted.
6. Physical Condition Testing Procedure and the Basic Law Enforcement Course Training Manual, provided on retesting, that only the failed portion of the physical exam be repeated.
7. The OCPA customarily requires recruits to take the entire test over again.
8. Frascati had one test prior to failing the sit-up portion of the test, a vertical jump, which he passed.
9. The instructor provided Frascati with a two minute rest/recovery period after the vertical jump prior to the commencement of the sit-up portion of the test.
10. The test culminated on the failure to perform twenty-eight appropriate sit-ups.
11. Frascati performed twenty-five appropriate sit ups.
12. The dismissal from the OCPA for the failure to perform a portion of the physical training portion of the training, prevents Frascati from performing his job duties for the Township of Freehold.
13. The dismissal by the OCPA did not occur as a result of actionable discrimination, invidious action, or in bad faith.

LEGAL ANALYSIS AND CONCLUSION

The Police Training Commission (PTC) "is charged with setting standards and overseeing the training and certification of police officers in New Jersey." Haines v. Twp. of Voorhees, 1997 U.S. Dist. LEXIS 18132, at n.3 (D.N.J. November 10, 1997) (citing N.J.S.A. 52:17B-71).

In Butler v. Passaic County Police Academy, PTC 01935-05 and CSV 13123-05, Initial Decision (August 27, 2007), aff'd, Merit System Board (March 17, 2008),

<<http://njlaw.rutgers.edu/collections/oal/>>, the ALJ stated that “[g]enerally, the appointing authority decision to remove the employee based on a failure to complete the academy should not be disturbed absent a showing of discrimination, invidious motive or bad faith,” and concluded that the appointing authority acted reasonably in terminating Butler from employment as a correction officer.

In this case, the OCPA dismissed Frascati for failing to meet the minimum requirement of performing twenty-eight sit-ups in an allotted one-minute time frame.

The burden of persuasion falls on the OCPA to show that petitioner could not be certified. See N.J.A.C. 13:1-7.2(a)(8). The OCPA must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

As I have found that OCPA proved that Frascati failed to complete the requisite number of appropriate sit-ups during his physical re-assessment on April 11, 2019,

In Greenwood, supra, 127 N.J. 500, the Court found good cause for dismissal when a legitimate business concern or a risk of harm to oneself or others is present, and in Butler, supra, PTC 01935-05 and CSV 13123-05, Merit System Board (March 17, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>, the Merit System Board found that a dismissal should not be disturbed in the absence of discrimination, invidious behavior, or bad faith, none of which is present here.

Frascati’s failure to complete the physical training portion of the OCPA training course resulted in his dismissal from the OCPA. This dismissal prevents Frascati from performing his duties as a police officer for the Township of Freehold.

Based on the above findings of fact and legal analysis, I **CONCLUDE** that the OCPA has shown by a preponderance of the evidence that on April 11, 2019, Frascati failed on reexamination the physical portion of the police training and was dismissed from the Academy.

I **CONCLUDE** the dismissal was not done in bad faith, as a result of actionable discrimination, or invidious action on the part of the OCPA.

I **CONCLUDE** the dismissal by the OCPA results in Frascati's inability to perform his duties as a Freehold Township Police Officer, and therefore, Frascati has violated N.J.A.C. 4A:2-2.3(3) inability to perform duties.

I **CONCLUDE** the dismissal by the OCPA results in Frascati's continued inability to perform his duties as a Freehold Township Police Officer, accordingly, the penalty of removal is compelled by the circumstances.

ORDER

I **ORDER** that the dismissal from the OCPA relating to Frascati's failure to complete the physical assessment testing are **SUSTAINED**, and the dismissal of Frascati from the OCPA is **AFFIRMED**.

I **FURTHER ORDER** Frascati's appeal of the OCPA dismissal is **DENIED**.

I **FURTHER ORDER** that the appeal from the dismissal by the Freehold Boro Police Department of Frascati is **DENIED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE POLICE TRAINING COMMISSION and CIVIL SERVICE COMMISSION** for consideration. The PTC will have the predominant interest. It is encouraged that the PTC consult with the CDC prior to issuing a Final Decision.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE POLICE TRAINING COMMISSION and CIVIL SERVICE COMMISSION**, who by law are authorized to make a final decision in this matter. If the Director of the **DIRECTOR OF THE POLICE TRAINING COMMISSION and CIVIL SERVICE COMMISSION** do not adopt, modify or reject this decision within forty-five days, 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 **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 16, 2021
DATE


JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

September 16, 2021

Date Mailed to Parties:

September 16, 2021

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APPENDIX
LIST OF WITNESSES

For Petitioner/Appellant:

None

For Respondent:

Lieutenant K. James Cooney	OCPA Physical Training Director
Detective Brook Joaquin	OCPA Physical Training Instructor
Under Sheriff Brian J. Klimakowski	OCPA Director

LIST OF EXHIBITS

Joint

- J-1 Not in Evidence**
- J-2 Initial Assessment March 28, 2019**
- J-3 Re-assessment April 11, 2019**
- J-4 Dismissal Notice April 11, 2019**
- J-5 Not in Evidence**
- J-6 Not in Evidence**
- J-7 Director's letter May 10, 2019**
- J-8 Instructor Certificates Joaquin Jan 2, 2017**
- J-9 Instructor Certificate Cooney Jan 2, 2018**
- J-10 Physical Condition Testing Procedure**
- J-11 Not in Evidence**
- J-12 Instructor Certificate Klimakowski September 8-12, 2008**
- J-13 Not in Evidence**
- J-14 General Physical Condition Testing Procedures, 2017**
- J-15 FNDA July 24, 2019**
- J-16 Not in Evidence**