MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

Volume 10, Number 1 - Winter 2001

IN THIS ISSUE

WRITTEN RECORD APPEALS

HEARING MATTERS

FROM THE COURT

OF PERSONNEL INTEREST

TO OUR READERS:

The Merit System Reporter is now available on the Internet. To access the Reporter, log in to the Department of Personnel Home Page at www.state.nj.us/personnel. Click on the "Publications" menu on the left of your screen. To view and print the Reporter, you must have a PDF viewer which is available free from Adobe. Instructions on how to download the latest version of the Adobe Acrobat viewer from the Adode web site are available on our "Reports and Publications" page.

NJDOP Personnel

Shaping a quality work force through competence, caring and commitment

Donald T. DiFrancesco, Acting Governor

Janice Mitchell Mintz, Commissioner

WRITTEN RECORD APPEALS

SLI Denied for Gross Negligence Based on Conduct Which Placed Employee at Substantial Risk of Harm

In the Matter of John Severino, Department of Corrections

(Merit System Board, decided August 29, 2000)

John Severino, a Dairy Worker with the Department of Corrections, appeals the denial of sick leave injury (SLI) benefits.

Appellant alleges that on September 17, 1998, he injured his left index finger when he attempted to retrieve a carton from a milk-packaging machine while the machine was running. On the incident date, appellant was treated in the emergency department at Capital Health System and was diagnosed with an open fracture to the distal phalanx of the left index finger. He was examined by Dr. Parvaiz A. Malik, a plastic and reconstructive surgeon, who diagnosed appellant's injury as an open fracture to the distal phalanx with lacerations and authorized appellant off duty until October 19, 1998. The record indicates that appellant had surgery to repair his left index finger.

The appointing authority denied appellant's request for SLI benefits on the basis that he was grossly negligent in placing his hand in the machine while it was running. *See N.J.A.C.* 4A:6-1.6(c)6. The appointing authority investigated the incident and presents that appellant had been properly trained to operate the machine in a safe manner and to turn the machine off when clearing blockages. In support of its position, the appointing authority submits a copy of a Supervisor's Accident Investigation Report dated October 8, 1998, in which appellant's supervisor states that all staff and inmates are trained to turn off the machine prior to making any repairs or clearing any blockages. The appointing authority also asserts that appellant admitted that he used poor judgment.

On appeal to the Merit System Board, appellant does not deny that he placed his hand into the machine while it was running and acknowledges that he used poor judgment. Appellant also does not deny failing to turn off the machine or being trained to turn off the machine prior to making any repairs or clearing any blockages. Appellant further notes that he learned a valuable lesson from the incident. However, appellant argues that his injury was an accident and not gross negligence on his part. Moreover, appellant contends that he is entitled to SLI benefits because had he been grossly negligent, the appointing authority would have disciplined him.

In response, the appointing authority asserts that it exercised its discretion not to impose discipline in this case since appellant acknowledged that he learned a valuable lesson from the incident.

CONCLUSION

According to uniform SLI regulations, in order for an injury to be compensable, it must arise out of a work-related accident or condition of employment and the burden of proof to establish entitlement to SLI benefits by a preponderance of the evidence rests with the appellant. *See N.J.A.C.* 4A:6-1.6(c) and *N.J.A.C.* 4A:6-1.7(h).

N.J.A.C. 4A:6-1.6(c)6 provides that an injury or illness is not compensable if an appointing authority establishes that gross negligence of the claimant contributed to the injury or illness. The Board interprets the gross negligence standard in the context of the SLI program to mean that benefits are appropriately denied when the claimant engaged in conduct which placed him or her at a substantial risk of harm.

For example, in *In the Matter of Lennox Williams* (MSB, decided December 22, 1998), SLI benefits were denied to an employee for an injury to his hand which was caught in the cylinder of a printing machine since the employee, despite numerous warnings, failed to turn off the machine before making adjustments to it. The Board determined that his conduct constituted

gross negligence and precluded him from receiving SLI benefits pursuant to *N.J.A.C.* 4A:6-1.6(c)6. The Board has similarly interpreted the gross negligence standard in more recent SLI appeals. *See e.g., In the Matter of Bessie Haynes* (MSB, decided March 7, 2000) (SLI denied to employee who bypassed a safety guard and placed her hand in a food cutter despite clear warning labels on the food cutter and instructions from a supervisor on the use of the machine); *In the Matter of Marva Nicholson* (MSB, decided May 23, 2000) (SLI benefits denied to employee who suffered injury to her eyes from mixing a cleaning agent with bleach where the employee admitted that she knew she should not have mixed the chemicals). Additionally, it is an appellant's burden of proof to provide evidence that his or her actions when the accident occurred did not subject him or her to a substantial risk of harm as the appellant was performing his or her job duties. If such a showing is made, SLI benefits cannot be denied based on gross negligence. *See In the Matter of Mary Montgomery* (MSB, decided May 9, 2000) (SLI granted to Trenton Psychiatric Hospital employee found not to be grossly negligent where employee accidentally dropped a cup containing chemicals, causing the chemicals to splash into the employee's eyes).

In this case, unlike *Montgomery*, it is clear that the evidence in the record shows that appellant's actions placed him at a substantial risk of harm. The record shows that appellant placed his hand in a milk-packaging machine that was running despite being trained to turn off the machine prior to making any repairs or removing any blockages. He also admits that he used poor judgment. Accordingly, since appellant's actions placed him at a substantial risk of harm, his actions constituted gross negligence, and he is not entitled to SLI benefits for the injuries received in the incident. Thus, a thorough review of the record indicates that the denial of SLI benefits was proper and consistent with uniform SLI criteria, and appellant has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

Improper Test Instructions Warrant Partial Retest

In the Matter of Michael Johnson et al., Police Sergeant (PM0959W), Newark
(Merit System Board, decided February 23, 2000)

Michael Johnson, Dennis Sanders, Willie Stroud and Derrick Varnado appeal the administration of the examination for Police Sergeant (PM0959W), Newark.

The subject examination consisted of 70 evenly weighted, multiple-choice questions and was administered on October 22, 1998. Appellants were all seated in Room N at the Essex Catholic High School in East Orange, New Jersey. In response to a candidate question, the room monitor instructed candidates that they could not mark in the test booklets. A total of 691 candidates were admitted to the examination: 38 candidates did not take the exam, 320 candidates failed and 333 candidates passed. Messrs. Sanders, Stroud, and Varnado filed appeals of this issue in February 1999, after receiving their test results. It is noted that Messrs. Sanders and Stroud passed the examination and were ranked 200 and 143, respectively, and Mr. Varnado failed the examination.

Mr. Johnson appealed this issue on the examination date. He stated that he was denied the use of a highlighter, which he had been prepared to use, and which affected his performance.

It is noted that the Center Supervisor Report on Conduct lists one appeal regarding the use of a highlighter. In a supplement to his appeal, in February 1999, Mr. Johnson claimed that on the test date, he questioned the monitor about the use of his highlighter and was advised by the room monitor that he could not use it. He states that he spoke to the Center Supervisor after he completed the examination and was not offered a remedy. He contended that he was adversely affected in his responses to questions 1-5, 11-15, 17-19, 29, 33, 35, 39 and 42. It is noted that Mr. Johnson correctly answered 34 of the 70 questions. Since the passing point was 36, appellant failed the examination.

Following receipt of an appeal of this matter, the Center Supervisor and the monitor of Room N were contacted and asked about their involvement in this matter. The room monitor acknowledges that she did not allow candidates to use highlighters or make markings in the test booklet. The Center Supervisor indicates that Mr. Johnson brought the matter to his attention after he had completed the entire examination, when the time to complete the examination had expired or nearly expired.

A review of the examination booklet reveals that questions 1 through 5 are unique in that they are a subtest pertaining to scheduling personnel. A blank calendar was included and candidates were told to plan a two-week schedule for 12 officers in three shifts. The analysis required to complete this assignment would have involved writing on the calendar or some other way to track the days worked by each of the 12 officers. As such, candidates in room N could have been disadvantaged by the inability to mark their test booklets. Questions 11-15, 17-19, 29, 33, 35, 39 and 42 cited by appellant are regular multiple choice questions requiring candidates to read a statement or scenario and pick the best answer to the question or best phrase which completes a sentence. They are not related to each other, that is, they do not share common material. These questions can all be answered without marking in the test booklet. There is nothing unique about these questions which set them apart from the remainder of the questions, except that Mr. Johnson incorrectly answered ten of these thirteen questions.

FINDINGS OF FACT

Upon independent review and careful consideration of all material presented, the Board made the following findings:

1. Appellants seated in Room N at the Essex Catholic High School in East Orange, New Jersey were not permitted to use highlighters or make marks in their test booklets.

2. Messrs. Sanders, Stroud, and Varnado filed appeals of this issue in February 1999, after receiving their test results.

3. Mr. Johnson appealed this issue on the examination date.

4. The analysis required to complete questions 1 through 5 would have involved writing on the calendar provided in the test booklet, or the use of another way to track the scheduling information.

5. Questions 11-15, 17-19, 29, 33, 35, 39 and 42 can be answered without marking in the test booklet.

CONCLUSION

Candidates seated in Room N at the Essex Catholic High School in East Orange, New Jersey were instructed not to use highlighters or mark their test booklets. Candidates were permitted to do so in other examination rooms. *N.J.A.C.* 4A:4-6.4(c), (Review of examination items, scoring and administration) states that appeals pertaining to examination administration must be filed in writing at the examination site on the day of the examination. The examination was administered on October 22, 1998, and only Mr. Johnson brought this matter to the attention of the Center Supervisor. As such, appeals from Messrs. Sanders, Stroud and Varnado are untimely.

With regard to Mr. Johnson's appeal, appellant contends that the lack of the use of a highlighter or the ability to mark in the test booklet adversely affected his performance, particu-

larly for questions 1-5, 11-15, 17-19, 29, 33, 35, 39 and 42. A review of these questions reveals that questions 1 through 5 are unique, but that the remainder of the questions can be answered without the use of a highlighter and without marking in the test booklet.

Questions 1 through 5 are unique in that most candidates would need to mark their test booklets or highlight information contained therein in order to complete an analysis necessary to answer these questions. As such, Mr. Johnson should be permitted to take an alternate form of the scheduling exercise. The scores for questions 1 through 5 on the original examination should be removed and the alternative subtest scores should be included to derive final examination scores.

Moreover, since the monitor's error is not disputed and her erroneous instructions had an adverse effect on other candidates in the room, the same remedy shall be made available to other similarly situated candidates for the examination for Police Sergeant (PM0959W), Newark who were tested in Room N. Thus, although Messrs. Sanders, Stroud, Varnado and others in room N did not raise timely appeals of this issue, good cause exists to relax the rule on appeal time limits in order to effectuate the purpose of Title 11A. *N.J.S.A.* 11A:4-1 states, in pertinent part, that the Commissioner of Personnel shall provide for examinations "which shall test fairly" the knowledge, skills and abilities required to satisfactorily perform the duties of a title. This remedy helps fulfill that purpose.

ORDER

Therefore, it is ordered that this appeal be granted and that candidates for the subject examination tested in Room N be administered an alternative scheduling sub-test consisting of five questions, which shall replace questions 1 through 5 on the original examination.

Reinstatement To Exact Prior Position Not Required

In the Matter of Diane Murphy
(Merit System Board, decided June 6, 2000)

Diane Murphy, a Supervisor of Legal Secretarial Services with the Department of Law and Public Safety (LPS), represented by Michael J. Herbert, Esq., requests enforcement of the Merit System Board (Board) decision in *In the Matter of Diane Murphy* (MSB, decided January 12, 1999).

Murphy had worked for the State since 1972 and in LPS's Division of Criminal Justice's Office of Casino Prosecutions (OCP) in Atlantic City from 1982 until she was removed from her position on February 25, 1997. On that date she was charged with conduct unbecoming a public employee and it was alleged that she compromised an ongoing confidential investigation by knowingly disclosing information pertaining to the investigation to the subject of the investigation. After a hearing, the Board determined that Murphy was guilty only of accessing computer records for a non-law enforcement purpose and relaying the results of her computer search to an outside individual. For this infraction, the Board imposed a five-day suspension and reinstated the appellant with back pay, seniority and benefits.

In her February 1, 2000 request for enforcement, Murphy argues that she is entitled to be reinstated to the exact position with the OCP in Atlantic City she held prior to her removal. She states that in March 1999, she was informed that her prior position in the OCP had been abolished and there were no positions available for her in Atlantic City. She was instead offered a position in Trenton with the Division of Law which she accepted "under protest" on April 14, 1999. She also informed LPS that she believed that its "post-hearing elimination of . .

. [her] title and position" at the OCP was retaliatory and done in defiance of the Board's order. On April 21, 1999, Murphy filed an Order to Show Cause in New Jersey Superior Court seeking her reinstatement to her position at the OCP. Murphy withdrew this matter in July 1999 based on an agreement with LPS that she would seek enforcement before the Board. Murphy states that she did not file her appeal with the Board until February 2000 "because of [the] related issue of reimbursement for attorney's fees. That matter was resolved in December 1999 . . . allowing this remaining issue to be filed with the Board."

Murphy specifically argues that "[b]y law, . . . [she] was entitled to the position from which she was removed . . ." She alleges that the Division of Criminal Justice nullified her reinstatement to that position by ostensibly "reclassifying" that position as a pretext to keep her from re-obtaining it. She states that LPS "has failed to produce any evidence that . . . [her] position had been legally reclassified." Additionally, she argues that the LPS' actions in compelling her to take a position far from her original position are in violation of *N.J.A.C.* 4A:4-7.7, which states that reassignments may not be used as a form of discipline.

Murphy also contends that the LPS' assertion that her OCP position had been reclassified through a desk audit of the position, even if true, is invalid. Specifically, she states that pursuant to *N.J.A.C.* 4A:3-3.5, no reclassification can occur without providing notice to a permanent employee, notice she did not receive. In this regard, she states that even though she was removed from her employment at the time of the reclassification, she "was still an employee in that title who was entitled to notice of the reclassification." Additionally, she contends that "under *N.J.S.A.* 11A:3-6, the Board cannot reclassify a position without a public hearing, on notice to an incumbent."

In response, LPS, represented by Jennifer Meyer-Mahoney, Deputy Attorney General, argues that Murphy's appeal is not properly termed a request for enforcement. Rather, it contends that she is challenging her reassignment from the OCP to the Division of Law. As such, it argues that she is out of time to appeal such action to the Board. Specifically, LPS argues that Murphy should have appealed her reassignment within 20 days of reasonably becoming aware of the reassignment, or in this case, with LPS' consent, within 20 days of the dismissal of her Order to Show Cause. LPS contends that the Order to Show Cause was dismissed on July 19, 1999, therefore, Murphy's appeal to the Board almost six months later is untimely and should be dismissed. LPS also argues that it reassigned Murphy in good faith. In this regard, it states that the Board did not order Murphy back to her particular OCP position. Additionally, it states that there was no vacant Supervisor of Legal Secretarial Services position to return Murphy to in the OCP. It also contends that it offered Murphy several other equivalent positions in various locations which were declined by Murphy. Moreover, LPS states that it was within its authority to place Murphy in a position with the Division of Law. Specifically, it states that the LPS, as the appointing authority, could reassign any employee in its discretion pursuant to *N.J.A.C.* 4A:4-7.2, so long as the reassignment was within Murphy's civil service title. Finally, LPS contends that Murphy's position at OCP was reclassified and downgraded to a Technical Assistant III title on October 9, 1997, only months after Murphy's removal, pursuant to merit system law and rules and was effected based on the duties of the position and the operational needs of the OCP. In support of these arguments, LPS submits the affidavit of Don Serden, a Deputy Director in the Division of Criminal Justice.

In response, Murphy argues that the appointing authority was the Division of Criminal Justice and not LPS and therefore, Murphy could not be transferred without notice and her consent pursuant to *N.J.A.C.* 4A:4-7.1. Additionally, she contends that even if the LPS is the appointing authority, her reassignment was taken as discipline as evidenced by the Division of Gaming Enforcement's refusal to give her a

position based on her charge of improper accessing of the computer system. Finally, she states that LPS' failure to take into consideration her severe arthritic condition in reassigning her to a location that entails a 120-mile daily commute "raises some serious questions about a violations (sic) of the Law Against Discrimination . . . and the Americans with Disabilities Act."

CONCLUSION

Initially, the Board must address Murphy's contention that she "was entitled to the position from which she was removed . . ." Murphy's contentions in this regard are unpersuasive. In cases where the Board orders reinstatement of an employee after a successful appeal of a removal, the Board does not explicitly order an appointing authority to return an appellant to his or her *exact* position with the *exact* duties as was held prior to the Board order. The Board does not expressly specify such a remedy in order to allow an appointing authority the opportunity to exercise its discretion regarding the deployment of its workforce. However, it is clear that an appointing authority must return an employee to the same Merit System title at the correct rate of pay as was held prior to the disciplinary action. Additionally, an appointing authority should seek to return an employee to the exact prior position, where practical, and when not practical, to a substantially similar position. While there are no Board cases directly on point, there is case law stating that where an employee's former position still exists but is occupied by another employee, the employee who is to be reinstated should be placed back in that position. *See e.g., Feldman v. Philadelphia Housing Authority*, 43 *F.3d* 823 (3d Cir. 1995). However, the Public Employment Relations Commission (PERC) has held that where an employee's position has been properly abolished, an employee is not entitled to be returned to that position absent a showing that the abolition was improper. *See In the Matter of Northwest Bergen County Utilities Authority*, 18 *New Jersey Pub. Employee Rep.* 23226 (1992). Further, PERC has held that an employer may reinstate an individual to a position substantially equivalent to the position the employee previously held, even if at a different location, so long as such a reinstatement was not for invidious reasons. *See In the Matter of County of Bergen (Bergen Pines County Hospital)*, 9 *New Jersey Pub. Employee Rep.* 14103 (1983). Therefore, in this case, in order for Murphy to establish an entitlement to her previous OCP position, she must demonstrate that the position exists, and if it does not, that LPS' abolition of that position was improper. For the reasons set forth in detail below, Murphy has not made such a showing. Accordingly, so long as Murphy was returned to her prior Merit System title at the correct rate of pay, her status regarding her assignments and accommodations are within the discretion of the appointing authority, so long as such assignments and accommodations are not in contravention of Merit System or other law and rules. In this regard, her request to the Board cannot be considered an enforcement action, but rather an appeal of the sufficiency of her reassignment pursuant to *N.J.A.C.* 4A:4-7.7.

In this regard, the Board must address LPS' contention that Murphy's appeal of her reassignment is untimely. The record shows that Murphy was reassigned in April 1999 and in the same month she filed an Order to Show Cause in Superior Court in an attempt to re-obtain her prior OCP position. This filing was dismissed on July 19, 1999 with the understanding that Murphy would file an appeal with the Board. Murphy's appeal in this regard was not filed until February 1, 2000, during which time Murphy apparently reported to her Division of Law position in Trenton. The LPS argues that the Board should dismiss Murphy's appeal as untimely since she agreed to file an appeal with the Board after the July dismissal of the Order to Show Cause, but waited almost six months to do so, outside the time period for filing an appeal. Murphy contends that the delay of her appeal was attributable to "[the] related issue of reimbursement for attorney's fees . . . [which] was resolved in December 1999 . . . allowing this re-

maining issue to be filed with the Board."

Based on the evidence in the record, it is clear that LPS' position has merit. *N.J.A.C.* 4A:2-1.1 states that appeals must be filed within 20 days after an individual has notice or should reasonably have known of the decision, situation or action being appealed. In this case, Murphy was reassigned in April 1999 and by apparent agreement, represented that she would appeal the issue of her reassignment to the Board after the dismissal of her Order to Show Cause in July 1999. However, Murphy did not appeal the matter until over six months later. Murphy's explanation that this delay was due to a non-resolved issue of attorney's fees is unpersuasive. The issue of her attorney's fees would have no bearing on her appeal to the Board regarding her reassignment. In fact, there was no logical reason for Murphy to wait for an issue that did not relate directly to her reassignment (her attorney's fees) to be resolved before appealing her reassignment to a position she felt she should not have held, and, all the while, report to the position for almost six months before filing her appeal. Additionally, there is no evidence in the record that Murphy and LPS agreed that she would not file her appeal pending the determination of the attorney fee issue. However, while such a delay would not generally be considered reasonable, in this case, since Murphy erroneously believed that she was absolutely entitled to be placed back in her former OCP position based on the Board's order, believed that the refusal of LPS to effect such a reinstatement was in violation of the Board's order, and erroneously believed that she was requesting that the Board enforce its prior order, in the interest of fairness, the Board will address the merits of her appeal of her reassignment.

Regarding the reassignment, Murphy first argues that there is no evidence that her OCP position was legally reclassified and even if it were, such a reclassification was invalid since she was not given notice of the reclassification pursuant to *N.J.A.C.* 4A:3-3.5. Further, she states "under *N.J.S.A.* 11A:3-6, the Board cannot reclassify a position without a public hearing, on notice to an incumbent." These arguments are unpersuasive. The record shows that LPS submitted a request to the Department of Personnel to transfer an individual from another Department to fill the position of Technical Assistant III with the OCP; a position it determined filled its operational needs and more closely resembled the duties Murphy performed while she was at the OCP. In this regard, it is noted that such a request is not technically a request to reclassify a position. Therefore, Murphy is correct in asserting that there is no evidence that her position was reclassified. However, based on the evidence in the record, it is clear that no such reclassification was necessary. The record clearly shows that after Murphy was removed, the OCP determined that a position at that level was no longer needed. However, it determined that it needed an individual to fill the position at a lower level. Based on this information and analysis, and to fill an operational need, LPS submitted an application to the Department of Personnel to fill the position with a Technical Assistant III, a title with duties more closely corresponding to the position, and with a class code five levels below and a salary five ranges lower than the Supervisor of Legal Secretarial Services title. This application was approved by the Department of Personnel on October 9, 1997.

Additionally, Murphy's argument that such a reclassification is invalid since she was not given notice under *N.J.A.C.* 4A:3-3.5, is meritless. *N.J.A.C.* 4A:3-3.5(c) states that "[n]o reclassification of any position shall become effective until notice is given affected permanent employees . . ." As previously stated, the action of the LPS was not technically a reclassification, therefore, no employee notice was required. However, assuming *arguendo*, that the action was a reclassification, at the time of reclassification, Murphy was not and could not be considered an LPS employee having been removed previously. Her contention that she still should have been afforded notice since she had appealed her removal, thus, in some way preserving her right to her OCP position, is incorrect. As stated previously, Murphy did not have any vested

right to her OCP *position*, and as such, the LPS was free to change the title and refill that position with a lower level employee if its operational and functional needs warranted such a change. Murphy's only vested rights were to her *title* of Supervisor of Legal Secretarial Services within LPS. Finally, her argument that the reclassification is invalid under *N.J.S.A.* 11A:3-6 is unpersuasive based on the same reasoning as set forth above. Additionally, this argument would not apply even if the position was reclassified since *N.J.S.A.* 11A:3-6 provides that "[w]henever the board considers moving a *title* from the career service to the unclassified service, the board shall first hold a public hearing before reaching a determination" (emphasis added). This section contemplates situations where a career service *title* is changed to an unclassified service *title*. This section does not refer to a reclassification of positions. In conclusion, there is nothing in the record evidencing that LPS downgraded Murphy's OCP position with the nefarious intent to somehow prevent her from regaining that position if she should prevail in her appeal of her removal.

Murphy also argues that the LPS' reassignment was actually a transfer under *N.J.A.C.* 4A:4-7.1, since the appointing authority was actually the Division of Criminal Justice. Therefore, she states that the transfer was invalid since she did not consent to the transfer. This argument is erroneous. *N.J.A.C.* 4A:4-7.1(a)1 provides that in State service, an organizational unit means an appointing authority. Appointing authority is defined in *N.J.A.C.* 4A:1-1.3 as "a person or group of persons having power of appointment or removal." Within the LPS, *N.J.S.A.* 52:17B-3 and *N.J.S.A.* 52:17B-4 provide that the Attorney General has the power of appointment and removal of all employees. Thus, an employee's movement from one division to another within the LPS is a reassignment pursuant to *N.J.A.C.* 4A:4-7.2, which may be at the discretion of the Attorney General. Also, since the rule governing the reassignment of State employees does not contain an advance notice requirement, Murphy's argument in this regard fails.

Murphy further argues that her reassignment was improper pursuant to *N.J.A.C.* 4A:4-7.7 since it was utilized as part of a disciplinary action. As evidence of this assertion, Murphy states that the Division of Gaming Enforcement in Atlantic City refused to allow her to take a position there based on her charge of improper access of the computer systems. This argument is unpersuasive. Initially, it is again noted that the Attorney General, as head of LPS, not the Division of Gaming Enforcement, would have the ultimate decision in its assignment of employees. In this regard, the evidence in the record, specifically, an affidavit submitted by LPS from a Deputy Director in the Division of Criminal Justice, states:

> I also explored placement with the Division of Gaming Enforcement in Atlantic City, however, I was informed that the Department was not willing to place an employee there who had been found to have improperly accessed the Criminal Justice Information System.

Based on this information, it is unclear whether there was actually a position available for Murphy with the Division of Gaming Enforcement. Regardless, it is clear that the LPS did not prevent Murphy from being reassigned with the Division of Gaming Enforcement as part of a disciplinary action. There is no evidence in the record demonstrating that LPS prevented Murphy from obtaining a position at the Division of Gaming Enforcement in Atlantic City, near to her residence, as a way to further penalize her for her improper access to the computer system. Rather, the evidence shows that the LPS, in its discretion, was not willing to reassign Murphy to a position where she would have significant access to the Criminal Justice Information System given the fact that she had been found guilty of unauthorized access to that system. Such a determination is within LPS' discretion and is certainly a valid business reason given the sensitivity of the information available on that computer system. Additionally, the

title of Supervisor of Legal Secretarial Services is used throughout LPS, including Divisions where such access is not available or necessary, thereby not limiting the reassignment of Murphy only to locations with access to that system. Also, LPS' apparent prohibition on Murphy's access to that computer system should not be considered disciplinary unless the ability to access that system was an integral part of her job functions and her inability to access that system negatively impacted her ability to perform her job. Additionally, other than this prohibition, there is nothing in the record evidencing that LPS was preventing Murphy from otherwise functioning as a Supervisor of Legal Secretarial Services in any capacity. In fact, the record shows that LPS is pleased with Murphy's efforts in her current position at the Division of Law. Finally, the record shows that the LPS offered Murphy several other positions in different capacities which she declined.

Murphy finally contends that LPS' failure to take into consideration her severe arthritic condition in reassigning her to a location that entails a 120-mile daily commute "raises some serious questions" about violations of the Law Against Discrimination and the Americans with Disabilities Act. In this regard, the Board notes that, based on the evidence in the record, the LPS attempted to accommodate Murphy with an appropriate position. However, none were available within close proximity to her home. There is nothing in the record demonstrating that the LPS actions were discriminatory. However, if Murphy feels that such actions were in violation of her rights under the Law Against Discrimination or the Americans with Disabilities Act, she may file a request for a reasonable accommodation with the LPS or a discrimination complaint with the LPS pursuant to the provisions of *N.J.A.C.* 4A:7-3.2, *et seq.*

ORDER

Therefore, it is ordered that this request for enforcement be denied.

Further, the Board finds that Diane Murphy's reassignment was proper and not in violation of any Merit System law or rules.

Female-Only BFOQ Granted for Sheriff's Officer Positions Based on Privacy Interests of Inmates and Visitors

In the Matter of Sheriff's Officer, Hudson County

(Merit System Board, decided January 11, 2000)

The Hudson County Sheriff's Office (Sheriff's Office), represented by Stephen E. Trimboli, Esq., appeals the decision by the Director, Division of Equal Employment Opportunity and Affirmative Action (EEO/AA), which denied its request for 13 bona fide occupational qualification (BFOQ) designations (female-only) for Sheriff's Officer.

By way of background, on June 12, 1998, the Sheriff's Office requested 13 BFOQ designations (female-only) for the title of Sheriff's Officer. Specifically, in support of this original BFOQ application, the Sheriff's Office requested two female-only BFOQ designations for transportation Officers, eight female-only BFOQ designations for court security Officers and three female-only BFOQ positions for patrol positions. The transportation Officer and court security Officer positions have work hours from 8:30 a.m. to 4:30 p.m., Monday through Friday, and the patrol positions function on a three shift, 24-hour basis.

The Sheriff's Office described the responsibilities and percentage of time devoted to each responsibility of the female transportation Officer as follows: (1) must transport female inmates to and from the Hudson County correctional facility to the Courthouse, including physically searching inmate for contraband prior to leaving and upon returning to the jail - 20 percent; (2) must be in holding area of the Courthouse to assist with female inmates, including performing any additional searches, appropriately dealing with privacy and hygiene issues and be available for emergency transports to medical facilities - 40 percent; (3) must physically search female defendants not in custody prior to sentencing and physically search a female defendant after sentencing and prior to placing in a detention cell at the Courthouse - 10 percent; (4) must escort female inmates from holding cells to various courtrooms and offices in the Courthouse - 10 percent; and (5) must transport female inmates to medical facilities and supervise female inmates during medical examinations - 20 percent.

The Sheriff's Office described the responsibilities and percentage of time devoted to each responsibility of the female court security Officer as follows: (1) must physically search female litigants in domestic violence cases - 10 percent; (2) must physically search any individual who sets off metal detector at Courthouse entrance twice - 10 percent; (3) must physically search female defendants arrested by a Sheriff's Officer in the Courthouse prior to placing that defendant in a detention cell at the Courthouse - 5 percent; (4) when applicable, must physically search any female who sets off metal detector outside of a courtroom's entrance twice - 5 percent; (5) must generally patrol the Courthouse - 55 percent; and (6) must randomly enter female restrooms to ensure a safe environment - 5 percent (it is noted that the Sheriff's Office did not account for 10 percent of the duties for this position in its original application). It described the responsibilities and percentage of time devoted to each responsibility of the female patrol Officer as follows: (1) must patrol roads for crime and motor vehicles violations, respond to police calls and support local municipal police force - 65 percent; (2) must physically search female suspects for contraband before incarceration - 10 percent; (3) must be available to assist with female suspects being held prior to incarceration, including assisting with any additional searches, dealing with privacy and hygiene, issues and emergency transports to medical facilities - 10 percent; and (4) must transport female inmates from the Duncan Avenue facility to other detention and medical facilities - 15 percent.

In its original application, the Sheriff's Office also stated that the main reason for its request for such BFOQ designations was to protect the privacy concerns of the female inmates and other females who require attention. It listed some of these privacy concerns as strip-searching of female inmates, the non-strip "pat-down" type searches of female suspects and others not in custody, the medical examinations of female inmates, and the supervision of female inmates while using rest room facilities. It argued that there was no acceptable alternative to having female officers conducting physical searches of female inmates since handheld metal detectors were not reliable in detecting small metal objects and did not detect non-metal objects. It also stated that it could not utilize Hudson County Correction Officers to perform searches since these employees did not fall under the Sheriff's Office jurisdiction. Additionally, it contended that due to low staffing levels of female officers and the number of female inmates handled by the Sheriff's Office, it could not reassign current staff to cover all of the female positions needed. It finally noted that its request for BFOQ designations was modeled after a previously granted request for BFOQ designations made for transportation Officer and court security Officer positions by the Monmouth County Sheriff's Office in 1995.

Based on this application, on July 24, 1998, the Director of EEO/AA issued a decision denying the BFOQ designations. In that decision, the Director stated that "the main thrust of these positions involves patrolling and trans-

porting inmates from one place to another and, therefore, it does not appear that female only positions are needed." It also states that "it seems that your searching function is performed only 10 percent of the time and it is not clear who conducts these searches." Finally, it states that the Sheriff's Office did not meet the criteria for BFOQ designations, including a failure to show "that grave harm to innocent third persons will result in the absence of the BFOQ."

The Sheriff's Office appealed this decision to the Merit System Board (Board). In its appeal, it first argues that the Director of EEO/AA used the wrong standard in denying its request for BFOQ designations. Specifically, it states that the Director added an additional requirement, namely that it was required to demonstrate that grave harm would result in the absence of the granting of the BFOQ designations. It argues that such a requirement is not supported in case law, *N.J.A.C.* 4A:4-4.5 or in prior Board decisions regarding BFOQ designations. In support of this contention, it cites *In the Matter of County Correction Officers, Middlesex County* (MSB, decided June 16, 1998) (referred to hereafter as *Middlesex I*) and *In the Matter of Residential Living Specialists, Human Services Assistants and Cottage Training Technicians, Vineland Developmental Center* (MSB, decided July 7, 1998). It is noted that, pursuant to a court remand, the Board made a subsequent decision in *In the Matter of County Correction Officers, Middlesex County* (MSB, decided July 7, 1999) (referred to hereafter as *Middlesex II*). The Sheriff's Office next argues that since the number of female-only positions it is requesting is small in relation to the overall staffing, that there is only a *de minimis* restriction on male employment opportunities and, therefore, it is unnecessary to decide whether gender is a BFOQ for the positions in question.

Additionally, the Sheriff's Office contends that the Director's denial of BFOQ designations was arbitrary and capricious based on the evidence in the record. Specifically, in this regard, it argues that the Board found in *Middlesex I, supra*, that strip searches raise legitimate privacy interests and that State law generally requires that such searches be performed by same sex individuals. It also contends that pat down searches raise legitimate privacy concerns. Further, the Sheriff's Office argues that it demonstrated that it cannot alleviate these privacy concerns through job reassignment of current personnel. Specifically, it contends that only nine of the 147 Sheriff's Officers are females and this number of female officers is insufficient to handle the over 3,000 female inmates that are processed by the County each year. It also states that it has attempted to handle such problems by summoning female Officers from their currently-assigned posts as needed, but such *ad hoc* reassignments have caused delay and disruption in court proceedings, and is completely ineffective when more than one female Officer is needed at any given time. Additionally, it asserts that the Director erred in finding that only 10 percent of the job duties described involved search-related activities. The Sheriff's Office contends that it has demonstrated that approximately 90 percent of the female transportation Officer's duties, 45 percent of the female court security Officer's duties and 35 percent of the female patrol Officer's duties include search or intimate surveillance-related functions. Finally, the Sheriff's Office argues that the Director erred in denying the BFOQ designations when he had previously approved an essentially identical application from the Monmouth County Sheriff's Office.

PBA Local 334, the union that represents Hudson County Sheriff's Officers, and the Director of EEO/AA did not submit any arguments for review by the Board, despite being provided the opportunity to supplement the record.

CONCLUSION

Initially, it is noted that the Director of EEO/AA used the incorrect standard in denying the Sheriff's Office's initial application for BFOQ designations. Specifically, the Director's inclusion of the requirement that the Sheriff's Office needed to show "that grave harm to innocent third persons will result in the absence of

the BFOQ" was improper. However, such an error does not establish that the Sheriff's Office is entitled to the requested BFOQ designations. The general two-pronged test used by the Board in assessing the need for BFOQ designations is as follows: (1) a showing that a BFOQ designation is needed based on the particular job requirements, and (2) no other accommodations can be made to eliminate the need for the BFOQ designation. This test as specifically applied to the case at hand would require the Sheriff's Office to establish that (1) a factual basis existed for its conclusion that the legitimate privacy interests of inmates and/or visitors and non-custodial individuals would be undermined by failing to place gender-specific requirements on the appointment of individuals to serve in the title of Sheriff's Officer at the requested transportation, court security and patrol posts, *See e.g., In the Matter of Hospital Attendants, Hudson County* (MSB, decided June 11, 1996), *aff'd, IMO Hospital Attendants, Hudson County*, Docket No. A-6071-95T1 (App. Div. July 14, 1997), *citing, Diaz v. Pan Am World Airways, Inc.*, 442 *F.2d* 385, 388 (5th Cir.), *cert. denied*, 404 *U.S.* 950 (1971); and (2) because of the nature of the operation of the Hudson County Sheriff's Office, it could not rearrange job responsibilities in a way that would eliminate the clash between the privacy interests asserted by the County and the employment rights of appellants. *Id., citing Hardin v. Stynchcomb*, 691 *F.2d* 1364, 1371 (11th Cir. 1982).

In applying this standard to the instant matter, the Board is particularly mindful of the repeated admonition of the courts that the language of Sec. 703(e) of Title VII, 42 U.S.C. Sec. 2000e-2(e), from which the BFOQ provisions of *N.J.A.C.* 4A:4-4.5 originate, and which permits sex-based discrimination "in those certain instances where . . . sex . . . is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," is meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex and that, due to the narrow interpretation of the BFOQ exception, the burden put on the Sheriff's Office to establish the exception is very heavy. *See Backus v. Baptist Medical Center*, 510 *F. Supp.* 1191 (1981); *Fesel v. Masonic Home of Delaware, Inc.*, 447 *F. Supp.* 1346, 1350 (D. Del. 1978) *aff'd mem. op.*, 591 *F.2d* 1346 (3d Cir. 1979); *Dothard v. Rawlinson*, 433 *U.S.* 321, 334 (1977).

Regarding the first prong of the test, the Sheriff's Office argues that the privacy right of female inmates regarding strip searches and other females who must undergo pat-down searches establishes the need for specific female-only BFOQ designations for the requested positions. In this regard, the Board found in *Middlesex I, supra*, at 9, that female inmates who are subject to strip searches have a legitimate privacy interest in having such searches performed by same-sex individuals. In this case, the Sheriff's Office has demonstrated that a significant percentage of the duties of a female transportation Officer, court security Officer and patrol Officer deals with the strip search of female detainees. The Sheriff's Office also contends that a significant percentage of the duties of such positions includes pat-down type searches of individuals. The Sheriff's Office argues that individuals who must undergo such searches also have a privacy interest and are entitled to have such searches performed by same-sex individuals. In this regard, the Board found in *Middlesex II, supra*, at 10, that visitors to a correctional facility who are subject to pat-down searches have a legitimate expectation that any pat-down search will be conducted by a Correction Officer of the same sex. *See also, Ybarra v. Nevada Board of State Prison Commissioner*, 520 *F. Supp.* 1000, 1003 (D. Nev. 1981); *Jones v. Wittenberg*, 509 *F. Supp.* 653, 699 (N.D. Ohio 1980); *Jordan v. Wolke*, 450 *F. Supp.* 213, 215 (E.D. Wis. 1978); *Black v. Amico*, 387 *F. Supp.* 88, 91 (W.D.N.Y. 1974). In this case, while the title in question is Sheriff's Officer, not Correction Officer, it is clear that the type of searches required are similar to those performed by Correction Officers at correctional facilities. Based on the evidence in the record, it is clear that the Sheriff's Office has established that such

searches constitute a significant proportion of the job duties of the female transportation Officer, female court security Officer and female patrol Officer duties. Therefore, since female inmates are entitled to same-sex strip searches, and other females who are subject to pat down searches are entitled to have same-sex individuals perform such searches, and the Sheriff's Office has demonstrated that such duties constitute a significant percentage of the duties of the positions it contends require BFOQ designations, it has satisfied the first prong of the test.

Regarding the second prong of the test, the Sheriff's Office has argued that based on the nature of the positions and the job duties, and the current permanent staffing level of female Sheriff's Officers, it would be virtually impossible to make alternate accommodations that would exclude male employees from being involved in strip searches of female inmates and pat-down searches of other females. In this regard, after extensively reviewing federal and State case law concerning the interpretation of the second prong of the standard for granting BFOQs in cases asserting a privacy interest, it appears that courts have tended to defer to the employer's representations concerning the reasonableness of alternatives. *See e.g.*, *Fesel v. Masonic Home of Delaware, Inc., supra*; *Jones v. Hinds General Hospital*, 666 *F. Supp*. 933 (S.D. Miss. 1987); *Backus v. Baptist Medical Center, supra*; *Norwood v. Dale Maintenance System, Inc.*, 590 *F. Supp*. 1410 (N.D. Ill. 1984). In this case, the Sheriff's Office has submitted persuasive arguments that it is logistically impossible to make alternative accommodations to ensure that the privacy interests of female inmates and other females who interact with the Sheriff's Office can be protected without the BFOQ designations requested. Therefore, the Sheriff's Office has satisfied the second prong of the test. Accordingly, since the Sheriff's Office has established its entitlement to the requested BFOQ designations, and given that there are no arguments in opposition of the County's request, the Board grants the Sheriff's Office's request for such designations.

ORDER

Therefore, it is ordered that BFOQ designations (female-only) be granted for two Sheriff's Officer transportation positions, eight Sheriff's Officer court security positions and three Sheriff's Officer patrol positions with the Hudson County Sheriff's Office.

SLI Benefits Granted for Unprovoked Attack by Co-Worker

In the Matter of John McKeown
(Merit System Board, decided June 20, 2000)

John McKeown, a Senior Correction Officer at East Jersey State Prison, Department of Corrections (DOC), appealed the denial of Sick Leave Injury (SLI) benefits.

McKeown was injured on December 21, 1994, when he was assaulted by George Van Woeart, another Senior Correction Officer. Based on the assault, McKeown sustained a broken finger and a fractured eye socket and was out of work from December 22, 1994 through January 22, 1995. The DOC, while not denying that McKeown was assaulted, contended that McKeown provoked his assailant and, therefore, his injuries could not be considered work related under *N.J.A.C.* 4A:6-1.6(c)1. Accordingly, it denied his request for SLI benefits. McKeown appealed this determination to the Merit System Board (Board) arguing that he did not provoke the attack but was performing his duties when he was assaulted. The Board, while generally resolving SLI appeals on the written record, found that this matter presented a factual dispute as to whether or not McKeown provoked the

assault, and whether he was performing work duties at the time of the assault. The Board concluded that these issues could best be resolved through testimonial evidence and transmitted the matter to the Office of Administrative Law (OAL) for a hearing. *See In the Matter of John McKeown* (MSB, decided September 3, 1997).

At the OAL, the parties entered into a settlement where it was agreed that McKeown would withdraw his SLI appeal and the DOC would provide McKeown with pension and seniority credit for the time he was out of work based on his injuries. The Board found that this settlement was improper since Merit System rules prohibit the accumulation of seniority while an employee is in an unpaid leave status and Treasury rules prohibit the accumulation of service time for pension credit purposes under the same circumstances. Based on this determination, the Board remanded the matter to the OAL for further proceedings. *See In the Matter of John McKeown* (MSB, decided October 13, 1999).

In his May 15, 2000 initial decision on remand, Administrative Law Judge R. Jackson Dwyer (ALJ) found that the appellant credibly testified regarding the incident and substantially corroborated Sergeant Russell Peterson's account of the incident. The ALJ also found Van Woeart's testimony about the incident not credible. Specifically, the ALJ found that on December 21, 1994, McKeown was assigned to work at the North Pre-Release Center and was to take counts, hand other officers their off-duty weapons, keep track of inmates on road details, check inmate identification cards, retrieve handcuffs and mace from other officers and answer the telephone. Van Woeart was the detail officer on the shift when McKeown came on duty. At that time, Van Woeart was using the telephone in the Center and McKeown asked Van Woeart to leave since he did not belong there. Van Woeart became agitated and started to mumble. At that point, Sergeant Russell Peterson approached the Center and McKeown retrieved Sergeant Peterson's weapon from a locker and returned it to him. After McKeown returned the weapon, Van Woeart grabbed McKeown by the collar, spun him around and punched him in the face three times. In attempting to ward off Van Woeart's assault, McKeown took a defensive posture but did not make a fist or throw a punch. Additionally, McKeown did not provoke Van Woeart in any way prior to the assault.

Based on this assessment of the evidence, the ALJ concluded that McKeown's injuries were sustained due to the non-provoked assault by Van Woeart while McKeown was in the performance of his duties pursuant to *N.J.A.C.* 4A:6-1.6(c)1. Accordingly, the ALJ recommended granting McKeown SLI benefits from December 22, 1994 through January 22, 1995. At its June 20, 2000 meeting, the Board agreed with the ALJ's assessment of the evidence and his recommendation and granted McKeown's appeal for SLI benefits.

Removal Upheld for Fraudulent Use of Family Leave and Improper Use of the Internet

In the Matter of Shelly Tozer
(Merit System Board, decided June 20, 2000)

Shelly Tozer, a Technical Assistant with Cape May County, was removed from her position on charges of conduct unbecoming a county employee, misuse of county property, chronic or excessive absenteeism and fraudulent use of Family Leave. On appeal to the Merit System Board (Board), the matter was transmitted to the Office of Administrative Law for a hearing.

At the hearing, the evidence showed the following for the charges of chronic or excessive absenteeism and fraudulent use of Family Leave. On July 27, 1998, Tozer was absent from work without pay since she had exhausted all of her sick and vacation leave time. According to the appellant, she requested that date off to in-

vestigate a nursing home she was considering for placement of her elderly mother. However, on that date, Tozer instead went to Pennsylvania to attend a NASCAR racing event. Additionally, on August 18, 1998, Tozer applied for a Family Leave from September 10, 1998 to September 18, 1998, ostensibly to care for her mother in the absence of her regular caretaker. While the facts evidenced that Tozer did tend to her mother on September 10, 1998, from September 11, 1998 to September 14, 1998, she attended a Hedgehog Convention in Chicago, Illinois.

For the charges of conduct unbecoming a county employee and misuse of county property the facts showed that as part of her work duties, Tozer was assigned a personal computer with Internet access. However, Tozer's job did not require that she access the Internet for any work-related functions. Prior to uncovering information regarding the charges of chronic or excessive absenteeism and fraudulent use of Family Leave, Tozer's supervisor advised Tozer about using the Internet and Tozer told her that all of her computer activity was work related. After uncovering evidence regarding Tozer's chronic or excessive absenteeism and fraudulent use of Family Leave, the County investigated the Internet sites visited by Tozer on her work computer. Included in the numerous sites visited by Tozer in the month of July 1998 were www.nascar.com, the website for the NASCAR racing circuit, and www.nerg.com, a site for individuals interested in African Hedgehogs. Additionally, the County found on the appellant's work computer that she had been scheduled to attend the Hedgehog Convention in Chicago on September 12, 1998. Further investigation uncovered a downloaded photo on Tozer's work computer that was pornographic in nature.

In his initial decision, the Administrative Law Judge (ALJ) upheld the charges against Tozer. With respect to the charges of chronic or excessive absenteeism and fraudulent use of Family Leave, the ALJ found that the County sustained its burden of proof in showing that Tozer fraudulently used such leave for improper purposes and also requested time off without pay under false pretenses. With respect to the charges of conduct unbecoming a county employee and misuse of county property, the ALJ found that the County had sufficiently shown that Tozer improperly used her work computer for non-work-related purposes. Based on these determinations, the ALJ concluded that, notwithstanding the fact that Tozer had no prior disciplinary record, the offenses committed were so egregious as to warrant her removal from employment. *See West New York v. Bock*, 38 *N.J.* 500 (1962); *Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). At its June 20, 2000 meeting, the Board agreed with the ALJ's assessment of the evidence and his recommendation, and affirmed the County's removal of Tozer from her position as Technical Assistant.

Employee Forever Barred from Public Employment under Forfeiture Statute

In the Matter of Andres Vives Rivera

(Merit System Board, decided September 21, 1999)

Andres Vives Rivera, a Residential Services Worker at Woodbine Developmental Center (Woodbine), Department of Human Services, was removed from his position on charges of making a misstatement of material fact on his employment application. The facts of the case were as follows: Rivera was employed at Woodbine in 1984 and in the same year was convicted of a disorderly persons offense in conjunction with an assault on a patient. For this offense, Woodbine gave Rivera an oral reprimand. He was later removed from his position on other grounds. In 1995, Rivera was rehired by Woodbine and on his employment application answered "no" to the question "have you ever been

convicted of a crime?" In 1998, upon discovering Rivera's 1984 conviction, Woodbine sought to have him removed for making a misstatement of material fact on his employment application.

The matter was transmitted to the Office of Administrative Law (OAL) for a hearing. In his initial decision, the Administrative Law Judge (ALJ) properly found that the appellant had not made a material misstatement in filling out the employment application. According to *N.J.S.A.* 2C:1-4, disorderly persons offenses "are not crimes within the meaning of the Constitution of this State." Therefore, Rivera's conviction could not be classified as a crime and his answer on the employment application could not be construed as falsification. Consequently, Woodbine's removal of Rivera on that ground was unsustainable.

Woodbine also argued that Rivera's appeal of his removal should have been barred since "he forfeited his public employment in 1984 . . . [and was] ineligible for any State employment after that time." In that regard, the ALJ found that Rivera's conviction in 1984 touched his employment. He concluded that "[w]hile a tribunal such as this cannot order forfeiture, it must recognize one which occurred by operation of law." He also stated:

> Appellant must also be barred under the present version of the [forfeiture] statute. It empowers the appointing authority to remove a person convicted of an offense demonstrating unfitness even when a court declines to order forfeiture. *N.J.S.A.* 51-2g (sic). Certainly an assault on a person committed to your care in a state institution touches employment and demonstrates unfitness.

The Merit System Board (Board) did not agree with the ALJ's assessment regarding Rivera's alleged forfeiture. Based on a 1995 amendment to the forfeiture law, the Board does not have the authority to determine whether an individual has forfeited his public employment as a result of a criminal conviction in cases, such as this one, where a court has not ordered forfeiture. *See N.J.S.A.* 2C:51-2(b). Neither the Board nor the OAL is a "court" of this State as that phrase is used in *N.J.S.A.* 2C:51-2. Therefore, neither the Board nor the OAL has the statutory authority to make the determination that Rivera forfeited his position. However, the Board determined that, pursuant to *N.J.S.A.* 2C:51-2(d), it has the authority to determine that an individual must be discharged from a State or local government position due to a permanent disqualification from public employment based upon a prior conviction for an offense involving or touching on a previously held public office or employment.

In this regard, the Board reasoned that only a court of this State may enter an order of forfeiture pursuant to *N.J.S.A.* 2C:51-2(a), which provides for the removal of a person from a public position held at the time that he or she is convicted of an offense involving dishonesty; or of a crime of the third degree or above, or the equivalent, under the laws of New Jersey or another state or the United States; or of an offense involving or touching such position. However, the Board retains the authority to determine that an individual is *disqualified* from public employment pursuant to *N.J.S.A.* 2C:51-2(d), which provides that:

> . . . [i]n addition to the punishment prescribed for the offense, and the forfeiture set forth in subsection a. of *N.J.S.* 2C:51-2, any person convicted of an offense involving or touching on his public office, position or employment shall be forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions.

N.J.S.A. 2C:51-2(d) does not provide additional grounds for forfeiture pursuant to *N.J.S.A.* 2C:51-2(b), requiring a court order, but merely establishes a permanent disqualification from future public employment. Thus, an appointing authority is precluded from hiring any indi-

vidual convicted of an offense which touched or concerned a previous public position. The Legislature acknowledged that forfeiture and disqualification are distinct processes when it listed each in *N.J.S.A.* 2C:51-2(e), which authorizes the Attorney General or a county prosecutor to seek a waiver by the court of either a forfeiture or a disqualification based upon a conviction of a disorderly persons or petty disorderly persons offense.

N.J.S.A. 2C:51-2(e) also makes clear that, absent a waiver by the court, the name of a disqualified individual must be removed from an eligible list for public employment, without reference to a forfeiture order from a court. Similarly, if a disqualified individual is erroneously hired by a public employer, his or her discharge is required whenever the disqualifying conviction is discovered, without reference to a forfeiture order from a court. Any question concerning whether or not a conviction touched or concerned the public position occupied by the individual at the time of the offense would be resolved through administrative procedures established for appeals from a list removal or a disciplinary removal.

An interpretation of *N.J.S.A.* 2C:51-2(d) which allows the Board to apply the disqualification provision is strongly supported by the Appellate Division decision *Cedeno v. Montclair State University*, 319 *N.J. Super.* 148 (App. Div. 1999), *aff'd*, 163 *N.J.* 473 (2000). In 1982, Charles Cedeno pled *nolo contendere* to four counts of bribery for taking kickbacks from vendors while he was employed as the Director of Purchasing for the Southeastern Pennsylvania Transportation Authority between 1973 and 1979. *Id.* at 151. In 1986, Montclair State University (MSU), unaware of the bribery conviction, hired Cedeno as the Director of Purchasing. When MSU declined to renew his contract in 1996, Cedeno filed an action against the university alleging a retaliatory discharge, in violation of the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 *et seq.*, and discrimination on the basis of ethnicity and age, in violation of the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 *et seq.*

During discovery, MSU became aware of Cedeno's bribery conviction, and moved for summary judgment on the ground that the wrongful discharge claims were barred because Cedeno was disqualified from public employment pursuant to *N.J.S.A.* 2C:51-2(d). *Cedeno, supra*, 319 *N.J. Super.* at 153. After granting the university's motion for leave to appeal from the denial of its summary judgment motion, the Appellate Division held that a person who is statutorily disqualified from obtaining public employment as a result of a criminal conviction may not pursue an action for an alleged wrongful discharge from a public position obtained after the conviction. *Id.* at 151.

Significantly, the basis of this holding was the Court's conclusion that, pursuant to the "forever disqualified" provision in *N.J.S.A.* 2C:51-2(d), at the time of Cedeno's application for employment and throughout the course of his employment, he was absolutely disqualified by statute from holding the position from which he claims to have been discharged in violation of the LAD and CEPA. Consequently, the Appellate Division stated, "MSU's administrators were prohibited by statute from hiring plaintiff, and if they had become aware of his conviction at any time during his employment, they would have been required to summarily discharge him." *Cedeno, supra*, 319 *N.J. Super.* at 156-157.

The Court explicitly rejected Cedeno's argument that his employment at MSU could not be terminated due to his bribery conviction without a court order of forfeiture pursuant to *N.J.S.A.* 2C:51-2(b)(2). The court noted that "this case does not involve the forfeiture of public employment which a person held at the time of a criminal conviction but rather the disqualification from future public employment based on a prior criminal conviction." *Cedeno, supra*, 319 *N.J. Super.* at 157, n.3. The Appellate Division stated that the application of this permanent disqualification is not governed by the procedures set forth in *N.J.S.A.* 2A:51-2(b), but rather by *N.J.S.A.* 2C:51-2(d), "which imposes an automatic disqualification from public employment

without the initiation of any court proceeding." *Id*.

The Court did not discuss the appropriate procedure for the threshold determination for the automatic disqualification: whether or not the offense touched and concerned the public employment. Clearly, if a court previously ordered a forfeiture of employment based on *N.J.S.A.* 2C:51-2(a)(2), then the disqualification applies. If, however, a forfeiture pursuant to *N.J.S.A.* 2C:51-2(a)(1) or (3) did not require a "touches and concerns" analysis, or no forfeiture order was ever sought, then a challenge to a disqualification requires that a "touches and concerns" analysis be conducted. Unlike the forfeiture provision in *N.J.S.A.* 2C:51-2(a), the plain language of the statutory disqualification provision, and its interpretation by the *Cedeno* majority, clearly do not require that a court determine the applicability of the disqualification. Thus, the "touches and concerns" determination is left to the Board in the context of an appeal from a list removal or termination of employment based on the statutory disqualification.

Accordingly, based upon the plain language of *N.J.S.A.* 2C:51-2(d), as interpreted by the Appellate Division in its published decision in *Cedeno*, the Board found that Rivera was forever barred from public employment. Since Rivera's conviction was for physically abusing a patient at Woodbine during his previous employment at that facility, his offense clearly touched and concerned his public employment at the time of the offense. Moreover, there is no evidence that the Attorney General or the county prosecutor sought or received a court order waiving the disqualification provision for the appellant's disorderly persons offense pursuant to *N.J.S.A.* 2C:51-2(e). Therefore, the Board ordered that, pursuant to *N.J.S.A.* 2C:51-2(d), Rivera was absolutely and automatically barred from regaining his erroneously conferred status as a Residential Services Worker at Woodbine and upheld his removal.

RULES ROUND-UP

By Elizabeth J. Rosenthal
Personnel and Labor Analyst

Several rule initiatives adopted or under review will help employees and appointing authorities better use and understand merit system rules and, in some cases, encourage flexibility in merit system employment.

Among recently adopted rules, amendments to *N.J.A.C.* 4A:3-3.8 permit local appointing authorities to request the establishment of intermittent titles. Before these amendments took effect on June 19, 2000, intermittent titles were only allowed in State service. With the adoption of these amendments, however, local appointing authorities can now fill vacancies on an on-call or seasonal basis, within the framework of noncompetitive, career service appointments. To seek the Department of Personnel's approval of intermittent titles in local service, a local appointing authority should contact its customer service team.

Also recently adopted is a new rule implementing former Governor Whitman's school volunteer leave program, *N.J.A.C.* 4A:6-1.24. This program, effective with the current school year, allows State employees in the career, senior executive and unclassified services up to 20 hours per calendar year to participate in an academically beneficial school activity in New Jersey. An employee need only request the leave in advance and provide written verification from the school principal or designee of his or her participation in the school activity. The school volunteer leave program thus helps schools meet the educational needs of students while providing State employees with the opportunity to become more involved in their communities. Local appointing authorities may establish their own school volunteer leave programs.

Benefiting both employees and appointing authorities are amendments to the donated leave rule, *N.J.A.C.* 4A:6-1.22, adopted on December 5, 2000 and effective in January, 2001. First, the amendments extend eligibility to employees who are organ donors, including bone marrow donors. Second, these amendments will help determine an employee's eligibility for donated leave. Prior to their adoption, for an employee to be eligible for participation in the program, the employee had to be suffering from a "catastrophic health condition or injury," or be needed for the care of an immediate family member with such a condition or injury. However, interpretations of the term "catastrophic health condition or injury" have varied and caused confusion. Following exhaustive research of donated leave programs of other public and private employers, the Merit System Board proposed and has now adopted a new, workable definition of the term.

Effective on November 6, 2000 was another rules clarification, this one concerning the maximum age requirement of 35 for municipal police officer eligibility. Former experience as a New Jersey Transit Police Officer, a police officer for the Southeastern Pennsylvania Transit Authority (SEPTA) and a police officer for Amtrak may be used to bring an individual's age below 35. Additionally, the experience of anyone previously employed by a State or Federal law enforcement agency or another public entity, who performed duties comparable to the positions listed in *N.J.S.A.* 40A:14-127.1 (municipal police of-

ficer, sheriff's officer, county police officer and State trooper), may be used to offset age. These amendments will assist municipalities in finding qualified and experienced individuals to appoint as municipal police officers. However, the amendments do not change the statutory prohibition against using these age offsets if an individual's actual age is over 45, unless he or she was laid off for reasons of economy or efficiency.

A practice taking place in some public safety agencies was the impetus for a rule amendment to *N.J.A.C.* 4A:10-1.1, regarding violations and enforcement of merit system law and rules. Although subsection (e) prohibits the payment and acceptance of compensation to affect a personnel action, it appeared that stronger, more specific language was necessary to address situations in which individuals in some local police and fire departments were inducing superior officers to retire with substantial sums of money not long before the expiration of an applicable promotional list. Therefore, additional language in subsection (e) specifically prohibits the offer, payment, acceptance or solicitation of a retirement or resignation incentive between an employee and his or her superior in order for the employee to gain a promotion or the opportunity for a promotion. This amendment was effective on December 18, 2000.

Two other rule amendments are under review for proposal in the near future. Pre-proposed for preliminary comment are amendments to *N.J.A.C.* 4A:2-2.12, regarding the awarding of counsel fees to an appellant in a major disciplinary matter who has prevailed on all or substantially all of the primary issues. Currently, the rule sets forth some general criteria for setting counsel fees: the time and labor required, and the customary hourly rate. However, in implementing the rule, the Merit System Board had, until recently, engaged in the uniform practice of granting counsel fees at the hourly rate of $125 for a partner and $100 for an associate. A recent court decision, *In the Matter of Eric Flake*, Docket No. A-3612-97T5 (App. Div., decided April 21, 1999), found that the Board was, in effect, engaging in rulemaking by uniformly applying those rates.

Therefore, specific criteria for setting hourly rates have been drafted and the Board has solicited comments from interested parties. The suggested criteria follow the factors set forth in the Rules of Professional Conduct and a landmark court decision, *Rendine v. Pantzer*, 141 *N.J.* 292 (1995). Once the comments received regarding the Board's pre-proposal are evaluated, amendments will be formally proposed and an opportunity for further comment provided.

Also under review are draft amendments and a draft new rule regarding intergovernmental transfers. A successful intergovernmental transfer pilot program established by the Commissioner of Personnel expired on August 31, 2000, and the Merit System Board plans to codify the program in the rules. The drafts are being circulated to the Commissioner's statutory advisory boards. They provide a mechanism to inject additional flexibility into merit system appointments. Intergovernmental transfers are intended to achieve three broad goals: provide appointing authorities with experienced employees, which would help eliminate the need for costly training; facilitate placement of employees who may wish to work for another jurisdiction for professional or personal reasons; and provide an alternative to employees facing layoffs due to economy, efficiency or other related reasons.

As the Department of Personnel moves forward into the 21st century, more rule initiatives such as the ones described here are expected to be proposed to add versatility and strength to the merit system.

FROM THE COURT

Following are recent Appellate Divisions decisions in Merit System cases. As the Appellate Division opinion *IMO Frank Hoffman* has not been approved for publication, its use is limited in accordance with *R.* 1:36-3 of the *N.J. Court Rules.*

NOTE: *IMO Robert Hammond and IMO Frank Hoffman have been summarized by staff. The summaries have been neither reviewed nor approved by the Appellate Division. In the interests of brevity, portions of any opinion may not have been summaried.*

Only Charges on FNDA Appealable to the Board

Robert Hammond v. Monmouth County Sheriff's Department
317 N.J. Super. 199 (App. Div. 1999)

County Correction Officer Robert Hammond received a Preliminary Notice of Disciplinary Action containing five charges, involving conduct unbecoming a public employee, sexual harassment, verbal abuse of a co-worker, insubordination and refusing to cooperate with an investigatory interview. Following a departmental hearing, the appointing authority issued a Final Notice of Disciplinary Action sustaining the first three charges but dismissing the last two. The Final Notice imposed a 10-day suspension on the appellant; however, it was thereafter amended to include a written agreement that, in lieu of a 10-day suspension, he would receive a five-day suspension and forfeit five vacation days.

Appellant filed an appeal with the Merit System Board in response to the appointing authority's decision sustaining the first three charges. The matter was referred to the Office of Administrative Law (OAL) for a hearing. At the hearing before the Administrative Law Judge (ALJ), the appointing authority moved to resurrect the remaining two charges over the appellant's objection. The ALJ denied the motion, concluding that expanding the charges at issue would be contrary to *N.J.A.C.* 4A:2-2.6(d), which requires the issuance of a Final Notice of Disciplinary Action within 20 days of the departmental hearing advising the employee of the charges sustained and the penalty to be imposed. Following the OAL hearing, the ALJ dismissed the charges sustained in the Final Notice, finding that the complainant's testimony was not credible in describing the alleged incident. The Merit System Board accepted and adopted the ALJ's findings and conclusions.

On appeal to the Superior Court, Appellate Division, the appointing authority challenged the ALJ's credibility determinations and an evidentiary ruling. The court rejected these arguments, holding that the Board was "well warranted in relying upon the administrative law judge's credibility determinations and other findings of fact..." and the ALJ was within his discretion regarding the admission of testimony concerning past conversations between the appellant and the complainant.

The appointing authority further argued, however, that, on appeal to the Board, it should have been permitted to go forward on the two charges that it had earlier dismissed. The court held that a public employer is not empowered by law to do so after dismissing the charges at the departmental hearing. The court noted that the Board had argued in its brief before the court that it could have considered the dismissed charges below and asked that the matter be remanded for that purpose. Rejecting this argument, the court held that, as a major disciplinary appeal to the Board is from an appointing authority's Final Notice of Disciplinary Action, allowing consideration of dismissed charges at the Board's level would violate "due process" and "fair play." The court further stated that the Board's original determination should be considered binding.

Back Pay Not Reduced for Period of Attorney's Delay

In the Matter of Frank Hoffman v. Hudson County Department of Public Safety

A-4124-96T2, (App. Div. June 22, 1999) cert. denied, 163 *N.J.* 80 (2000)

The Superior Court, Appellate Division, reversed and remanded a decision of the Merit System Board in which the appellant was denied back pay for the period of a six-month suspension as well as for a period of delay determined to be attributable to the appellant's attorney.

The decision concerns the effect of appellant's noncompliance with a "Final Warning" the appointing authority issued to him in 1992 regarding chronic or excessive absences. Specifically, the warning indicated that appellant would be removed from employment if he was absent for more than 15 days a year in any of the next three years, even if the absences were justified by doctor's notes. In April, 1994, he sustained serious injuries in an automobile accident which, he said, necessitated his absence from work until July, 1994. Upon his return, the appellant was served with a Preliminary Notice of Disciplinary Action and removed following a hearing. All of the charges emanated from his 1994 work absence due to the car accident.

On appeal to the Merit System Board, the matter was referred for a hearing at the Office of Administrative Law (OAL). The Administrative Law Judge (ALJ) found that the appellant violated the conditions of the warning, but asked whether such a violation should lead to his removal, given the fact that the appointing authority did not dispute that his 1994 absence was beyond his control. The ALJ therefore recommended a six-month suspension in lieu of termination. As the matter was adjourned twice in a one-year period at the request of appellant's attorney, the ALJ also recommended that back pay date back to the date the OAL proceedings commenced, over one year after the six-month suspension would have concluded.

The Merit System Board accepted and adopted the ALJ's findings of fact and conclusions of law and the recommendation that the removal be modified to a six-month suspension. The Board also determined that appellant was not entitled to counsel fees, as he had not prevailed on "all or substantially all of the primary issues" in the matter, since the Board had upheld the charges of chronic and excessive absenteeism. *See N.J.A.C.* 4A:2-2.12(a).

Appellant then took this matter to the Superior Court, Appellate Division, regarding the issues of back pay and counsel fees. The court noted that the issue of back pay is controlled by *Steinel v. City of Jersey City*, 99 *N.J.* 1 (1985). As no "equitable considerations or special circumstances" existed that would justify the denial of back pay from the date of reinstatement, such as delay of the proceedings by the appellant, the appellant was entitled to back pay from the date of his reinstatement following his six-month suspension. The court indicated that the appellant did not himself cause any of the delays. For the appellant to be held accountable, the court stated, the record would have to show that his attorney had engaged in unprofessional conduct and that it would be equitable to have the appellant bear the financial cost of this conduct. The court also found that the delays appeared to have had legitimate reasons, and some of the delays actually were attributable to the appointing authority's attorney and the ALJ. Therefore, the court found unreasonable the Board's decision denying appellant back pay back to the end of his six-month suspension.

However, the court took this holding a step further by noting that, even if the appellant's attorney had engaged in misconduct, appellant should not be held accountable (absent demonstrable prejudice to the appointing authority). The court explained that, were the appellant so held accountable, he would then be entitled to indemnification by the attorney, which would impinge on the judicial power to discipline attorneys and therefore be of questionable constitutionality.

With regard to the issue of counsel fees,

the court found that the appellant had not prevailed on all or substantially all of the primary issues presented to the Board. Therefore, the court concluded, the appellant was not entitled to counsel fees.

The court's decision did not cite *N.J.A.C.* 4A:2-2.10(d)4, a rule provision directly on point which states as follows: "The award of back pay is subject to reduction by any period of delay of the appeal proceedings caused on behalf of the employee." As the Board believed that the decision had serious implications for the disciplinary appeal process, it filed a petition for certification to the New Jersey Supreme Court. However, that court denied the petition.

CEPA Claim Does Not Preclude Employee's Appeal to the Board
Robert Scouler v. City of Camden
332 N.J. Super. 69 (App. Div. 2000)

The Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -8, includes a provision that "the institution of an action [under CEPA] shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law." *N.J.S.A.* 34:19-8. The Merit System Board (Board) held that this provision precludes a career civil service employee who has filed a CEPA action against his employer from appealing to the Board from a disciplinary action that is also one of the grounds of the employee's CEPA claim. We conclude that a career civil service employee who has filed a CEPA action is not precluded from appealing a disciplinary action to the Board simply because the employee alleges that his employer instituted disciplinary charges against him for the same retaliatory reasons alleged in the CEPA action.

Appellant Robert Scouler is employed by respondent City of Camden (City) in the career civil service position of construction official. On November 24, 1997, the City served Scouler with a preliminary notice of disciplinary action for insubordination, neglect of duty and misuse of public property. The notice indicated that the alleged insubordination consisted of Scouler ignoring repeated requests by the Director of Development and Planning for information and reports, and that the alleged neglect of duty consisted of Scouler's failure to produce and deliver monthly reports. At a departmental hearing, the charge of misuse of public property was dismissed, but Scouler was found guilty of insubordination and neglect of duty, and suspended for thirty days. Scouler appealed this disciplinary action to the Board, which referred the matter

to the Office of Administrative Law (OAL).

While Scouler's civil service appeal was still pending, he filed an action in the Superior Court against the City and various City officials, alleging that they had retaliated against him, in violation of CEPA, because he had objected to and refused to participate in violations of the Uniform Construction Code and other laws and had reported those violations to the Department of Community Affairs. One of the retaliatory acts alleged in Scouler's CEPA complaint was the City's disciplinary action that was the subject of his appeal to the Board.[1]

Subsequently, an Administrative Law Judge (ALJ), relying upon *N.J.S.A.* 34:19-8, issued a recommended initial decision which concluded that "[w]here . . . a civil service employee elects to file a superior court complaint against the appointing authority, citing the CEPA and involving the same or substantially the same issues as are involved in the civil service case, . . . [t]he CEPA action is the exclusive means of determination of the parties' rights and duties and a civil service administrative case involving the same subject matter must be dismissed." The Board adopted this recommended decision and dismissed Scouler's appeal of the thirty-day suspension imposed upon him by the City. Scouler appeals the dismissal of his civil service disciplinary appeal, and we now reverse.

In *Young v. Schering Corp.*, 141 *N.J.* 16 (1995), the Supreme Court addressed the scope of the CEPA waiver provision involved in this appeal. The issue in *Young* was whether this provision precludes an employee who has filed a CEPA action from pursuing not only related common-law claims but also other claims that are substantially independent of the retaliation claim. The Court found that the purpose of the waiver provision is solely to "prevent an employee from pursuing both statutory and common-law retaliatory discharge causes of action" based on the same operative facts. *Id.* at 27. For this reason, the Court rejected "the overly literal reading of the waiver provision urged by defendants," *id.* at 25, and decided that this provision should be construed "narrowly," *id.* at 27. Accordingly, the Court held that "the waiver provision applies only to those causes of action that require a finding of retaliatory conduct that is actionable under CEPA." *Id.* at 29.

The civil service disciplinary action instituted by the City against Scouler does not involve a "cause[ ] of action that require[s] a finding of retaliatory conduct that is actionable under CEPA." Scouler is a permanent employee in the career civil service.[2] The City may suspend or take other disciplinary action against such an employee only for neglect of duty or other good cause. *N.J.A.C.* 4A:2-2.3. The Civil Service Act entitles a career civil service employee to a departmental hearing before the employer can impose a suspension of more than five days, *N.J.S.A.* 11A:2-13, and if the employer sustains a disciplinary charge at a departmental hearing, the employee is entitled to appeal to the Board, *N.J.S.A.* 11A:2-14, which may refer the matter for a hearing before an ALJ in accordance with *N.J.A.C.* 4A:2-2.9(b). At that hearing, the employer has the burden of proving that the employee is guilty of misconduct warranting disciplinary action. *N.J.S.A.* 11A:2-21. Moreover, if the Board concludes that the charge has been sustained, it must make a de novo determination of the appropriate disciplinary action. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 576-80 (1980). Thus, the "cause of action" at a civil service disciplinary hearing is not the employee's claim that the employer has taken "retaliatory action," but rather the employer's claim that the

[1] Scouler also alleged that defendants had retaliated against him by undertaking to eliminate his position by "privatizing" his job responsibilities and by a course of "threatening, intimidation, hostile, abusive and humiliating" conduct.

[2] Only a career civil service employee has the right to appeal a disciplinary action to the Board. *N.J.S.A.* 11A:2-6; *N.J.A.C.* 4A:2-2.1(a).

employee was guilty of misconduct. Any claim that the disciplinary charge was brought in retaliation for conduct protected by CEPA is solely a matter of defense, which the employee has no burden to prove in order to be exonerated. Therefore, the CEPA waiver provision does not preclude a career civil service employee who has filed a CEPA action from appealing a disciplinary charge to the Board simply because the employee alleges that the charge was instituted for the same retaliatory reasons alleged in the CEPA action.

Furthermore, the CEPA waiver provision does not require the exclusion of evidence of retaliation in a civil service disciplinary hearing. *N.J.S.A.* 34:19-8 was only intended "to curtail essentially cumulative remedial actions." *Young*, *supra*, 141 *N.J.* at 27. It is not an evidentiary rule which requires exclusion of evidence with obvious probative value. When an employee denies the factual allegations underlying a disciplinary charge, the ALJ must weigh the credibility of the employer's allegations of misconduct, which frequently consist of a supervisor's testimony, against the employee's denials. In making this credibility determination, one obvious consideration is whether the supervisor may have had a motive other than the faithful performance of his public duties for filing the charge and testifying against the employee. Consequently, if *N.J.S.A.* 34:19-8 were construed to preclude an employee who had filed a CEPA action from presenting evidence of retaliation at a civil service disciplinary hearing, it could result in the exclusion of evidence critical to a fair and reliable evaluation of the credibility of the witnesses testifying in support of the charge.

We also note that neither *N.J.S.A.* 34:19-8 nor any other section of CEPA precludes an employee who alleges a retaliatory motive for the institution of a civil service disciplinary charge from subsequently filing a CEPA action. Thus, if the OAL had scheduled a hearing on Scouler's civil service appeal prior to the expiration of the one-year period for filing a CEPA action, see *N.J.S.A.* 34:19-5, Scouler could have pursued his civil service appeal, and presented evidence of the City's alleged retaliatory motive for bringing the disciplinary charges, and then initiated a CEPA action after the civil service appeal was concluded. An employee's right to appeal a disciplinary charge and present evidence of retaliation in defense of the charge should not turn on the fortuitous circumstance of whether the OAL and Board complete the proceedings in a civil service disciplinary appeal before expiration of the limitations period for filing a CEPA action. Therefore, consistent with the intent of *N.J.S.A.* 34:19-8 to only "prevent an employee from pursuing both statutory and common-law retaliatory discharge causes of action," *Young*, *supra*, 141 *N.J.* at 27, we conclude that a career civil service employee who files a CEPA action is not precluded from pursuing an appeal of a related disciplinary charge to the Board, and that the employee may present evidence of retaliation at the hearing on the charge.

Accordingly, the Board's decision dismissing Scouler's appeal is reversed and the case is remanded for a hearing on the merits.

The *Merit System Reporter*
is published semi-annually by the New Jersey Department of Personnel.

Janice Mitchell Mintz
Commissioner
Department of Personnel

Henry Maurer
Editor-in-Chief

Editorial and Production Staff

Phyllis L. Ali
Nicholas F. Angiulo
A. Peter Boone
Elaine M. Dundala
Rebecca Evans
Timothy M. Griscom
Nancy C. Gilbert
Sybil Janowitch
Elizabeth A. Napolitano
Don Pappano
Elizabeth Rosenthal
Elizabeth Wood

Appeals Staff Contributing to this Issue: Steve Livingston

New Jersey Department of Personnel
Division of Merit System Practices and Labor Relations
P. O. Box 312
Trenton, New Jersey 08625-0312
www.state.nj.us/personnel