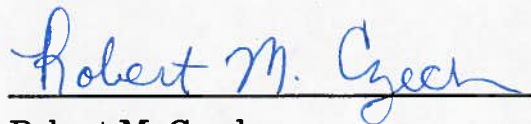


Re: Justin Voigtsberger

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 3, 2015

A handwritten signature in blue ink that reads "Robert M. Czech". The signature is written in a cursive style and is positioned above a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 17848-13

AGENCY DKT. NO. 2014-1493

**IN THE MATTER OF JUSTIN
VOIGTSBERGER, CAMDEN COUNTY
DEPARTMENT OF CORRECTIONS.**

Jeffrey S. Ziegelheim, Esq., for appellant Justin Voigtsberger (Alterman and Associates, LLC, attorneys)

Antoinette P. Rinaldi, Esq., Assistant County Counsel, for respondent Camden County Department of Corrections (Christopher A. Orlando, County Counsel, attorney)

Record Closed: December 17, 2014

Decided: May 4, 2015

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE

On November 29, 2013, appellant, Justin Voigtsberger (Voigtsberger), timely appealed the Camden County Department of Correction's (CCDC) November 18, 2013, termination of appellant at the end of his **working test period** which commenced on November 18, 2012. The reasons for the termination were consistent unsatisfactory evaluations during the **working test period**, primarily in the area of taking responsibility

for his actions, exercising judgment in the interaction with the inmates, and placing other corrections officers and himself at safety risk due to his actions. Appellant acknowledged counseling sessions, verbal reprimands and suspensions during the first eight months of the **working test period**. He however, maintains he did not receive continued regular notice of unsatisfactory behavior after March 18, 2013, until the July 16, 2013, evaluation, which he disputed, and the November 11, 2013, evaluation which preceeded the termination. Appellant claims that after April 2013, he did not receive ongoing guidance in the performance of his duties. He attributes his termination to an impermissible bias against him due to the CCDC's knowledge of his medical treatment prior to his attending the Academy and working at the CCDC.

PROCEDURAL HISTORY

On November 18, 2013, (CCDC) terminated appellant as a probationary corrections officer (CO) at the end of the **working test period**. The termination recited the unsatisfactory evaluations from the Training Academy, the July and November evaluations conducted by supervisory staff responsible for Voigtsberger's evaluations at the CCDC, and the prior disciplinary counselings, reprimand, and suspensions. This matter was transmitted to and filed with the Office of Administrative Law on December 12, 2013, by the Civil Service Commission for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on December 15, and December 17, 2014, and, the record closed on December 17, 2014. An extension of time within which to issue the Initial Decision was requested and granted for good cause.

TESTIMONY

Captain Karen Taylor (Taylor)

Taylor is an eighteen-year employee of the CCDC. She is presently a Captain, serving as a shift commander for the past year, prior to that she served seven years as a Lieutenant, and a Sergeant for six years. Her duties as a Lieutenant included administration of the facility. On August 18, 2013, her evaluation recommended not to

hire Voigtsberger (R-11). In preparing the recommendation she reviewed seven comments from Sergeants made in January/February 2013 (R-3), the three prior evaluations, one performed by her on August 11, 2013, (R-10), and the other two performed by Sergeants Dimitri Collins and Robert Leithead, dated March 16, 2013, (R-4), and July 16, 2013, (R-5), respectively. Appellant's reviews from the Correction Officer Training Academy as well as his disciplinary history, there, and at the CCDC facility, were also considered. Taylor also made observations from her personal interactions with the appellant during the period she served as shift commander of him. Taylor denied familiarity with appellant's medical history, the Academy cleared him to come to the CCDC without any accommodation.

The four areas where Taylor raised concern were the areas of following rules, accepting responsibility for his actions, his knowledge, and his work judgment. She quantified the evaluations giving less weight to the earlier evaluations and more to the final evaluation. The March 2013, evaluation reflected twenty-one points, computed as two points each for unsatisfactory performance, and one point each for areas marked needs improvement. The July 2013, appellant's evaluation scored at twenty-two points. In Taylor's final evaluation of appellant, she scored him with seventeen points, which far exceeded the six points or less she would have anticipated from a probationary CO with one year experience.

Taylor testified that the Internal Affairs Division investigated the December 13, 2012, incident between Sergeant Duddy and appellant (A-1). The incident alleged that at a Christmas party, Sergeant Duddy called appellant a "retard." An Internal Affairs Division investigation of the incident, concluded as unfounded. She did not see the report prior to the transfer of appellant in March 2013. She does not recall at what time she heard of the Internal Affairs Division's unfounded finding. She did not see the report until November 2013 when she prepared her termination memo.

Taylor testified to her awareness of an incident in February 2013, while appellant secured the breakfast trays, appellant coughed, and spit into an inmate's used food tray. CCDC brought a disciplinary action against appellant, it concluded with a five-day suspension.

Taylor testified to the transfer of appellant to the day shift in March to have more interaction with the public and inmate population, an area where the March evaluation recommended needed improvement. The shift change would also allow appellant to work on learning his job function. At that shift, Sergeant Leithead, had supervision of appellant.

Taylor testified that all three evaluations were not satisfactory. Many minor infractions were waived. However, appellant had two major five-day disciplines, one at the Police Training Academy and one at the CCDC facility¹. The Academy discipline related to sexual comments to another recruit. The CCDC's facility disciplinary action found appellant's conduct unbecoming as it related to the February spitting incident. A third disciplinary action is pending for neglect of duty. In addition to the disciplinary actions, there were seven performance memos from various Sergeants in February 2013. Taylor found this many disciplinary actions during the **working test period** to be excessive.

Taylor testified that appellant had good attendance, timeliness and grooming. She expressed concern with appellant's poor judgment, constant need for supervision, and inability to accept responsibility for his actions. The totality of her impressions, as well as the disciplinary actions led her to recommend termination.

Taylor confirmed that the **working test period** only requires three 120-day evaluations. The progress notes are not required for those evaluations. The progress notes are designed to assist the individual recruit to self improve and succeed. She acknowledged that during the second evaluation period she did not find any performance memos. N She also acknowledged that she could not say from looking at the first or second evaluation whether appellant's offense of spitting in the used tray had an effect on both those evaluations. Taylor also could not point to any incident appellant had with the public during the evaluation periods which indicated need for

¹ Appellant's discipline from the Police Training Academy which was not heard until he became a Correction Officer recruit is not considered as grounds for the Working Test Period evaluation, see further discussion below.

improvement in that area. Taylor testified that the absence of sufficient public contact could justify the notation that appellant had need for improvement in that area.

Taylor testified to the training made available to the appellant. In addition to sexual training, appellant had available various other on-line training in the security area. She confirmed he passed all the training tests completed at the end of the on-line training. Appellant also had available other staff to advise him daily of procedures, in an attempt to improve appellant's areas in need of improvement.

Christopher Fosler (Fosler)

Fosler commenced employment with the CCDC in 1989, and retired in 2014. He served as Deputy Warden for three years, prior to that he served as a Captain, Lieutenant and Sergeant, each for a period of five years. His duties included working with the warden and, after July 18, 2013, he came to work in the administration. One of his early duties was to review a March to July 2013 evaluation of appellant prepared by then Sergeant Robert Leithead. This review occurred at the request of the appellant. The review occurred on August 1, 2013, in the presence of appellant, Sergeant Leithead, Taylor. Fosler advised appellant that the review is intended to allow appellant to bring to the administration's attention an incorrect factual statement, or to explain a portion of the evaluation that is not understood. Appellant initially addressed prior discipline received. Fosler advised that should have been addressed at the time of the discipline, for the purpose of this evaluation, it is already part of the record. Fosler advised appellant that this second negative review would be hard to overcoming in the last period. Fosler noted that appellant had a consistent theme of performing well and then poorly. Fosler personally recalled an incident in which appellant received no discipline, but placed himself and staff at risk of injury. Appellant had entered the pod in response to a confrontational inmate. Appellant entered the pod instead of attempting to resolve the situation from outside the pod, and attempted to forcefully move the inmate into his cell. A Code Brown had to be called due to the concern for the appellant's safety. Fosler advised the Sergeant to talk to appellant about this. The sergeant spoke with appellant, and appellant acknowledged that discussion. Fosler expressed concern regarding this incident in his report (R-6) as appellant had already

completed the Police Academy training and completed more than two-thirds of his **working test period**. Fosler testified that appellant had worked with approximately seventy sergeants over the year **working test period**. Fosler did not have much interaction with appellant but did participate with Taylor in the decision to terminate appellant.

Lieutenant Robert Leithead (Leithead)

Leithead is an employee of the CCDC. He serves as the lieutenant assigned to the administration of the CCDC. He served in this function for approximately the last two years. Prior to that he served as a sergeant for thirteen years. Approximately fifteen months as a disciplinary sergeant. In that capacity, he recommended to the warden disciplinary actions to take against correction officers who violated rules and regulations. He completed the evaluation of appellant, though he only served as a superior officer of appellant during some of the months in 2013. During that time he completed the 18 July 2013, evaluation of appellant, marked as R-5. He testified to personal observations of appellant during that time, as well as discussions regarding the spitting incident. Leithead testified that appellant never accepted any responsibility for the spitting incident. His evaluation resulted in a scoring of twenty-two points. Leithead testified this is unacceptable. Leithead testified that appellant's actions were inconsistent, he would be overly aggressive at times and at other time overly friendly. He did complement appellant for good work but found that he regularly spent fifteen to twenty minutes to explain unsatisfactory actions. He did not observe improvements by appellant over the time he observed him. Appellant had knowledge of simple things but his interaction with other officers and the inmate population is lacking. Appellant needs improvement regarding knowledge of the work. He specifically recalled appellant in an interaction with another employee of CCDC saying, "Don't tell me how to run my shift." Appellant did not work with others to get the job done.

Voigtsberger

Voigtsberger testified he is thirty-five years of age. In September 12, 1999, he had an accident with a truck. He was in a coma for forty days, and suffered brain

damage. He applied to the police academy at the age of thirty-two or thirty-three, and he graduated from the Police Academy. He began work at the CCDC as a pat down cell inspector for the shift that ran from 24 p.m. to 8 a.m. At a Christmas party in December 2012, a Sergeant Duddy, allegedly, said to appellant, "I think that you are slow and I think you are retarded." Duddy also said, "I was given an order from the captain to document any problems that you have because they are trying to get rid of you." Within a week of the incident, Voigtsberger related this incident and filed a general incident report. The Internal Affairs Division investigated the incident but could not substantiate Voigtsberger's incident. Voigtsberger's incident report A-1 reflected that he is nervous when a superior officer is around, and feels threatened by Sergeant Duddy. Voigtsberger shift changed to days at the end of February 2013. The shift change made him feel better. However, during the second and third period he did not get performance memos. Voigtsberger claimed, in his mind, he performed a great job, he did not receive negative progress reports. He did not know of a performance problem until the second evaluation in July 2013. Then, his mental impression became, the only thing he did right was showing up for work. He did not know if Leithead observed him. He claims he modified his cell inspections and spoke to inmates more respectfully and spoke with co-workers. Appellant, at the evaluation, was told that on the present track he would not be returning at the end of the **working test period**.

Appellant testified that the incident with Sergeant Duddy happened at approximately 2:30 p.m. at the end of the party. He and Sergeant Duddy were the only two to the conversation. Sergeant Duddy's faculties were impaired. Sergeant Duddy never wrote a performance report. Appellant claimed, Taylor asked if he wanted to be transferred and CCDC transferred appellant to a different shift.

Appellant acknowledged that Leithead discussed his performance a couple of times, he clarified that it might have been five times. He did not recall discussions with Sergeant Antrilli. He admitted that Sergeant Collins may have talked to him but he does not remember. He did not recall discussions with Sergeant Jones, stating this happened three years ago. He denies a conversation with Sergeant Farlow addressing appellant's willingness to learn or capabilities, but remembered a kindness of Sergeant Farlow providing appellant a sweater. Appellant acknowledged his paranoia but only

requested one shift change. Appellant does not remember conversations with Sergeant Worlds but may recall something some comment that sergeant made about his judgment.

Appellant recalled Sergeant Farley told him, "He did not think Captain Hilton tried to get rid of him."

FACTUAL DISCUSSION

CCDC presented three witnesses who personally observed the appellant, during the **working test period**. One of these individuals prepared the July Evaluation Report of appellant. The other two individuals had exposure to the appellant as he performed his duty. Taylor and Leithead recommended the termination of appellant to Deputy Warden Fosler, Warden Eric M. Taylor. The termination resulted from deficiencies of appellant in four areas, appellant's poor judgment, constant need for supervision, negative interaction with inmates and the inability to accept responsibility for his actions or understand the impact of the exercise of his poor judgment.

Taylor testified that the evaluation report included the actions which occurred at the Police Training Academy. A time prior to the **working test period**. A decision based upon that incident and the two allegedly affected evaluations might be insufficient to support a good faith termination of appellant. The analysis of the **working test period**, however, requires personal observations during the time from November 18, 2012, through November 18, 2013. Respondent did perform those evaluations and three of the CCDC's personnel or former personnel testified to those personal observations.

Voigtsberger testified to an incident that occurred with Sergeant Duddy on December 12, 2012, at a Christmas Party, out of state. This incident had no observers other than appellant and Sergeant Duddy. Appellant filed a general incident report with the Internal Affairs Division. He characterized that incident report as required by a direct order to him. The investigation resulted in a determination that the incident could not be substantiated. Sergeant Duddy did not testify, for either party in this matter.

Voigtsberger thereafter became wary of superior officers and fearful of Sergeant Duddy. Voigtsberger became paranoid. Seven sergeants other than Duddy filed mostly negative progress reports of appellant during the time from January 25, 2013, through February 13, 2013. Appellant offered no substantiation that those reports were not offered in the ordinary course of interaction between appellant and his superiors. Voigtsberger's conclusion is they resulted either from retaliatory action for his filing the Sergeant Duddy report, or the alleged conspiracy that Duddy referenced at the Christmas party. Other than Voigtsberger's conclusion no other testimony or documentary evidence is offered to support that conclusion.

Voigtsberger points to the fact that he performed good until the incident with Sergeant Duddy. This statement cannot be accepted by the court. During appellant's testimony he used excuses to deny or fail to remember discussions with superiors regarding his deficient performances. Relying on the fact that the event happened three years before the hearing.

Appellant introduced documents related to his acceptable grades on various on-line testing (A-2). Appellant also was designated on the Probe Reaction Team at the lineup call from time to time. He introduced General Order Number 170 (A-3) addressed to the Probe/Reaction Teams which identified the criteria for assignment to the team. Specifically, appellant identified, that, "The shift commander will assign individuals who he/she feels confident can evaluate and deescalate most incidents." Appellant offers this as an indication that supported a more favorable evaluation than the termination proposed. Finally, appellant introduced evidence of General Order 1, in support of the obligation of the officer's of CCDC to document in writing incidents which occur. Appellant again relying of the failure of supervisors to make more progress or incident reports again supports a more favorable evaluation than the termination proposed.

Fosler, a retired Deputy Warden of CCDC, testified that he reviewed with appellant, in the presence of Leithead and Taylor the Leithead evaluation of July 2013. He also participated with Taylor in the decision to propose termination. In regard to the review of appellant, Fosler's analysis reached the conclusion that he did not

understand, despite explanation the appropriate process of the evaluation. Appellant did not bring to his attention during the review process any corrections but rather arguments over the penalties proposed. Fosler also recalled that appellant placed himself in a dangerous situation, resulting in a Code Brown, when appellant chose to enter the D pod and physically handle a confrontational inmate. Fosler directed a sergeant to speak to appellant regarding better alternatives. Appellant recalls this situation and the discussion with the sergeant.

In addition to preparing the July 2013 report, Leithead testified regarding the February 15, 2012, spitting incident. Where appellant discharged sputum into the finished meal plate of an inmate. Appellant never accepted any responsibility for the spitting incident. Leithead testified that appellant's actions were inconsistent, he would be overly aggressive at times and at other time overly friendly. He did not observe improvements by appellant over the time he observed him. Appellant had knowledge of simple things but his interaction with other officers and the inmate population was lacking. Leithead testified appellant needs improvement regarding knowledge of the work. Leithead also testified that it would regularly take fifteen to twenty minutes to explain to appellant why his actions were wrong and the consequences of those actions.

Taylor denied familiarity with appellant's medical history, the Academy cleared him to come to the CCDC without any accommodation. She did not become aware of the Sergeant Duddy incident until the time she made her termination evaluation. The four areas where Taylor raised concern were the areas of following rules, accepting responsibility for his actions, his knowledge, and his work judgment. She did rely on the Performance evaluations as well as the seven memos from Sergeants (R-3). While the disciplinary proceeding that carried over from the Police Training Academy falls outside the **working test period**, this tribunal is not in a position to say that numerous sergeants', lieutenants' and captains' observations were all part of a concerted effort to deny the appellant a promotion to a senior correction officer, either because of appellant's medical condition, or the incident report he filed as to Sergeant Duddy. This tribunal finds insufficient evidence to accept those theories.

The respondent's witnesses have not been shown to possess malice or ill will toward appellant. Their credibility has not been impeached. Some of their testimony for supporting appellant's termination maybe outside the scope of the **working test period**, and are insufficient to support a good faith termination during the **working test period**. However, there is sufficient testimonial and documentary evidence to support a good faith termination during the **working test period**.

The appellant's testimony is understandable, but his selective memory regarding discussions of his negative performance becomes questionable, when on cross-examination, the memory somewhat reappears. He is desirous of reinstatement as a correction officer, however, the actions that he displays leaves this tribunal concerned that his poor judgment, and lack of understanding of the consequences of his actions may result in personal injury to himself or other staff. This is the main concern of my observation of his testimony.

In a disciplinary matter, this tribunal does not look at the prior disciplinary record, but here, the decision to be made is appellant's actions during the twelve-month **working test period**. Accordingly, this tribunal does not see how a proper analysis of good faith can be made without reference to those incidents, especially when appellant has not denied that the incidents occurred. They will appear in the Factual Findings below.

FINDINGS OF FACT

As a result of the evaluation of the credible testimony, the documentary evidence, and giving fair weight thereto, I **FIND** the following **FACTS**:

1. CCDC accepted Voigtsberger as a correction officer trainee on November 18, 2012. Voigtsberger in such position entered a **working test period** through November 18, 2013.
2. CCDC assigned Voigtsberger to the 24:00 p.m. to 8:00 a.m. shift.

3. On 20 December 2012, CCDC assigned Voigtsberger to escort a protective custody inmate to the medical department. Voigtsberger performed this action, then while waiting, Voigtsberger sat at a convenient desk. A superior officer directed Voigtsberger to remain standing. Voigtsberger rose for the officer, but upon the officer's departure, Voigtsberger returned to a desk seat only to be noticed by another superior officer.
4. On 13 January 2013, at approximately 1:47 a.m., Voigtsberger requested a break, his superior advised him to perform the 2:00 a.m. head count prior to taking the break. Voigtsberger took the break without performing the head count. On the superior's return, another officer informed him Voigtsberger did not perform the head count. Voigtsberger claimed he performed the headcount, then he stated that he thought they were done.
5. On 15 February 2013, CCDC's duty required Voigtsberger to collect inmate food trays. At that time Voigtsberger discharged his sputum into the inmates finished tray.
6. On 25 February 2013, CCDC's duty required Voigtsberger to deliver inmate food trays. Trays were never delivered to the area.
7. On 9 April 2013, CCDC's duty required Voigtsberger to perform cell searches. Inmates complained Voigtsberger made excessive noise banging on windows and bunks while occupied. The inmate reported Voigtsberger as being overly aggressive and confrontational, including making physical contact with the inmates to move them from the bunk. When the superior office spoke to him, Voigtsberger advised he would correct this activity.

8. Voigtsberger, even excluding an incident which happened at the Police Training Academy, had unacceptable performance evaluation for March 18, July 16 and November 13.
9. Voigtsberger failed to follow rules.
10. Voigtsberger refused to accept responsibility for his negative actions.
11. Voigtsberger knowledge of his job function was inadequate.
12. Voigtsberger work judgment was inadequate.
13. Voigtsberger has failed to show that respondent's actions resulted from knowledge of his medical condition, or filing an incident report as to Sergeant Duddy.
14. The analysis of Voigtsberger's actions can only occur during the **working test period** from 18 November 2012, to 18 November 2013.
15. Voigtsberger had good attendance, timeliness and grooming.
16. Voigtsberger did subject himself and other staff to risk of personal injury when he entered pod D to attempt to control a confrontational inmate.
17. Respondent witnesses reflected no malice or ill will toward Voigtsberger that could result in a finding of bad faith.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection.

Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a).

The Civil Service Act (Act), N.J.S.A. 11A:1 to 11A:9 reflects the public policy of the State of New Jersey to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance. N.J.S.A. 11A:1-2c. In furtherance of this public policy, the Act and the regulations of the Department of Personnel thereunder delineate two distinct obligations on the part of an appointing authority. One obligation is to monitor a probationary employee during a **working test period** as part of the examination process designed to permit an appointing authority to determine whether the employee can satisfactorily perform the duties of the title. N.J.S.A. 11A:4-15; N.J.A.C. 4A:4-5.1(a). The purpose of a **working test period** is to furnish an additional **test** of efficiency. Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954). As found in Dodd v. Van Riper, 135 N.J.L. 167, 171 (E&A 1947), "a basic condition of permanent appointment for any civil service employee is the favorable opinion of the employee's fitness as formed by the appointing authority during the probationary **period**." **Termination** at the end of the **working test period** may occur for unsatisfactory performance. N.J.S.A. 11A:2-6a(4); N.J.A.C. 4A:2-4 and 4A:4-5.4(a).

The other obligation of an appointing authority is to discipline an employee for misconduct in order to discourage a recurrence of such misconduct or, where appropriate, to remove an employee from public service because of the individual severity of the misconduct or because of the cumulative effect of multiple acts of misconduct. Disciplinary action may take the form of removal, suspension, fine or disciplinary demotion. N.J.S.A. 11A:2-6a(1), (2) and (3); N.J.A.C. 4A:2-2 and 3. Probationary review and discipline are not mutually exclusive of one another. Certainly, a probationary employee may be disciplined during the **working test period**. N.J.S.A. 11A:4-15(c); N.J.A.C. 4A:4-5.4(b). Indeed, appellant was disciplined during his **working test period**. Infractions occurring during a **working test period** logically can be factors to consider in making an ultimate determination of whether a probationer's

overall performance is unsatisfactory at the conclusion of the **working test period**. However, the probationary review process cannot permissibly substitute for the disciplinary process. The agency recognizes the difference between the disciplinary and probationary review processes by placing them in separate subsections of N.J.A.C. 4A:4-5.4.

The issue present here is not one of disciplinary review but instead whether respondent was justified in terminating appellant at the end of his **working test period**. Entry level law enforcement officers serve a twelve-month probationary **period**. N.J.A.C. 4A:4-5.2(d). Advancement to a primary title in the related title series (in this case Senior Correction Officer) shall take place only upon successful completion of the training **period**. N.J.A.C. 4A:3-3.7(d).

An employee who seeks to challenge his or her **termination** at the end of a **working test period** faces a heavy burden. The employee bears the burden of proof "to establish that the action was in bad faith." N.J.A.C. 4A:2-4.3(b); Dodd v. Van Riper, *supra* at 172. In Briggs v. N.J. Dept. of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), the court stated that the only issue in such a case is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position.

Although the courts have not defined "good faith" or "bad faith" specifically in the context of a **working test period** case, "good faith" has generally been defined as meaning honesty of purpose and integrity of conduct with respect to a given subject. Smith v. Whitman, 39 N.J. 397, 405 (1963). Hence, if the decision to terminate an employee at the end of the **working test period** lacks integrity of conduct, then the decision must fall as having been rendered in bad faith.

A police officer or a correction officer is a special kind of public employee whose primary duty is to enforce and uphold the law. He may carry a service revolver and represent law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public. *See, e.g., Moorestown v. Armstrong*, 89 N.J. Super. 560, 566 (App. Div. 1965), *certif. denied*, 47 N.J. 80 (1966).

“The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official.” In re Phillips, 117 N.J. 567, 576 (1990). A police officer’s (or correction officer’s) ability to utilize good judgment in stressful situations protects his own life, the lives of his fellow officers, and the civilians he is sworn to protect. Keena v. Newark Police Acad., 95 N.J.A.R. 2d (PTC) 19, 25. Correction officers serve in a capacity analogous to that of law enforcement officers. As such, they have a duty to serve the public with the highest fidelity, honesty, integrity, and good faith. As they are vested with powers and responsibilities not held by other public employees, law enforcement officers are held to the highest standards of conduct. See, e.g., In re Carberry, 114 N.J. 574 (1989). It is also widely recognized that correction officers, like police officers, belong to a quasi-military organization.

Helpful in the analysis of this matter are cases in the police training academy area. In Greenwood v. State Police Training Center, 127 N.J. 500 (1992), the New Jersey Supreme Court addressed the “good cause” requirement applicable to the dismissal of a recruit. The Court noted that, in the employment context, a provision permitting termination only for good cause “protects an employee from unreasonable or arbitrary termination.” 127 N.J. at 509. In this regard, good cause exists in an employment context when the employee’s dismissal is prompted by a legitimate business concern or poor job performance. Id. at 509–10. In contrast, good cause does not exist, and a termination would be arbitrary and unreasonable, if the employee’s dismissal is grounded on factors irrelevant to job performance. Id. at 510. The Court further noted that, “although the good-cause standard eludes precise definition, courts ordinarily uphold findings of good cause when the employee’s performance is deficient or when the employee creates a risk of harm to himself or herself or others.” Id. at 510. “An employer must present substantial objective evidence to meet the good-cause standard.” Id. at 510–11.

In Butler v. Passaic County Police Academy, PTC 01935-05 and CSV 13123-05, Initial Decision (August 27, 2007), aff’d, Merit System Board (March 17, 2008), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ stated that “[g]enerally, the appointing authority decision to remove the employee based on a failure to complete the academy should not be disturbed absent a showing of discrimination, invidious

motive or bad faith," and concluded that the appointing authority acted reasonably in terminating Butler from employment as a correction officer.

In this case, the CCDC dismissed appellant for failure to follow rules, failure to accept responsibility for his actions, failure of his general knowledge of job requirements, and failure of his work judgment. The burden of persuasion here is on the appellant to show that CCDC acted in bad faith in its decision to terminate him. That said, it is also true that the CCDC has broad discretion to remove, recruits during the **working test period** on basically any reasonable "good cause" ground. As a correctional institution, a para-military organization, strict discipline and adherence to rules and regulations are especially important. A good degree of deference must be accorded to the CCDC's decisions as to a candidate that it deems unfit for service.

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing. In the case of a **working test period** the OAL is directed to determine whether CCDC's actions were taken in bad faith.

PENALTY

When dealing with the question of penalty in a de novo review of a **working test period** matter, the employing units determination to terminate must be evaluated from the perspective of whether the employing unit exercised bad faith. If such a finding is made this tribunal may recommend providing a new **working test period**. Rembert v. East Jersey State Prison, Department of Corrections, CSV 3556-03, Initial Decision, (October 21, 2003), adopted Comm'r (December 23, 2003), <http://njlaw.rutgers.edu/collections/oal/>. If the determination is that the action occurred in good faith this tribunal may terminate the appellant. See N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. West New York v. Bock, supra, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing

employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Voigtsberger's prior disciplinary history (R-12), reflects five counseling sessions, and a five-day suspension for neglect of duty, and one verbal reprimand for violation in general. All of which occurred during the period of December 20, 2012 and May 15, 2013. The earlier violation from the Police Training Academy resolved at the CCDC was not considered. A latter violation at appellant's counsel's request has not been considered. Coincidentally, all violations occurring after the alleged incident with Sergeant Duddy on December 12, 2015. However, other than this coincidence, even if the Police Training Academy violation and the last violation are not considered as it is under appeal, I see no reason to disturb respondent's termination of appellant.

Appellant may desire to be a correction's officer but his poor judgment and social interaction skills are a detriment to his ability to perform the duties of a correction officer. Appellant has not shown that the respondent acted in bad faith. Respondent's administrative personnel all had personal observation of appellant during the **working test period**. These personal observations in addition to sergeants evaluations during the course of the **working test period** comprise the good faith determination that appellant, if retained, would likely subject himself or other co-workers to safety concerns and exposures, predominately because his judgment in the type of action to take does not come independently. It relies on the direction and approval of superiors. This does not meet the minimal requirements for a correction officer. A reasonable calculation to terminate appellant in the presence of the prior disciplinary actions, the conduct of the appellant, and the unsatisfactory evaluations is made in good faith.

Accordingly, I **CONCLUDE** that the respondent's termination of appellant at the end of the **working test period** is appropriate.

ORDER

I **ORDER** that Voigtsberger's appeal is **DENIED** in all respects.

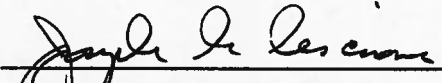
I further **ORDER** that the termination of Voigtsberger is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 4, 2015
DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

5/4/15

Date Mailed to Parties:

5/4/15

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

Justin Voigtsberger

For Respondent:

Lieutenant Robert Leithead, CCDC

Captain Karen Taylor, CCDC

Deputy Warden Christopher Fosler, retired CCDC

LIST OF EXHIBITS

For Appellant:

- A-1 December 20, 2012, General Incident Report
- A-2 On-line Training Completed
- A-3 Probe Reaction Teams General Order 170
- A-4 Incident Report General Order 001

For Respondent:

- R-1 Six Week Camden County Correctional Academy Performance Evaluation by Sergeant Denita Forrest, dated September 12, 2012
- R-2 Twelve Week Camden County Correctional Academy Performance Evaluation by Sergeant Denita Forrest, dated November 13, 2012
- R-3 Seven letters from various sergeants
- R-4 One hundred and twenty day Jail Evaluation by Sergeant Dimitri Collins, dated March 26, 2013

- R-5 One hundred and twenty day Jail Evaluation by Sergeant Robert Leithead, dated July 18, 2013
- R-6 Memorandum by Warden Christopher Foster, dated August 1, 2013
- R-7 Letter from Correction Officer Voigtsberger, dated August 2, 2013
- R-8 Second letter from Correction Officer Voigtsberger, dated August 2, 2013
- R-9 Memorandum by Deputy Warren Fosler, dated August 6, 2013
- R-10 One hundred and twenty day Jail Evaluation by Sergeant Kevin Kelly, dated November 14, 2013
- R-11 Memorandum by Captain Karen Taylor, dated November 18, 2013
- R-12 Memorandum by Deputy Warden Fosler, dated November 18, 2013
- R-13 Correction Officer Voigtsberger Chrono of Discipline