



STATE OF NEW JERSEY

**DECISION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Clive Campbell,
Central Reception and Assignment
Facility, Department of Corrections

CSC DKT. NO. 2022-1743
OAL DKT. NO. CSV 01895-22

ISSUED: NOVEMBER 23, 2022

The appeal of Clive Campbell, Institutional Trade Instructor 1, Cooking, Central Reception and Assignment Facility, Department of Corrections, removal, effective December 7, 2021, on charges, was heard by Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on October 24, 2022. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of November 23, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and her recommendation to reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive and mostly unworthy of comment as the ALJ's findings and conclusions in upholding the charges and the penalty imposed based on her thorough assessment of the record are not arbitrary, capricious or unreasonable.

The Commission agrees with the ALJ that the appellant completed the reinstatement process and as such, did not violate the Last Chance Agreement in this matter. While the appellant clearly and admittedly did not report the 2014 arrest, for the reasons expressed by the ALJ, the Commission finds that omission was not a violation of that agreement. Additionally, the Commission notes that the ALJ specifically found that the appellant's testimony regarding his prior reporting of that

arrest was credible. Upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. See *Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” See also, *In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ’s decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. See N.J.S.A. 52:14B-10(c); *Cavalieri u. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ’s credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10 from the first date of separation until the date of reinstatement. Moreover, as the removal has been reversed, the appellant is entitled to reasonable counsel fees pursuant to N.J.A.C. 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division’s decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission’s decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Clive Campbell. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation until the date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in N.J.A.C. 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF NOVEMBER, 2022

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 01895-22

AGENCY DKT. NO. 2022-1743

CLIVE CAMPBELL,

Petitioner,

v.

**CENTRAL RECEPTION AND ASSIGNMENT
FACILITY, DEPARTMENT OF CORRECTIONS**

Respondent.

William A. Nash, Esq., for petitioner (Nash Law Firm, LLC, attorneys)

Gary W. Baldwin, Deputy Attorney General, for respondent (Matthew J. Platkin,
Attorney General, State of New Jersey, attorney)

BEFORE **SARAH G. CROWLEY, ALJ:**

Record Closed: September 27, 2022

Decision: October 24, 2022

STATEMENT OF THE CASE

The petitioner has been employed by the State of New Jersey for seventeen years. He was hired in 2003 at Woodbridge Developmental Center. After the facility closed, he was transferred to the New Jersey Department of Corrections (NJDOC) in 2013. He was working as an Institution Trade Instructor (ITI) at the Woodbridge facility when he was disciplined on September 28, 2018, for chronic absenteeism and lateness. That

disciplinary matter was ultimately resolved, and a settlement and last chance agreement was executed on September 16, 2020. The agreement provided in relevant part that the petitioner would serve a fifteen-day suspension and successfully complete a background check as part of the reinstatement process. The agreement further provided “that he would be removed for any subsequent attendance infraction.”

In connection with his reinstatement, the respondent discovered a drug possession charge from 2014. The respondent seeks petitioner’s removal based upon this arrest in 2014, which was not disclosed on his reinstatement paperwork. The arrest was ultimately dismissed under a pre-trial intervention agreement. The appointing authority seeks petitioner’s removal on the grounds that he did not complete the necessary steps in the reinstatement process and is thus, in breach of his last chance agreement. The petitioner counters that the arrest was disclosed in 2014, and he has done everything necessary to complete the reinstatement process under the agreement.

PROCEDURAL HISTORY

The respondent issued a preliminary notice of discipline on April 23, 2021. After a departmental hearing, a final notice of discipline was served on December 7, 2021. The petitioner appealed and the matter was transmitted to the Office of Administrative Law (OAL) as a contested matter on March 14, 2022. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14D-1 to -13. A hearing was held on August 24, 2022, and August 25, 2022, and the record closed after submissions by the parties on September 27, 2022.

TESTIMONY AND FINDINGS OF FACT

Kathleen Kreager is a legal specialist in the Office of Human Relations. She is responsible for disciplines and is responsible for the issuing preliminary and final notices of discipline for the DOC. She also serves as a hearing officer for the department. She is familiar with the Clive Campbell matter and identified the last chance agreement entered into with the petitioner on September 16, 2020. She summarized the terms of the agreement, which included a fifteen-day suspension and successful completion of the background check. He was employed as an institution trade instructor. She testified that

following the execution of the agreement, he had to fill out some forms in connection with his reemployment as he had been out due to the pending disciplinary charges. He checked off "yes" in the box about arrests and listed a 1993 arrest. However, there was an arrest that resulted in a dismissal under a pre-trial intervention agreement that he failed to disclose from 2014. Her opinion was that the failure to list the details of this arrest constituted a failure to successfully complete the reinstalment process and thus, a breach of the last chance agreement.

The final notice of disciplinary action (31-B) sustained the following charges:

N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employ.

12. Other sufficient cause.

HRB 84-17. As amended C-8 intentional misstatement of material fact in connection with work employment application, attendance or in nay(sic) record, report investigation or other proceeding. C-11 Conduct unbecoming an employee.

The specifics in the FNDA state that the charges are:

. . . as a result of a failure to disclose a drug arrest in Rahway on 4.1.14 in an effort to conceal this incident during the completion of your renewal application for clearance and issuance of NJDOC ID card. "The charges go on to state that this nondisclosure was a "material breach of the last chance settlement agreement" requiring successful completion of the background check.

Ms. Kreager did not know if the 2014 charges which were ultimately dismissed would constitute grounds for removal. Moreover, the last chance agreement only related to time and attendance issues. Ms. Kreager discussed the background check process done at the DOC. She discussed the Prison Rape Elimination Act (PREA) checks that are completed regularly on employees as well as the criminal background checks that are completed on all employees every three to five years in connection with the issuance of new ID cards. She conceded that the 2014 arrest would have come up on either a PREA or basic background check done in connection with the issuance of a new identification

card. However, she did not investigate whether they were aware of the 2014 arrest or if the petitioner had disclosed this arrest in 2014. That was not her job. She felt that the failure to list it on the form they use to complete background check was a material misrepresentation and a breach of the last chance agreement.

Ms. Kreager also discussed the policy which requires you to report an arrest. She identified the policy which requires employees to notify their supervisor of any arrest within forty-eight hours and to thereafter, file a written report. However, she conceded that she did not investigate whether the petitioner had given such notice in 2014, or if the arrest had shown up during routine background checks, which is should have. She reiterated that this was not her responsibility, and she did not know if the petitioner reported the incident to his supervisor. She was also unsure if such disclosure or the underlying offense would have resulted in any discipline. He was being disciplined because they felt that the failure to list this arrest on his reinstatement paperwork was a violation of the last chance agreement requiring successful completion of a background agreement. The background check was in fact completed and she provided no testimony on the ultimate impact of the 2014 arrest would be if it had been disclosed on the form.

Wayne Lemme is an NJDOC senior identification officer. He has been employed by DOC for twenty-two years. He does background checks for the DOC and does over two hundred background checks a month. He did the background check on the petitioner in connection with his reemployment application. He only sees what the charge was and the conditional dismissal and the dates of them. His background check does not provide any details about the arrest. He testified that he is aware of what a PREA check is and that they do background checks every three to five years on any DOC employees in connection with the renewal of ID cares for all employees as well as PREA checks. He prepared a memo regarding the results of the background check on the petitioner to Jennifer Rodrigues on November 20, 2020. He had no information about prior background checks for the petitioner which would have been completed in the last eight years. He is not involved in the process other than to report what is found after he completes the background check.

Lieutenant Thomas O'Keefe (Lt. O'Keefe) is an administrative lieutenant in the Rahway Prison. He was held this title for three and a half years. He discussed the difference between civilian and non-civilian employees. Lt. O'Keefe discussed the duty to disclose any arrests or convictions, whether you were a civilian or a non-civilian. He identified the FNDA which was issued on December 7, 2022, which charged the petitioner with conduct unbecoming for a misstatement of material fact on his reemployment application. He also discussed the duty to report any arrests within forty-eight hours and to prepare a report in connection with same. However, he was not certain if any disciplinary charges would be issued for the underlying arrest as that always dependant on the severity of the charges. He discussed the policy to report an arrest, but he did not investigate whether this arrest was ever reported by the petitioner. He discussed the importance of the policy in terms of the risk to security of the facility.

For petitioner:

Clive Campbell was employed at the Woodbridge Development Center before being transferred to CRAF after Woodbridge closed. He has been employed by the State for approximately seventeen years before he was suspended for a time and attendance infraction in 2018. He testified that he was going through a divorce and had a sick child and had trouble with time and attendance. He was given a fifteen-day suspension for his time and attendance issues and signed a last chance agreement. He understood that to mean that if he had any more time and attendance infractions that he would be terminated. He complied with the other requirements of the agreement.

He acknowledged that he was arrested for possession of marijuana in 2014 in Rahway. He reported his arrest the next morning to his Supervisor Charles Finch. After he reported it to Mr. Finch, he went to SID with him where he prepared a statement and submitted it. They met with someone at SID, but he does not remember the individual's name. He does not have a copy of it as he through a divorce and has moved since then. It was almost eight years ago. He recalls that he had to write something down and sign it and gave it to the guy at SID. He was not disciplined for the arrest, and it was dismissed after a year of compliance with the pretrial intervention agreement. He knew that he had to go through a background check to return to work and he did fill out the necessary

paperwork. His did not list the 2014 arrest as he could not remember the details and he knew it had been dismissed pursuant to the pretrial intervention agreement. He also had reported it when it occurred in 2014.

FINDINGS OF FACT

The resolution of the claims in this matter requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency, and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, I **FIND** that the testimony of the petitioner that he reported the offence in 2014 to his superior officer was credible. Moreover, it was not disputed by the respondent that they never even investigated if there had been a disclosure of the offense in 2014, or why they would not have been aware of this from subsequent background checks in the eight years since the arrest. I found the testimony of the respondents witnesses credible but that they offered no testimony or documentation to support that there was a failure to complete the paperwork necessary for reinstatement or that there that there was a violation of any rules or regulations or a violation of the last chance agreement. Moreover, they do not allege the 2014 arrest itself would result in any discipline. The last chance agreement pertained to any future time and attendance violations which there were none.

Based upon the testimony and the credibility of the parties, I find the following as **FACT:**

1. Petitioner has been employed by the State of New Jersey for seventeen years. He was terminated on December 13, 2018, for chronic lateness and absenteeism. The petitioner appealed and the matter was resolved by a settlement agreement.
2. The settlement agreement provided in relevant part:
 - a. Petitioner shall be reinstated to his position of ITI at the Department of Correction/CRAFT, contingent on the successful completion of a background check and reinstatement process including but not limited to complying with all timeframes, background check, social medial checks and PREA check. If he fails to meet all the requirements, he will not be reinstated. He will remain in non-pay status during the reinstatement process.
 - b. The agreement provided that it was a last chance agreement with respect to any absenteeism or lateness.
 - c. The petitioner filled out a renewal application on November 19, 2020. The form which asked for any prior arrests, convictions, summonses, and expungements.
 - d. The petitioner checked the box for "yes" but failed to list a 2014 arrest which resulted in a diversionary program which ultimately led to the dismissal of the charges.
 - e. A background check was conducted by the NJDOC which revealed that petitioner was arrested for possession of a controlled dangerous substance on April 1, 2014, completion of a one-year diversionary program and was granted a conditional discharge.

- f. The petitioner does not dispute that there was a charge that was ultimately dismissed.
- g. The respondent did not investigate whether the arrest had been reported in 2014, nor did they indicate why such a charge would not have been previously disclosed during their ID or PREA check done every three to five years.
- h. The petitioner reported the 2014 arrest to his supervisor at the time and completed the necessary paperwork in connection with the same.

LEGAL ANALYSIS AND CONCLUSION

The respondent seeks removal of petitioner on the grounds that the petitioner breached a last chance agreement which was executed in connection with a settlement of time and attendance infractions. The agreement required that petitioner "successfully complete the paperwork including a background check in connection with his reinstatement. They are seeking his removal due to the non-disclosure of the 2014 arrest on his reemployment application. The respondent has not alleged that the arrest from 2014, which resulted in a dismissal would constitute grounds for removal, but that there are rules and regulations for the NJDOC which require disclosure of an arrests. (HRB 84-19.)

The petitioner was disciplined in 2019 for time and attendance and had to fill out paperwork in connection with a background check that was to be completed in connection with his re-employment in 2020. He failed to list an arrest for possession of marijuana that occurred in 2014, which was ultimately dismissed. The respondent does not allege that the arrest itself would constitute grounds for dismissal, nor do they demonstrate by a preponderance of the credible evidence that he failed to disclose this fact in 2014. In fact, the respondents did not even investigate if such a disclosure was made eight years ago, and why the periodic background checks on all employees pursuant to PREA regulation and in connection with reissuance of ID cards every three years would not have revealed

this fact. I have found as fact that the petitioner did disclose this fact in 2014 and the respondent did not investigate if such disclosure was made.

The sole remaining issue is, did the failure to list the 2014 arrest constitute a "failure to successfully complete the background check." The background check was completed, and it revealed an arrest from 2014. Moreover, periodic background checks would have revealed this to the respondent. In addition, I have found as fact that the petitioner disclosed the arrest at the time of the arrest in 2014, and no action was taken by the respondent. The respondent does not allege that this arrest from 8 years ago would have constituted grounds then or now for removal of a civilian employee.

The charge is for failure to "successfully complete" the background check. It is unclear what the intention of this language is and whether the disclosure itself would have rendered it an unsuccessful completion. Would the 1993 arrest which was disclosed result in an unsuccessful completion? I am assuming if the arrest that resulted in a conditional discharge in 2014 was grounds for removal, then that is what the FNDA would have said. However, such a charge was not brought and that is not before me. The petitioner completed the application, and did everything else necessary for reinstatements. It is important to note that the last chance agreement was drafted by the respondent and any interpretation issues must be construed against the drafter. This rule is especially important when the appointing authority is seeking removal of an employee.

I therefore **CONCLUDE** that the respondent has failed to demonstrate by a preponderance of the credible evidence that the petitioner breached the last chance agreement. I further **CONCLUDE** that the respondent has failed to demonstrate a violation of any rules or regulations or a material misrepresentation in connection with work employment application. I further **CONCLUDE** that charges have not been sustained and should be **DISMISSED** and the petitioner should be reinstated to his position.

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.



October 24, 2022

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

Date Mailed to Parties:

SGC/tat

APPENDIX

WITNESSES

For respondent:

Kathleen Kreager
Wayne Lemme
Lt. Thomas O'Keefe

For petitioner:

Clive Campbell

EXHIBITS

For petitioner:

None

For respondent:

R-2 Final Notice of Disciplinary Action, dated December 7, 2021
R-5 Settlement and Last Chance Agreement
R-6 NJDOC application for clearance and issuance of ID card
R-7 Criminal History result, dated November 20, 2021
R-19 NJDOC New Hire Orientation checklist

Joint:

J-21 NJDOC policy and procedure reporting requirements