



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Annie Baker, Juvenile Justice Commission

CSC Docket No. 2015-1286

Court Remand

ISSUED:

(DASV)

The Superior Court of New Jersey, Appellate Division, has remanded the April 24, 2012 removal of Annie Baker, a Correction Sergeant, Juvenile Justice, with the Juvenile Justice Commission (JJC), to the Civil Service Commission (Commission). See In the Matter of Annie Baker, Juvenile Justice Commission, Docket No. A-5340-12T1 (App. Div. November 10, 2014). The Court did not retain jurisdiction. A copy of the Appellate Division's decision and the Commission's decision, In the Matter of Annie Baker, Juvenile Justice Commission (CSC, decided June 5, 2013) are attached.

By way of background, the appellant was removed from employment, effective April 24, 2012,1 on charges of inability to perform duties and other sufficient cause: violation of the firearms re-qualification policy. The appellant failed to re-qualify in the use of firearms during a semi-annual re-qualification session. The appellant appealed her removal, which was transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge (ALJ). In reviewing the job specification for Correction Sergeant, Juvenile Justice, the Attorney General's Semi-Annual Qualification and Re-qualification Standards for New Jersey Law Enforcement (AG Standards), and the JJC's policy on firearms re-qualification, the ALJ found that the appellant was required to re-qualify in the use of firearms. The ALJ also found that the appellant was given multiple opportunities to remedy her failing scores, which included participation in a remedial re-qualification program, but she could not meet the minimum

1 The appellant was initially immediately suspended without pay, effective February 15, 2012, to maintain safety, order, and the effective direction of public service.

requirements to pass. Additionally, the ALJ set forth the testimony of several witnesses, one of whom testified that despite restrictions in carrying a weapon and appearing on a "Do Not Carry List," several officers had remained employed with the JJC. Further, the witness reported that not all JJC officers needed to carry a weapon in order to perform the essential functions of the job. While the ALJ acknowledged that JJC custody staff do not carry a firearm within the perimeter of the facility, that fact did not invalidate the requirement that JJC custody staff must have the ability to qualify with a JJC duty weapon. Therefore, the ALJ concluded that the appointing authority proved by the preponderance of the evidence that the appellant lacked the ability to fully perform her duties and violated the JJC policy regarding firearms re-qualification. Accordingly, the ALJ recommended sustaining the appellant's removal.

Upon its *de novo* review, the Commission agreed with the ALJ's assessment of the charges, emphasizing that the appellant was given multiple opportunities to re-qualify. Further, although the appellant alleged that the re-qualification program and instructor were somehow deficient, the Commission dismissed her argument, indicating that the basic fundamentals of shooting were covered in the program and the instructors worked with the participants. The Commission stated that it was clear that the appellant violated the JJC's policy on firearms re-qualification in not meeting the minimum score for qualification, and it was required of a Correction Sergeant, Juvenile Justice to have the ability to carry a firearm. The Commission found that the fact that the JJC permitted other employees who could not carry a weapon to be placed on the "Do Not Carry List" and remain employed did not demonstrate that the ability to carry a weapon was not required for the appellant to perform the full duties of her position. Therefore, notwithstanding the appellant's unblemished employment record of 22 years, the Commission concluded that the only appropriate course of action was to remove the appellant from employment. However, the Commission noted its concern with the application of the "Do Not Carry List" and suggested that the JJC revisit its policy. The Commission stated that, while it was not unreasonable to allow officers with temporary restrictions to be accommodated, it was troublesome to permit continued employment of officers who are unable to carry a weapon for extended periods of time.

Thereafter, the appellant pursued an appeal with the Appellate Division. On appeal, she maintained that she was able to perform the functions of her position, which did not require her to be qualified in the use of a firearm. Alternatively, if a firearm was required for her position, the appellant requested the same accommodation afforded to other officers who were legally prohibited from carrying a weapon but were still employed. The appellant also challenged the penalty of removal as unwarranted given her circumstances. Upon its review, the Court found that, while the AG Standards dictated the semi-annual firearms re-qualification standards for State law enforcement, it did not limit the number of attempts an individual is given "prior to the imposition of a consequence for failure to meet the

required minimum score.” Therefore, the Court determined that “the consequence attached to not re-qualifying rests in the discretion of the appointing authority, here the JJC.” Nevertheless, the Court could not agree with the appellant’s assertion that, although some of her duties did not require the use of a weapon, re-qualification in the use of firearms was unreasonable or that JJC’s limitation to re-qualify in six attempts prior to removal from employment was arbitrary or capricious. Further, the evidence established the necessity for the re-qualification program and that the appellant was treated fairly in the program. Additionally, the Court could not conclude that carrying a firearm was not an essential function of the appellant’s position. Thus, the Court noted that “[w]ere the evidence in this matter limited to [the appellant’s] failed attempts after adequate opportunities to re-qualify, we would determine this record contains adequate factual support to uphold the [Commission’s] decision.” However, the Court indicated that “questions of fundamental fairness and the possibility of arbitrary conduct” were raised in this matter given the evidence showing that other JJC officers failed to meet the re-qualification requirements and were still employed. The Court identified JJC officers who had been disqualified since 2008 and stated that:

We cannot discern why these JJC law enforcement officers have been afforded extended periods of weapons disqualification without employment discipline or how the extended periods could possibly be considered “temporary.” The only justification suggested, but not clearly explained or even linked to the specified officers, was the “prohibited” status resulted because of domestic violence and an accommodation was mandated by the Attorney General’s guidelines. *Slip Opinion* at 19.

However, the Court did not find that such an accommodation existed. Rather, the “Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers” prepared by the Division of Criminal Justice directed that disciplinary consequences should result. The Court also noted that:

An officer prohibited from carrying a firearm after an adjudication of domestic violence cannot participate in semi-annual re-qualification as mandated by [the JJC policy]. Accordingly, these officers cannot meet the requirements of [the] position and also should face discipline. The fact that their impediment arises by operation of law rather than from an inability to achieve the minimum passing score is not a distinction which can support disparate application of the policy. *Slip Opinion* at 22.

Thus, the Court determined that the record was unclear as to the reasoning for the continued employment of the disqualified employees. Consequently, it remanded the matter to the Commission to clarify the application of the re-qualification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC

officers who failed to re-qualify in the use of firearms. The Court indicated that the JJC's policy "must be revised to achieve uniform treatment." The Court further directed that "[i]f the disparate treatment . . . is verified, [the appellant] must be given the same opportunities as others who have also not re-qualified, because they too are legally barred from carrying a firearm. . . . Thereafter, [the appellant's] circumstances must be assessed in light of the past practice of allowing other enforcement officers who failed to complete semi-annual weapons re-qualification, to continue employment." *Id* at 24-25.

In response, the appellant requests that this matter be remanded to the OAL to uncover pertinent facts as instructed by the Appellate Division. The appellant submits that in accordance with the Court's decision, an additional hearing should explore whether the JJC has created categories of officers who are permitted to work despite their inability to carry a firearm and whether she was subjected to disparate treatment as compared to those employees prohibited from carrying a firearm due to domestic violence charges.

It is noted that despite the opportunity, the appointing authority did not submit additional information or arguments.

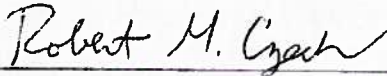
### CONCLUSION

The Appellate Division affirmed in part and reversed and remanded in part the Commission's decision, which upheld the removal of the appellant from her position as a Correction Sergeant, Juvenile Justice for her failure to qualify during the semi-annual firearms re-qualification. The Court rejected the appellant's argument that the re-qualification requirement was arbitrary or unreasonable. Moreover, the Court found that the appellant was treated fairly in the re-qualification program and that limiting re-qualification attempts to six was not arbitrary or capricious. However, the Court found evidence that several other JJC officers remained employed despite being prohibited from carrying firearms due to domestic violence incidents. There was not an adequate explanation by the JJC for this differential treatment. Therefore, in accordance with the Appellate Division's decision, the matter of the appellant's removal is remanded to the OAL for additional hearings to clarify the application of the re-qualification policy for all JJC officers and to analyze the evidence regarding the treatment of all JJC officers who failed to re-qualify in the use of firearms. Should either party wish to present testimonial or other evidence regarding the treatment of all JJC officers who failed to complete the firearms re-qualification, they should be afforded the opportunity. Upon his evaluation of the evidence on remand, the ALJ should assess whether the appellant was subject to disparate treatment and whether the disciplinary action is warranted.

**ORDER**

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

**DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 17<sup>TH</sup> DAY OF DECEMBER, 2014**



**Robert M. Czech  
Chairperson  
Civil Service Commission**

**Inquiries  
and  
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**Attachments**

- c: Annie Baker  
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Kenneth Connolly  
Joseph Gambino**

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5340-12T1

IN THE MATTER OF ANNIE BAKER,  
JUVENILE JUSTICE COMMISSION.

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Argued July 16, 2014 – Decided November 10, 2014

Before Judges Lihotz and Guadagno.

On appeal from the Civil Service Commission,  
Docket No. 2012-3265.

Frank M. Crivelli argued the cause for  
appellant Sergeant Annie Baker (Pellettieri,  
Rabstein & Altman, attorneys; Mr. Crivelli  
and Donald C. Barbati, on the brief).

Joseph M. Micheletti, Deputy Attorney  
General, argued the cause for respondent  
Juvenile Justice Commission (John J.  
Hoffman, Acting Attorney General, attorney;  
Randy Miller, on the brief).

PER CURIAM

Appellant Sergeant Annie Baker, a former corrections officer with the Juvenile Justice Commission (JJC), appeals from a June 26, 2013 final decision of the Civil Service Commission (CSC) sustaining disciplinary charges and removing her from her position as a corrections officer. Although this action was labeled as a disciplinary proceeding, Sergeant Baker's separation from service was based upon her inability to

successfully meet the minimum eighty percent accuracy score during a fall 2011 firearms re-qualification session. Sergeant Baker seeks reversal, arguing the CSC's decision was arbitrary and capricious. We agree in part. Consequently, we affirm in part and reverse and remand in part.

Sergeant Baker had been employed by the JJC for almost twenty-two years, seventeen of which were as a corrections officer. She has an unblemished service record. At the time this matter was reviewed, she worked as a uniformed Corrections Sergeant at the New Jersey Training School for Boys (Jamesburg).

The CSC published a lengthy and detailed nine-page job description for the Corrections Sergeant position. Included within the provisions describing the qualifications is this special note:

Appointees must have successfully completed the NJ Police Training Commission and agency training course standards for custody, supervision, investigation, and related law enforcement requirements. Appointees shall have qualified in the usage of firearms and the ability to re[-]qualify on a semi[-]annual basis.

[Civil Serv. Comm., Correction Sergeant, Juvenile Justice Job Specification 40809 (May 11, 1996), <http://info.csc.state.nj.us/jobspec/40809.htm>.]

In this regard, JJC policy number 11H-3.2, effective September 29, 2011, required all JJC law enforcement officers "must

achieve and maintain" active firearms qualification status, which included semi-annual firearms re-qualification in accordance with the Attorney General's re-qualification standards for state law enforcement personnel. Testing includes three separate proficiencies: handgun day fire; handgun night fire; and shotgun use. The JJC policy provides that in the event an officer fails to re-qualify after six attempts during the re-qualification cycle, JJC management is authorized to take appropriate action "up to and including termination."

Sergeant Baker's issued equipment included a .40 caliber Smith and Wesson handgun and a shotgun. She successfully completed re-qualification for handgun night fire and shotgun use. However, she was unable to meet minimum proficiencies for handgun day fire. Under required testing time and conditions, after the first four attempts, Sergeant Baker's best score on this test was thirty-nine of sixty shots fired, thus, missing the minimum passing score of forty-eight. Consequently, Sergeant Baker was ordered to attend a remedial firearms training class, comprised of classroom instruction, shooting fundamental exercises and live fire. Following this training, Sergeant Baker did not successfully meet the minimum re-qualification score.



During this period of JJC re-qualification, a challenge was filed by the corrections officers' bargaining unit, objecting to the manner in which the remediation course was conducted. Based on an agreement reached, Sergeant Baker and other unsuccessful candidates tested during this period were afforded the opportunity to participate in a one-hundred-twenty round firearms practice. After the practice session, Sergeant Baker was given two additional attempts to pass the re-qualification course. She failed both attempts, achieving scores of forty-two and forty-four.

Sergeant Baker's inability to meet the minimum passing score caused the JJC to serve a Preliminary Notice of Disciplinary Action, seeking her "immediate suspension [a]s necessary to maintain safety, order or effective direction of public services." The charges stated Sergeant Baker failed to perform her duties, N.J.A.C. 4A:2-2.3(a)(3), and she was removed from her position of employment on February 14, 2012.<sup>1</sup>

After departmental hearings, the disciplinary action was upheld. Sergeant Baker appealed to the CSC, which certified the

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<sup>1</sup> The bases for discipline cited in the Final Notice of Disciplinary Action are the "[i]nability to perform duties, N.J.A.C. 4A:2-2.3(a)(3), as well as any "[o]ther sufficient cause," further described as "violation of JJC HR policy 11H:3.2 Firearms Re[-]qualification," N.J.A.C. 4A:2-2.3(a)(12). This notice incorrectly lists subsection 11, but properly recites the operative provision, subsection 12.

matter as a contested case and transmitted it to the Office of Administrative Law for a hearing before an Administrative Law Judge (ALJ).

The JJC presented testimonial and documentary evidence to prove Sergeant Baker's testing opportunities, remedial training and scores. Witnesses included the range masters who supervised the re-qualification sessions attended by Sergeant Baker. Generally, the position taken by the JJC was Sergeant Baker ignored her obligation to practice with her weapon, resulting in her failure to qualify. Sergeant Baker presented factual and expert testimony regarding flaws in the testing administration, causing her and other officers who had not re-qualified to fail. She also presented evidence of officers prohibited from carrying weapons who were accommodated by the JJC and who remained employed. Finally, she testified on her own behalf.

The ALJ's written decision recounted the testimony of all witnesses appearing at the hearing. In our opinion, we limit recital to the evidence necessary to address the issues raised on appeal.

John Moore, a qualified range master and instructor at the Training Academy at the time Sergeant Baker failed to qualify, identified the instruction provided to Sergeant Baker. He also addressed the need for weapons proficiency. Although noting JJC

custodial staff members do not carry weapons within the facility's perimeter, he asserted the duty weapon was necessary when performing transportation, security outside the perimeter, and in the gate house and other circumstances mandating tactical training to protect the security and safety of others.

On cross-examination, Officer Moore stated he knew of four officers who failed to re-qualify since the JJC policy 11H-3.2 was adopted, all of whom, he believed, were terminated. He also confirmed there were certain JJC officers who were "prohibited" from carrying a weapon "for administrative purposes" or "pending domestic violence charges." The possible administrative purposes included medical or maternity leave, sick leave from injury or workers compensation requirements. Regarding officers prohibited from carrying weapons because of domestic violence involvement, Officer Moore suggested the JJC "follows the direction that's given from the Attorney General's office and the JJC Office of Investigations." In either case, Officer Moore knew of no officer identified as "prohibited" who was removed from his or her employment.

Officer Moore was asked to review what was termed a "Do Not Carry List" (DNC List). The July 24, 2012 DNC List contains the names of fourteen JJC law enforcement officers "prohibited" from carrying a firearm because they do not possess a valid or

current firearms possession card. Included on the list was Sergeant Baker, who was assigned to work at Jamesburg, her last assigned post. Officer Moore also discussed a second list of the almost four hundred JJC officers, which identified whether each officer qualified after the Fall 2011 semi-annual re-qualification testing process. The latter list showed several officers had not been authorized to carry a weapon for more than three years.

Officer Moore identified the four officers on the DNC List whom he knew remained fully employed at Jamesburg. He noted they had not qualified with their service weapon for at least a year. Officer Moore believed generally those officers were "temporarily" prohibited from carrying weapons following an order in a domestic violence matter and pending an investigation. He also stated JJC policy requires those found guilty of domestic violence "be terminated from [a] law enforcement position."

Cross-examination also revealed Officer Moore had been transferred from supervising the range, sometime following Sergeant's Baker failure to qualify. He acknowledged complaints presented by the collective negotiations unit alleged his tactics and procedures were unnecessarily stressful causing four candidates to fail.

JJC Sergeant Joshua Doner, also a range master assigned as a supervisor at the Training Academy in Seagirt, was responsible for reviewing Sergeant Baker's re-qualification training and testing. He confirmed some JJC uniformed law enforcement officers "[had] not qualified" with their weapon, and others were "not permitted to possess a weapon because of domestic violence charges" but remained employed with the JJC. On cross-examination, Sergeant Doner stated he knew only two officers who could not re-qualify with a duty weapon and both were removed from duty. He agreed, however, functionally an officer who cannot possess a weapon because of domestic violence circumstances is indistinguishable from an officer who cannot possess a weapon because of an inability to re-qualify. Yet as far as he knew, all of the officers prohibited from carrying weapons for reasons other than failure to re-qualify remained employed.

Sergeant Andrei Martin, employed by the JJC and assigned to Jamesburg, testified on behalf of Sergeant Baker. Sergeant Martin viewed the July 24, 2012 DNC List and identified those individuals who remained employed at Jamesburg despite their inability to carry a weapon, some of whom had been "prohibited" from carrying for many years. He discussed the circumstances of one officer who he believed had an unresolved domestic violence

matter and another who failed to graduate from the academy so she never qualified to carry a weapon.

Sergeant Martin, a negotiations representative for the officers' bargaining unit, also discussed difficulties candidates had experienced while Officer Moore supervised the Academy re-qualification program. Officer complaints contended Officer Moore's methods were not "conducive to learning" and at times his behavior was rude and disrespectful. Sergeant Martin suggested four officers failed to re-qualify while Officer Moore supervised the process, a development that had never before occurred. Sergeant Martin attributed this adverse result to Officer Moore's unacceptable and overly confrontational demeanor and methods. Further, he noted when Officer Moore was transferred and procedures were modified, all candidates satisfactorily re-qualified at the firing range.

Next, Sergeant Baker testified, asserting the use of a duty weapon was not essential for every post in the JJC and maintaining weapons re-qualification was not necessary for performance of her position. In this regard, she also discussed those officers who were prohibited from carrying weapons because of domestic violence restraining orders and one who never qualified with a weapon, but all of whom remained fully employed.

Sergeant Baker challenged the administration of the re-qualification test and the adequacy of the remediation program offered, explaining her objections to Officer Moore's manner and methods in conducting the re-qualification testing. She discussed difficulties with the .40 caliber Smith and Wesson that had been recently issued to JJC officers, who formerly used a different firearm during testing. Finally, she argued removal was an excessive penalty, not one mandated by the policy.

Sergeant Baker presented expert evidence showing the weapon used in the testing afforded an advantage to those with larger hands. The expert noted the increased kickback when fired repeatedly, which posed greater control difficulty for smaller persons, adversely affecting accuracy.

The ALJ's initial decision found the ability to effectively use a weapon was a condition of the Corrections Sergeant position, and was not obviated by the fact weapons are not carried inside the perimeter of the Jamesburg facility because weapons are necessary in the event of an emergency and are reasonably necessary to maintain security and control in the facility. The ALJ considered Sergeant Baker's evidence of what she asserted were conflicting policies allowing only certain corrections officers to serve while restricted from carrying and using weapons because they were involved in domestic violence.

The ALJ distinguished these circumstances from Sergeant Baker's failure to re-qualify, accepting Officer Moore's assertion the treatment of officers restrained from use of a duty weapon because of an incident of domestic violence was imposed by Attorney General guidelines, not the JJC.

Finding Sergeant Baker failed to demonstrate proficiency with her duty weapon despite sufficient opportunity under conditions that did not thwart her ability to do so, the ALJ concluded the JJC proved Sergeant Baker was unable to perform her duties, and the sanction of removal was appropriate. After rejecting any suggestion progressive discipline principles applied to these facts, the ALJ affirmed the disciplinary action by the JJC.

Sergeant Baker filed exceptions, appealing the ALJ's determination. Upon its review, the CSC accepted and adopted the ALJ's findings and conclusions. It sustained the disciplinary charges and upheld Baker's removal from employment. The CSC addressed what it characterized as an accommodation to other officers legally restricted from carrying weapons because of alleged or actual commission of domestic violence. Further, the CSC concluded accommodating a temporary restriction did not excuse Sergeant Baker's inability to re-qualify. However, to the extent the JJC had officers with permanent orders against



possession or use of a service weapon who remained employed, the CSC stated "the JJC is well advised to revisit its policy in this regard." Sergeant Baker's appeal ensued.

Our review of agency decisions is limited. Catholic Family & Cmty. Servs. v. State-Operated Sch. Dist., 412 N.J. Super. 426, 436 (App. Div. 2010). It is well settled that a "strong presumption of reasonableness attaches to the actions of administrative agencies." In re Carroll, 339 N.J. Super. 429, 437 (App. Div.) (citation and internal quotation marks omitted), certif. denied, 170 N.J. 85 (2001). We may not substitute our judgment for that of the agency. Rather, our review assesses whether the decision is "arbitrary, capricious, or unreasonable, or . . . lacks fair support in the record." Catholic, supra, 412 N.J. Super. at 436 (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)).

Accordingly, the party challenging the administrative action has the burden and must establish the agency's action was arbitrary, capricious or unreasonable. In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div.), certif. denied, 188 N.J. 219 (2006). In our review, we will not disturb an administrative agency's determinations or findings unless the appellant shows the agency did not follow the law; its decision was arbitrary, capricious, or unreasonable; or its decision was unsupported by

substantial credible evidence in the record. In re Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Twp. Pharmacy v. Div. of Med. Assistance and Health Servs., 432 N.J. Super. 273, 283-84 (App. Div. 2013) (same).

However, an agency's interpretation of a statute or any legal determination is not accorded the same deference. "[W]here technical or specialized expertise is not implicated, and the issue is one of statutory interpretation, we owe no deference to the agency." A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth., 427 N.J. Super. 389, 394 (App. Div. 2012).

On appeal, Sergeant Baker reasserts the arguments she advanced in the administrative hearing. First, she maintains the facts show she is able to perform the functions of her position, which do not require the need to be qualified with a duty weapon. Second, she argues if a weapon is a requirement of her employment, she seeks the same accommodation afforded other officers suffering a legal impediment prohibiting he or she from carrying a weapon. Specifically, she highlights some officers on the DNC List have had continued employment without the ability to carry a weapon for years. Finally, if the charges

are upheld, she urges reversal of the imposed sanction as unwarranted.

N.J.S.A. 52:17B-174 describes the qualifications and position of a juvenile corrections officer. More specifically, subsection (d) of that statute provides:

Each juvenile corrections officer shall by virtue of such employment and in addition to any other power or authority, be empowered to act as an officer for the detection, apprehension, arrest and adjudication of offenders against the law and . . . shall have the authority to possess and carry a firearm.

[N.J.S.A. 52:17B-174(d).]

Further, Attorney General issued guidelines dictate the semi-annual firearms re-qualification standards for state law enforcement officers. See, Semi-Annual Firearms Qualification and Requalification Standards for New Jersey Law Enforcement (Attorney General's Standards), § 2 (definition of Semi-Annual Qualification), § 4 (Agency Training and Qualification Requirements), § 5 (Qualification Program) (June 2003), <http://www.state.nj.us/lps/dcj/pdfs/dcj-firearms.pdf>. To re-qualify, a candidate must shoot sixty rounds from various positions on the range, and score eighty percent or forty-eight shots within the target. Id. at Appendix A. Following a practice round, a candidate is given three opportunities to qualify. If a candidate fails, he or she is give remedial

instruction and additional practice time. Id. at 9-13 to 9-15; 9-34.

Section nine of the Attorney General's Standards address unsuccessful candidates and provides, in relevant part:

A participant who fails to achieve a passing score on a prescribed qualification course shall receive remedial instruction. This instruction shall be provided after the supervising firearms instructor analyzes the problems which may have led to the failure. The time allotted and method of remedial training to be conducted shall be determined by the supervising firearms instructor. The supervising firearms instructor, in consultation with the firearms instructors and the participant, will:

1. Review factors which may have contributed to or caused a participant's failure to qualify, including a check of the participant's firearm.
2. Document any subsequent attempts to qualify and the results of those attempts.

If after the remedial training and subsequent attempts to qualify the participant still does not fire a passing score, the supervising firearms instructor shall report this information to the chief or agency executive. The chief or agency executive will then determine what action is appropriate. The chief or agency executive is to notify in writing the county prosecutor (Division of Criminal Justice for some state agencies) of participants who fail to qualify on the service weapon.

If a participant fails to qualify, all targets that participant used during initial and subsequent qualification attempts (those conducted following remedial training) are

to be kept on file until the participant achieves a qualifying score. These targets are to be signed by both the non-qualifying participant and the firearms instructor.

[Id. at 9-20.]

Indeed, the Attorney General's Standards do not limit the number of opportunities a candidate is afforded prior to the imposition of a consequence for failure to meet the required minimum score. Nor do they mandate the termination of an officer's employment or, for that matter, designate any specific sanction to be imposed if an officer fails to qualify after remedial training. Ibid. Section nine requires only that the targets to be "kept on file until the participant achieves a qualifying score." Ibid. Therefore, the consequence attached to not re-qualifying rests in the discretion of the appointing authority, here the JJC. In this matter, the JJC authorized six attempts and relied on past practice and current policy, which was set forth in 11H-3.2 to dictate the disciplinary result of termination.

Although many duties and responsibilities performed by a JJC Correction Sergeant do not require use of a weapon, we cannot agree with Sergeant Baker's assertion that the inclusion of such a requirement to remain employed in the position is either arbitrary or unreasonable. Nor can we conclude that the

qualification to use and the carrying of a service weapon are not essential functions of such position of employment.

Witnesses testifying during the administrative hearing listed those instances mandating a Corrections Sergeant be armed and, therefore, proficient with a service weapon. Included among these circumstances are: transportation of juveniles; duties outside the perimeter; and, most importantly, maintaining security within the facility, the gatehouse, as well as thwarting attempts to break into or out of the facility. The evidence of record fully supports the ALJ's finding: "The ability to re[-]qualify with the JJC's duty weapon is essential for full performance of the duties of [a] JJC [C]orrections [S]ergeant."

It also is not argued that JJC policy number 11H-3.2, requiring removal of JJC law enforcement officers who "cannot re[-]qualify with firearms semi-annually" was published and understood. The policy was designed to assure all law enforcement officers would "fully meet the job requirements of a JJC law enforcement officer."

Were the evidence in this matter limited to Sergeant Baker's failed attempts after adequate opportunities to re-qualify, we would determine this record contains adequate factual support to uphold the CSC's decision. The JJC's

evidence shows the necessity for the re-qualification program and proof Sergeant Baker was treated fairly, in this regard. Also, there is no evidence to suggest limiting re-qualification attempts to six was arbitrary or capricious. However, this record contains other evidence showing certain JJC officers failed to meet the re-qualification requirements, but suffered no sanctions and remained fully employed. Accordingly, this evidence of disparity in the enforcement of the job requirements and re-qualification policy raises questions of fundamental fairness and the possibility of arbitrary conduct. Specifically, testimony and documents showed full-time corrections officers who have not re-qualified for several years, and one who purportedly never qualified to use a weapon, yet these officers never faced disciplinary charges for non-performance. While the CSC generally categorized these instances as "temporary" and as involving restriction mandated by the Attorney General's domestic violence policy, this record does not support either of those findings.

The DNC List includes those law enforcement officers "prohibited" from carrying weapons, but who continued to work in their law enforcement positions. The List identified thirteen Jamesburg officers besides Sergeant Baker who could not carry weapons while at the facility. Checking these names against the

semi-annual re-qualification list of all JJC officers, we note two have been disqualified and prohibited from carrying weapons since October 2008 and November 2008. Further, the list of all JJC law enforcement officers contains another officer assigned elsewhere, who has been prohibited from carrying a weapon since June 2008. We also note the expired gun authorization status of two other officers contained on the Jamesburg DNC List have existed since October 2008 and October 2010. The record does not explain the bases of such designations.

We cannot discern why these JJC law enforcement officers have been afforded extended periods of weapons disqualification without employment discipline or how the extended periods could possibly be considered "temporary." The only justification suggested, but not clearly explained or even linked to the specified officers, was the "prohibited" status resulted because of domestic violence and an accommodation was mandated by the Attorney General's guidelines.

The specific Attorney General guidelines relied upon by Officer Moore and the JJC are not identified. We have located and reviewed the "Departmental Policy for Handling of Domestic Violence Incidents Involving Law Enforcement Officers" prepared by the Division of Criminal Justice. See Office of the Attorney General, Departmental Policy for Handling of Domestic Violence



Incidents Involving Law Enforcement Officers, <http://www.state.nj.us/lps/dcj/agguide/DV-Model-Policy-Final-12-11-09.pdf> (last viewed October 20, 2014). However, we do not find a provision in that policy mandating indefinite special employment treatment of officers prosecuted for domestic violence. To the contrary, in such instance, the policy directs disciplinary consequences should result.

Once a domestic violence complaint is filed, absent good cause, a hearing on whether the plaintiff establishes the need for entry of a final domestic violence restraining order must be held within ten days of the issuance of a temporary restraining order. N.J.S.A. 2C:25-29(a). We might agree a temporary accommodation appears appropriate for an officer accused, but not yet adjudicated of committing an act of domestic violence, because the period of disposition is short, which in fact would make the accommodation temporary. However, it is improbable that the officers identified as prohibited on the DNC List have merely been accused of domestic violence and await final adjudication; the period of prohibition could not be the result of a temporary restraining order. More likely, these officers, if prohibited from carrying weapons because of domestic violence, have been found to have committed domestic violence and remain enjoined from firearms possession following entry of

a final restraining order. See N.J.S.A. 2C:58-3(c)(6) (prohibiting the issuance of a handgun purchase permit or firearms-purchaser identification card to a person who is subject to a domestic violence court order under N.J.S.A. 2C:25-29); see also 18 U.S.C.A. § 922(g)(8)(B) and (C) (barring firearm possession upon a court order that "restrains such person from harassing, stalking, or threatening an intimate partner of such person, . . .").

But the record is murky. Sergeant Martin merely asserted he knew officers on the DNC List he believed were prohibited because of longstanding domestic violence restraining orders. On the other hand, Officer Moore, looking at the same DNC List, suggested the circumstances were temporary. Neither party offered conclusive evidence to resolve this apparent dispute and the documents admitted are not dispositive. Also, no explanation was provided as to why other JJC officers, who failed to re-qualify years ago, continued with employment. Absent these facts, it is not possible to determine whether JJC restrictions were available which did not mandate that a weapon be carried as Sergeant Baker asserted.

We also find unavailing the JJC's assertion of an Attorney General policy mandating an accommodation to officers convicted of an act of domestic violence. As we noted, the policy we

located suggests otherwise. Further, we have difficulty reconciling the JJC's expressed need for rigid application of the re-qualification policy, with the notion that, other than the brief approximately ten-day span from issuance of a temporary restraining order to the date of the final hearing, special treatment should be extended for years to putative batterers. An officer prohibited from carrying a firearm after an adjudication of domestic violence cannot participate in semi-annual re-qualification as mandated by 11H-3.2. Accordingly, these officers cannot meet the requirements of a Corrections Sergeant's position and also should face discipline. The fact that their impediment arises by operation of law rather than from an inability to achieve the minimum passing score is not a distinction which can support disparate application of the policy.

As Sergeant Baker noted, she missed re-qualification by four shots on one of three sections of the test for which she was cited for discipline and subject to termination, yet a corrections officer enjoined from possessing a weapon after commission of an act of domestic violence is possibly given an apparent special, indefinite assignment, without a service weapon. When the two circumstances are compared, the arbitrariness of such disparate treatment in the implementation

of the same policy, requiring performance of all requisitions to maintain employment as a corrections officer, is illuminated: both officers failed to re-qualify; the veteran officer, with an unblemished service record who struggles but falls short is terminated; yet the officer who commits one of the designated criminal offenses and found guilty of domestic violence, N.J.S.A. 2C:25 2C:25-19(a)(1) to (14), is given an alternate, special assignment and keeps working.

Again, we are not suggesting the policy to terminate an officer who is unable to meet the standards defined for performance of the position is arbitrary and capricious. We are saying the evidence in this case suggests application of that policy in the instances described appears to be. Because the record is not clear, a remand is necessary to clarify the application of the re-qualification policy for all JJC officers.

We briefly address Sergeant Baker's challenge to the imposed sanction. First, the Attorney General's Standards do not mandate termination of an officer who has failed to re-qualify. Second, we understand the concept of progressive discipline is a "flexible" one intended "to promote proportionality and uniformity in the rendering of discipline of public employees." In re Stallworth, 208 N.J. 182, 195 (2011).

Progressive discipline is unnecessary when the conduct "renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." In Re Herrmann, supra, 192 N.J. at 33. Further, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." In re Carter, 191 N.J. 474, 484 (2007). The JJC needs competent and qualified officers who meet the re-qualification policy and the agency cannot afford to allow officers to backslide on the requirements of employment. Although we may find it difficult to accept that a longstanding officer who did not commit misconduct, but rather for the first time in twenty-two years failed to re-qualify with her weapon, should not have been considered for lesser sanction, such as a period of suspension without pay, rather than termination, we nevertheless recognize courts should not attempt to substitute their views of whether a particular penalty is correct for the body charged with making that decision. Ibid.

In summary, because the JJC appears to have created categories of officers who may work despite the inability to carry a firearm, that treatment must be afforded to all suffering a similar impediment. The policies must be revised to achieve uniform treatment for all officers who fail to re-

qualify. Upon remand, further evidence of the treatment of all JJC officers who failed to re-qualify must be analyzed. If the disparate treatment as discussed in our opinion is verified, Sergeant Baker must be given the same opportunities as others who have also not re-qualified, because they too are legally barred from carrying a firearm.

If disparate treatment in the application of 11H-3.2 has occurred as discussed, the CSC's determination of discipline must be vacated. Thereafter, Sergeant Baker's circumstances must be assessed in light of the past practice of allowing other enforcement officers who failed to complete semi-annual weapons re-qualification, to continue employment.

Affirmed in part, reversed in part and remanded for additional proceedings.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office

  
CLERK OF THE APPELLATE DIVISION



Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In the initial decision, the ALJ indicated that the appellant had been working for the New Jersey Training School for Boys for approximately 17 years when she failed to requalify in the use of firearms.<sup>2</sup> The ALJ found that, as set forth in the job specification for Correction Sergeant, Juvenile Justice, "[a]ppointees shall have qualified in the usage of firearms and [have] the ability to requalify on a semiannual basis." Similarly, the Attorney General's Semi-Annual Qualification and Requalification Standards for New Jersey Law Enforcement (AG Standards) requires all law enforcement personnel to requalify in the use of firearms, including handguns and agency authorized shotguns. Furthermore, according to the JJC's policy on firearms requalification, law enforcement personnel must maintain active firearms qualification status. On October 26, 2011, the appellant failed to requalify with the JJC's service handgun and service-issued shotgun. The appellant was given a second opportunity to requalify on November 3, 2011. However, she again failed to achieve an acceptable score for qualification. Consequently, the appellant attended a two-day firearms remedial program on December 12, 2011 and December 13, 2011. The appellant received failing scores during the simulated and practice courses and was also not successful in the actual attempts to qualify during the program. The appellant was then given additional opportunities to qualify on January 20, 2012 and January 24, 2012, but she could not meet the minimum requirement to pass. As a result, the appointing authority sought her removal from employment.

The ALJ also set forth the testimony of several witnesses, including the appointing authority's witnesses who specifically testified about the requalification requirement, the remedial program, what transpired in the program with respect to the appellant, and the deficiencies found in the appellant's performance. Moreover, the appellant presented witnesses, one of whom testified that despite restrictions in carrying a weapon and appearing on a "Do Not Carry List," several officers have remained employed with the JJC. Further, the witness reported that not all JJC officers need to carry a weapon in order to perform the essential functions of the job. In addition, testimony was presented regarding issues with the firearms instructor. Another witness for the appellant testified as to the inadequacy of the remedial program and the lack of accommodation given to officers of different sizes, gender, and physical stature. The witness opined that the appellant should have been given a smaller weapon for her requalification. Furthermore, the ALJ set forth the testimony of the appellant. The appellant maintained that she did not have a "chance to get acclimated to the new weapon." Additionally, she asserted that a

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<sup>2</sup> The appellant began her employment with the JJC on February 20, 1990 as a Teaching Assistant, 12 Months. She was then appointed as a Correction Officer Recruit, effective November 25, 1995, and eventually promoted to Correction Sergeant, Juvenile Justice, on November 29, 2003.



medical condition contributed to her poor performance on October 26, 2011 and November 3, 2011. The appellant also testified that she had limited interaction with the trainers during the remedial program, noting that she was not assisted in perfecting her stance or sight picture.

Based on the foregoing, the ALJ found that JJC custody staff are required to qualify with the JJC duty weapon semi-annually, regardless of their post assignment, unless excused. JJC custody staff, however, do not carry a firearm within the perimeter of the facility. Nonetheless, the ALJ determined that this fact did not invalidate the requirement that JJC custody staff must have the ability to qualify with the JJC duty weapon. Requalification with the JJC's duty weapon was essential for the appellant to fully perform her duties as a Correction Sergeant, Juvenile Justice. Moreover, the ALJ indicated that JJC custody staff who are prohibited from carrying firearms due to domestic violence matters, for instance, remain employed on restricted status and appear on the "Do Not Carry List." Once the restricted status is lifted, they must requalify in the use of firearms. The ALJ noted that the AG Standards dictate the temporary restricted status of JJC staff. Moreover, the ALJ found that the appellant did not maintain a regular practice schedule at the JJC shooting range. She practiced only a few times with the new service weapon prior to January 2012. Additionally, the ALJ found that the appellant did not request a medical exemption from participation in the Fall 2011 firearms requalification session nor was fatigue a factor in the appellant's performance. Further, the ALJ indicated that, notwithstanding the appellant's challenges to the sufficiency of the remediation program, the appellant's expert witness agreed that the basic fundamentals of shooting were covered during the training and instructors worked with the participants to improve their skill. Additionally, although the JJC changed its firearm in 2008, the old and new weapons were of the same caliber, i.e. both were .40-caliber semi-automatic weapons.

Therefore, the ALJ concluded that the appointing authority proved by the preponderance of the evidence that the appellant lacked the ability to fully perform her duties and violated the JJC policy regarding firearms requalification. Accordingly, the ALJ recommended sustaining the charges against the appellant. As for the penalty, the ALJ stated that it is undisputed that the appellant does not have a disciplinary history in her long tenure as a law enforcement officer. However, requalification in the use of firearms is a condition of employment and an essential function of the position. The ALJ noted that the appellant's status was distinguishable from that of other JJC officers who were temporarily restricted from carrying a firearm, as these individuals did not fail to qualify. Thus, the ALJ recommended sustaining the appellant's removal.

In her exceptions, the appellant argues that the ALJ erred in finding that she was unable to perform the essential functions of her employment. She maintains

that the evidence revealed that many JJC law enforcement officers are prohibited from possessing and/or carrying firearms. However, these individuals remain employed, which demonstrates that "the JJC [has] expressly acknowledged that these individuals are able to perform the essential functions of their employment." The appellant underscores that, as of July 24, 2012, the "Do Not Carry List" for the New Jersey Training School for Boys contained 13 names in addition to hers. She notes that there is a more expansive list which covers all of the JJC. Further, the appellant emphasizes that several of the officers on the list have been prohibited from possessing and/or carrying firearms for over five years and the list includes officers who have had Final Restraining Orders issued against them. Moreover, the appellant submits that certain officers are not required to carry a firearm. For instance, one witness testified that as a Correction Sergeant, Juvenile Justice, he has not needed to carry a weapon for eight years. Thus, the appellant maintains that the appointing authority's argument that she cannot perform the essential functions of her employment is flawed.

Moreover, the appellant argues that the Office of the Attorney General does not determine whether the officers who are on restricted status should be removed. Rather, it is the JJC as the employing agency which makes that determination. The appellant contends that the Office of the Attorney General merely advises agencies regarding persons subject to restrictions. The foregoing is evident by the JJC's actions in allowing certain officers on the "Do Not Carry List" to remain employed. In other words, the appellant maintains that there is no uniformity in the JJC's application of its own policy for requalification in the use of firearms. Furthermore, the appellant asserts that, consistent with the "literal and/or strict examination" of the job specification for Correction Sergeant, Juvenile Justice, she has the "ability to requalify on a semi-annual basis." In contrast, the other officers on the "Do Not Carry List" do not have the ability to qualify as they are restricted from possessing or carrying a firearm by law. Thus, in order for it to be fair for her, the appellant asserts that she can remain on the list and be assigned to positions which do not use or handle a firearm until she can requalify with her weapon.

Lastly, the appellant argues that, even if the charges against her are upheld, the penalty of removal "is unduly harsh, excessive, and flies in the face of progressive discipline." The appellant stresses that she has been a model State employee for approximately 22 years and has never been disciplined. She contends that she will eventually requalify in the use of her weapon with "additional and proper remedial training." The appellant relies on a recent court case where the Superior Court of New Jersey, Appellate Division, remanded a matter to the Commission for reconsideration of the penalty of removal of a 17-year employee with the Department of Corrections. See *In the Matter of Vanessa Warren, Department of Corrections*, Docket No. A5092-09 (App. Div. August 3, 2012). In that case, the court determined that the penalty was disproportionate to Warren's

offense, as her actions did not create a serious breach of security.<sup>3</sup> In her case, the appellant submits that it would be patently unfair to remove her since she has an unblemished disciplinary history in her 22 years of State employment and the charges against her did not involve misconduct, criminal action, or breach of security or protocol. She argues that to remove her from employment only three years prior to her eligibility to retire would irreparably harm her. Therefore, the appellant requests that she be reinstated to employment with an award of back pay and counsel fees.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the charges. It is undisputed that the appellant was given multiple opportunities to requalify in the use of the JJC issued firearms. Although the appellant alleges that the remedial program and instructor were somehow deficient, the evidence reveals otherwise. The appellant's own witness agreed that the basic fundamentals of shooting were covered in the program and the instructors worked with the participants. Notwithstanding the appellant's claims, the appellant was given proper remedial training, but unfortunately could not requalify. Further, the assertion regarding the lack of accommodations regarding the newly issued weapon is not persuasive. Rather, the appellant could have availed herself of a regular practice schedule at the JJC shooting range. Further, the record evidences that the old and new weapons were of the same caliber, which the Commission notes that the appellant obviously qualified with prior to the Fall 2011 requalification session. Additionally, it is clear that the appellant violated the JJC's policy on firearms requalification in not meeting the minimum score for qualification. Moreover, the ability to carry a firearm is required for a Correction Sergeant, Juvenile Justice, who is a law enforcement officer. In that regard, the job specification for the title states:

Appointees must have successfully completed the NJ Police Training Commission and agency training course standards for custody, supervision, investigation, and related law enforcement requirements. Appointees shall have qualified in the usage of firearms and the ability to requalify on a semiannual basis.

The fact that the JJC has permitted other employees who cannot carry a weapon to be placed on the "Do Not Carry List" and remain employed does not demonstrate that the ability to carry a weapon is not required for the appellant to perform the full duties of her position. Moreover, the appellant argues that she has the ability

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<sup>3</sup> The Appellate Division also found that Warren's previous discipline should not be considered because the Preliminary Notice of Disciplinary Action had not been served prior to the second incident in question, *i.e.*, she did not have a realistic opportunity to be educated by her mistakes and the ramifications of the earlier incident in order to correct her behavior.

to requalify since she is not prohibited by law from carrying a firearm. However, the appellant's argument is not persuasive since she in fact attempted to qualify and failed to meet the minimum score requirement for requalification. Accordingly, the Commission finds that the charges against the appellant have been upheld.

With regard to the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See *Carter v. Bordentown*, 191 N.J. 474 (2007).

In the instant matter, it is undisputed that the appellant has an unblemished employment record of 22 years, with 17 years as a law enforcement officer. Notwithstanding this record, the Commission finds that the only appropriate course of action is to remove the appellant from employment. The Commission acknowledges the appellant's arguments that her act is not one of misconduct, criminal action, or breach of security or protocol. If it were the latter as in *Warren*, *supra*, the appellant's penalty could have arguably been less than removal. However, the appellant's case is distinguishable since her offense involves a requirement of her position that she cannot meet. It cannot be overstated that the appellant failed to qualify in the use of firearms, which is undeniably a serious defect for a law enforcement officer.

Moreover, the appellant argues inequity in the application of the "Do Not Carry List." However, the fact that the JJC may have accommodated other officers for a period of time does not establish that the appellant as a Correction Sergeant, Juvenile Justice, should be excused from requalifying with her firearm and remain employed. Indeed, as set forth above, requalification is a requirement of the position. See *e.g.*, *In the Matter of Harold Hawkins* (MSB, decided March 14, 2007) (In denying the appellant reconsideration of its decision to remove him from his position as a Senior Correction Officer, Juvenile Justice, it was found that the fact that the appointing authority accommodated the appellant's inability to carry a firearm due to the existence of a restraining order for a period of time and permitted him to work modified duties does not demonstrate that the ability to carry a weapon is not required for the appellant to perform the *full* duties of his position). Nonetheless, the Commission is troubled with the JJC's application of its "Do Not Carry List." In that regard, a review of the JJC's Disciplinary Policy reveals that

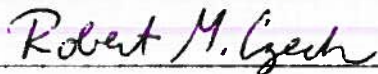
for the infraction of "Failure to qualify with required firearms after remediation," which is the appellant's offense, the penalty for the first infraction is removal. The infraction of "Officially prohibited from possessing or using a firearm" also carries removal from employment for the first infraction. Moreover, the ALJ noted that the AG Standards dictate the temporary restricted status of JJC staff. However, while the AG Standards prohibit law enforcement officers with domestic violence orders against them from carrying weapons, this policy does not specifically direct employers to continue or discontinue the officers' employment in such a situation. Therefore, it is strongly suggested that the JJC revisit its policy regarding its "Do Not Carry List." While it is not unreasonable to allow officers with temporary restrictions to be accommodated, it is troublesome to permit continued employment of officers who are unable to carry a weapon for extended periods of time. It is even more disturbing where officers have permanent orders against their possession or use of a firearm and remain employed for years. It is underscored that the ability to carry a weapon is required for a law enforcement officer to perform the full duties of his or her position. Accordingly, the JJC is well advised to revisit its policy in this regard. It is emphasized that such review by the JJC does not impact the appellant's case or provide her with the remedy of reinstatement. The Commission finds that, as set forth above, the record amply supports the appellant's removal.

### ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Annie Baker.

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  
THE 5<sup>TH</sup> DAY OF JUNE, 2013



Robert M. Czech  
Chairperson  
Civil Service Commission

**Inquiries  
and  
Correspondence**

**Henry Maurer  
Director  
Division of Appeals  
and Regulatory Affairs  
Civil Service Commission  
P.O. Box 312  
Trenton, New Jersey 08625-0312**

**Attachment**



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSR 7347-12

2012-3265

**IN THE MATTER OF ANNIE BAKER,  
JUVENILE JUSTICE COMMISSION.**

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**Frank M. Crivelli, Esq.,** for appellant Annie Baker (Pellettieri, Rabstein & Altman, attorneys)

**Michael Cleary,** Director of Training, for respondent Juvenile Justice Commission pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 3, 2013

Decided: May 3, 2013

**BEFORE ROBERT BINGHAM II, ALJ:**

**STATEMENT OF THE CASE**

Appellant Annie Baker, a correction sergeant at the New Jersey Training School for Boys, appeals a removal from employment by respondent, the Juvenile Justice Commission (JJC), on charges of inability to perform duties and other sufficient cause, specifically, violation of JJC policy regarding firearms requalification, based upon a failure to successfully requalify with the JJC duty weapon.

## PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action (PNDA) dated February 10, 2012 (R-1), the JJC charged Baker with inability to perform duties, and other sufficient cause. Following a departmental hearing on March 30, 2012, the JJC issued a Final Notice of Disciplinary Action dated May 7, 2012 (R-3), removing her from employment based upon those charges, effective April 24, 2012. Baker requested a hearing, and the matter was simultaneously filed with the Civil Service Commission and the Office of Administrative Law (OAL) on May 11, 2012, for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to-15. A notice of appearance for representation of respondent was filed on July 30, 2012.

By prehearing telephone conference on July 25, 2012, and subsequent written notice, the matter was scheduled for hearing on August 9, September 11, and September 25, 2012. The hearing commenced on August 9; however, the second scheduled hearing date, September 11, 2012, was adjourned at respondent's request, with appellant's consent, for medical reasons, and the matter resumed on September 25, 2012. Due to Hurricane Sandy, a third scheduled hearing date, October 30, 2012, was rescheduled, and the hearing resumed on November 14, 2012. An additional date to complete testimony became necessary, and testimony concluded on December 11, 2012.

At the parties' request, the record remained open for the receipt of transcripts and submission of closing briefs. On or about January 11, 2013, the parties received transcripts. On February 25, 2013, I granted a request for a final fourteen-day extension, from February 28, for the submission of closing briefs, which were received by fax on March 14, 2013. On March 18, 2013, appellant's hard copy was filed, and the record was closed. On April 23, 2013, following a telephone conference on that date, the record was reopened for submission of appellant's disciplinary history. On April 24, 2013, by joint submission (J-1b), appellant's disciplinary history (J-1a) was filed and the record was deemed closed. On May 3, 2013, the hard copy of the parties' joint submission (J-1b) was filed with appellant's disciplinary history (J-1a) and the record finally closed.



## **FACTUAL DISCUSSION**

Many of the material facts are undisputed. Accordingly, I **FIND AS FACT** the following:

Annie Baker, a twenty-two-year State employee,<sup>1</sup> has been a correction officer for approximately seventeen years at the New Jersey Training School for Boys (NJTS or Jamesburg). Her position came under the purview of the JJC upon its creation in 1997 and she ultimately attained the rank of sergeant. The New Jersey Civil Service job specification for JJC Correction Sergeant affords that position "all powers and rights of . . . a law enforcement officer for the detection, apprehension, arrest, custody, and prosecution of offenders against the law," and requires that "[a]ppointees shall have qualified in the usage of firearms and the ability to requalify on a semiannual basis." (R-4.) The job specification for JJC Correction Sergeant further indicates that responsibilities of the position include the security of the facility and persons. The New Jersey Attorney General's Semi-Annual Qualification and Requalification Standards for New Jersey Law Enforcement (the AG's Standard) (R-6) requires that all law enforcement personnel requalify with their firearms at least twice a year (R-6 at 9-7),<sup>2</sup> including semi-annual qualification with handguns and semi-annual qualification with the agency-authorized shotgun utilizing standardized courses of fire under daylight and night-firing conditions. (R-6 at 9-9). And the JJC, as a State law enforcement agency, has the responsibility to schedule and conduct individual semi-annual firearms qualification programs pursuant to the AG's Standard.

Pursuant to the JJC policy on firearms requalification, Policy 11H-3.2, it is a job requirement for JJC law enforcement personnel to achieve and maintain an active firearms qualification status. According to the policy, an officer who does not so qualify as required, under the direction of the JJC Training Academy, cannot fully meet the job

<sup>1</sup> Initially, Sergeant Baker served in a civilian position with the New Jersey Department of Corrections, specifically, as a teacher. She remained in this position for approximately five years. Thereafter, she became a law enforcement officer for the Department of Corrections, serving at the New Jersey Training School for Boys located in Jamesburg.

<sup>2</sup> Specifically, firearms requalification courses must be passed in the spring and fall of each year.

requirements of a JJC law enforcement officer. (R-7.)

The JJC's firearms requalification program consists of daytime handgun qualification (HQC), night handgun qualification (NHQC), shotgun qualification (SQC), and night shotgun qualification (NSQC) (R-12). On October 26, 2011, Baker made an initial attempt to requalify with the JJC's service handgun, a .40-caliber Smith & Wesson (S&W) Military & Police (M&P) (M&P.40), and a service-issued shotgun. She failed to qualify with the handgun day-fire only, scoring 33 and 38 on two qualifying attempts, respectively.<sup>3</sup> A minimum of 48 qualifying shots out of 60 is required for a passing score. On November 3, 2011, Baker failed at two more attempts that were provided under JJC policy, scoring 36 and 39, respectively.

Pursuant to JJC policy, she thus attended a two-day firearms remedial program at the JJC Sea Girt Training Academy on December 12, and 13, 2011. The first day of the program was conducted in the Academy's firearms-simulator building and consisted of: (1) classroom lecture; (2) practical exercises in the classroom; and (3) firing with a firearms training simulator, the Meggitt Firearms Training System (FATS) machine. The second day of the remediation program was conducted on the Academy's range and consisted of: (1) live-fire shooting fundamental drills; (2) three practice qualification courses; and (3) two attempts to qualify. Baker received failing scores for both the simulated and practice qualification courses, and then she failed at both actual attempts to qualify.<sup>4</sup>

Subsequently, JJC administration met with union officials who had complained about JJC's firearms instructors and its requalification program. Thereafter, on January 20, 2012, Baker participated in a firearms practice session and was given one final opportunity to qualify with the handgun. The practice session consisted of sixty rounds used for shooting fundamentals and sixty rounds for practice of the HQC. Baker scored a 33 on the practice HQC.

<sup>3</sup> As per the JJC Firearms Requalification Policy, she was afforded a second chance to requalify that same day.

<sup>4</sup> Baker fired a 38, 35, and 29, respectively, on the practice qualification courses, and scored a 34 and 37 out of 60 on her attempts to qualify.

On January 24, 2012, Baker had two final attempts to pass the requalification course. At that time, the course of fire was called by detective Andrew Schrader of the Division of Criminal Justice (DCJ). The targets were scored by Schrader and deputy chief Alan Buecker of the DCJ. Schrader first provided an orientation and a nineteen-round warm-up course of fire to acclimate participants with his method of "calling the line." Baker scored 16 of 19 hits, or 84 percent.<sup>5</sup> However, she subsequently failed both attempts at requalification, scoring a 42 and 44 out of 60.

As a consequence of Baker's failure to requalify, JJC served her with the PNDA seeking her removal from employment based on charges of inability to perform duties and other sufficient cause, specifically, violation of JJC policy regarding firearms requalification.

Baker contends that carrying a firearm is not an essential function of her employment as a JJC correction sergeant and that she can perform the essential functions of her employment without weapons requalification. She also contends that the administration of the qualification test was deficient, and the length of the remedial program and its method of instruction were inadequate. She further argues that, even if the charges were appropriate, her removal constitutes an excessive penalty.

### TESTIMONY

#### Witnesses for Respondent

##### *John Moore*

John Moore is a senior correction officer (SCO) employed by the JJC and is a certified firearms instructor and range master.<sup>6</sup> As a JJC range master, Moore was

<sup>5</sup>This course of fire included shooting from the 5-, 7-, 10-, 15-, and 25-yard lines.

<sup>6</sup> Moore has been employed by the JJC since 1997 and was assigned to the JJC Training Academy in 2001. He has been certified by the New Jersey Police Training Commission (PTC) as a firearms

responsible for conducting firearms activities during the requalification cycle, determining the method of remedial instruction for participants who failed to requalify, and supervising the remedial training and subsequent qualification attempts. In that role, he conducted the subject two-day remedial class, for which he rendered a report dated January 3, 2012. (R-19.)

Moore testified that the class started with a review of the participants' deficiencies, including a PowerPoint presentation utilizing the participants' prior targets, with "explanations of target analysis [on] the same page so we can identify with the shooter based upon the firearms instructor manual exactly what their deficiencies were and how we could correct them."<sup>7</sup> For Baker, a report by SCO Timothy Madas, who had analyzed her shooting deficiencies at the November 3 qualification attempt, was also reviewed.<sup>8</sup> An explanation of the instructor's target evaluation was also given. In his interaction with Baker, Moore determined that she needed a smaller grip,<sup>9</sup> which she subsequently used.

The class also incorporated a refresher on the fundamentals of shooting principles, including stance, grip, sight alignment, trigger control, follow through, scan and breathing control. Two primary objectives were improving consistency and motion control. According to Moore's report, trigger control, follow through, scan and breathing control were also demonstrated to ensure comprehension, and drills were repeated to ensure an understanding of all aspects of the basic shooting principles. (R-19.) Participants were checked to ensure use of proper sight technique and emphasis was placed on the participants finding the stance that was most comfortable for them during qualification.

Moore emphasized the importance of consistently controlling the movement of

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instructor since 2000 (R-9; R-10; R-11), and as a range master since 2005. He testified that he has performed between 900 and 1,000 days of in-service firearms training

<sup>7</sup> Baker's targets were from her two failures on October 26, 2011, and November 3, 2011. (R-20.)

<sup>8</sup> Madas's report cited eye sprinting, jerking the trigger, anticipating her shots and not focusing on her sights, and rushing as Sergeant Baker's shooting deficiencies.

<sup>9</sup> The S&W M&P .40 comes with three interchangeable grips

the gun barrel, as well as incorporating all of the shooting principles in order to control the weapon, all of which requires practice, which, in turn, improves skill. Mind-set is also important, to prepare for the possibility of an actual "street" confrontation. Moore testified, "we have to be able to assure that the shooter's going to be proficient with [a] handgun if they're involved in some type of situation, preferably to be able to protect themselves and whoever else they may be with." At the end of that phase of the remedial course, participants acknowledged that they understood the fundamental shooting principles that had been presented to them.

The second day of the remedial course began with another review of the basic shooting principles, followed by a practice HQC, during which targets were scored and analyzed, and the instructors discussed with the students deficiencies that they observed. Baker's primary deficiency was loss of her sight picture due to continual eye sprinting, resulting in a number of missed shots from the 10- and 15-yard lines and a score of 63.3 percent. Deficiencies, suggested improvements, and shooting principles were reviewed during a break and, afterward, various live-fire drills were conducted. According to Moore, the instructors gave positive feedback and corrections as participants were shooting, but the participants did not correct the deficiencies.

After another break, when deficiencies and shooting principles were discussed again, there were drills using blank rounds. Baker continued to have problems with shooting technique, including eye sprinting, and her deficiencies were discussed with her again. Another rest break was followed by more shooting drills. There was an untimed practice HQC on which Baker scored 58.3 percent, attributed to eye sprinting, poor sight picture and rushing the trigger. Following a break, a final timed practice HQC was conducted, with input provided between each phase of fire. Baker scored 48.3 percent on this practice HQC. Moore reported that "the shooters continued to recognize their deficiencies yet made no effort to make corrections unless an instructor was standing in their ear talking them through each round." (R-19 at 4.)

After lunch, Moore conducted the actual qualification phase and called the drill. Moore and Madas first inspected and test-fired each of the weapons and found all firearms to be intact, operating properly, and firing accurately. Moore testified that

Baker's score on the first HQC was 34, or 56.7 percent. (R-19; R-25.) Afterward, during a break, the instructors performed another performance evaluation. On the second and final HQC Baker's score was 37, or 61.7 percent. (R-19; R-25.) The passing score was 48, or 80 percent. Moore further testified that Baker did not practice at the range during the fall requalification cycle.

According to Moore, 354 officers succeeded and 6 failed to requalify in the fall 2011 cycle. (R-26.) Of those 6 officers, 2 were exempted for medical reasons. Moore knew of two prior failures after remediation, in 2007 or 2008, and to his knowledge each officer was removed from his or her position.

Moore further testified that JJC custody staff carry weapons on duty for transportation purposes, perimeter security and gatehouse security. According to Moore, the gatehouse officer is supposed to be armed to protect the facility from anyone coming through the facility doors. Also, officers must be able to handle the weapon proficiently and accurately when in public for their own safety, and the safety of the public. Additionally, an employee who is temporarily prohibited from carrying a handgun, for reasons relative to either administrative leave<sup>10</sup> or in connection with the Attorney General's restrictions for domestic-violence matters, must return to the range and qualify once his or her status has changed. And in domestic-violence cases, the determination and process restricting firearms possession is controlled by the Attorney General's Office, not the JJC. The JJC follows the direction of the Attorney General's Office.

On cross-examination, Moore agreed that the JJC has employees who are subject to firearms restrictions, some legally mandated because of domestic-violence issues, yet they remain employed. However, as to why they remain employed, he said, "they didn't fail to qualify with firearms." (Tr. 3, November 14, 2012, at 8–10.) Moore explained that persons who are temporarily restricted have qualified, which is different from those who have failed to meet firearms-qualification requirements. Moore

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<sup>10</sup> Officers on sick leave injury, workers' compensation, medical disability and other types of leave listed in R-26 are not physically at work during the duration of their approved leave and are granted exemptions from qualifying until they return from their leave.

conceded that employees with firearms restrictions can carry out their functions within the facility "inside the fenced areas," regardless of whether they have qualified to carry a firearm. (Id. at 55–56.)

Although five days had originally been proposed for remediation, the director of operations ultimately determined that it would be a two-day program, a condensed version of the recruit training program. At one point Moore himself had proposed to lengthen the remedial program to three days because he believed it would be more advantageous for purposes of improving participants' shooting skills for requalification. Moore also conceded that the JJC's remediation program is really only a day and a half, not two days as stated, and the second day of the remediation contains an actual requalification course and is thus limited in instruction.

Moore acknowledged that Sergeant Baker was still exhibiting numerous deficiencies on the second day of the remediation program, before she was required to requalify that afternoon, but "she was also acknowledging that she understood what her deficiencies were and not correcting them on her own also. I'm not allowed to hold a gun and pull the trigger for them . . . there is some responsibility on them to acknowledge and correct their own deficiencies." (Id. at 37–38.) Yet, he admittedly worked within the time allotted rather than requesting additional remedial time to help correct those deficiencies in an effort to assist Baker in qualifying. Moore testified that the JJC does not have a remedial-program policy similar to that of the DCJ, where instructors work with the shooter without a set time period, nor has it ever considered adopting such a policy.

Moore also testified that he had been temporarily reassigned from the JJC Training Academy to Jamesburg in 2012 for "operational effectiveness," (Id. at 49), but has since returned to the Academy. When given the transfer he did not discuss the matter further, and merely went where assigned.

In testimony on redirect, Moore explained further that the Attorney General's Office controls restrictions imposed in domestic-violence matters. The JJC thus does not control the status of those matters and does not, by its own policy, disallow those

persons from qualifying. The status of those individuals is a temporary condition, and when the matter is rectified, those individuals must return to the range to qualify. He personally has witnessed such persons being subsequently reinstated and allowed to qualify.

Moore further described the remedial class as a condensed version of the forty-hour (five-day) basic training class that officers had received when they first attended the Training Academy. (R-7 at 3.) Moore affirmed that the purpose of remedial instruction "is to remind individuals in that course of [the basic training in firearms shooting principles and techniques] to assist them to focus and correct any deficiencies they're exhibiting." (Tr. 3 at 58–59.) According to Moore, the problem in the fall of 2011 was not the length or content of the remedial program, but rather the fact that the participants were unable to properly execute the basic shooting skills independently, and to achieve a passing score, without instructors "in their ear talking." (Tr. 3 at 63.)

In Moore's experience as JJC range master, from 2007 until 2011 only 6 JJC officers failed to qualify successfully. Four of them, including Baker, were from the fall 2011 qualification cycle, the highest number of failures in any one JJC qualification cycle. Approximately 400 JJC law enforcement officers attended the fall 2011 qualification cycle. So, with 4 out of 400 officers failing that cycle, the passing rate on requalifications was 99 percent.

On re-cross examination, Moore conceded that the remedial program is supposed to be an intensive retraining effort, in accordance with JJC Policy 11H-3.2. (Tr. 3 at 70.)

#### *Timothy Madas*

Timothy Madas is a senior correction officer who has been employed at the JJC for twelve years, and for the past six years he has been assigned as training instructor at the Training Academy in Sea Girt. He has been a certified firearms instructor since



2006 and became a certified range master in 2012.<sup>11</sup> He is also certified to instruct with a firearms training simulator, the Meggitt Firearms Training System (FATS) machine. (R-16).<sup>12</sup> Using FATS, he conducted the second phase of the remedial course on December 12, 2011, for which he rendered a report dated December 16, 2011 (R-21). Madas testified that the simulated weapon used on FATS was a Glock 17 9mm (Glock 17). Though the JJC duty weapon was the S&W M&P.40, the simulated Glock 17 was used because Meggitt did not have a simulated S&W M&P.40 in production as yet. The Glock 17 and the S&W M&P.40 are similar in weight and trigger pull, and both are double-action semi-automatic firearms.

After qualifying as an expert witness in firearms instruction, Madas testified that, in his opinion, it does not matter what type of weapon is used on FATS to ensure identification of and correction of shooting deficiencies, because "shooting principles are shooting principles. It applies to all weapons." Thus, JJC officers who successfully requalify with the JJC duty weapon often requalify with their off-duty weapons, even if they are different from the JJC duty handgun, the M&P.40. In Madas's opinion, an officer who practices good shooting principles and has consistent techniques should be able to shoot successfully with a similar weapon.

At the beginning of the session, Madas explained FATS and had the participants shoot rounds. After each cycle of rounds, he analyzed the targets, identified errors and made suggestions, checking posture, stance, trigger control and grip. He also demonstrated the goal of precision shooting with minimal movement. According to his report, Madas's analysis indicated that all shooters showed excessive movement prior to pulling the trigger, a great amount of movement while pulling the trigger, and an exceptional amount of movement after firing the weapon. (R-21.)

Subsequently, participants fired numerous times from a range of distances that

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<sup>11</sup> Madas has instructed both the basic firearms training course and the JJC requalification course.

<sup>12</sup> The FATS machine is a computerized system that uses wireless technology and projects three distinctively colored beams onto a screen when a simulated weapon is fired. The instructor analyzes the laser beams to determine whether the shooter is properly sighting, keeping the weapon steady while acquiring the target, pulling the trigger, keeping the weapon on target while squeezing the trigger, and keeping the weapon on the target after it discharges.

simulated the phases of fire in the HQC, specifically, the 5-, 7-, 10-, 15- and 25-yard lines. After each segment, he reviewed mistakes and gave pointers. Baker demonstrated improper posture, eye sprinting, grip and "anticipation," or pushing weapon down before it actually shoots. Madas discussed Baker's deficiencies with her and she acknowledged that she understood what was causing her deficiencies and what actions she needed to take to correct those deficiencies. Participants next practiced in a simulated HQC, with normal time constraints for the different phases of fire. None of the participants completed the HQC within the required time limits, despite exhibiting minimal deficiencies. According to Madas's report, "All shooters showed great improvement throughout the day in identifying their deficiencies, correcting them and having built up one's self-confidence to obtain a qualifying score on the HQC." (R-21 at 3.) At the end of this FATS session, shooters acknowledged an understanding of the training and had no further questions. According to Madas, Moore's report accurately reflected Madas's observation of how the remedial program was conducted.

Regarding the sufficiency of the remediation program, Madas testified that there were two instructors to four shooters, as compared to one instructor for six shooters in the basic firearms-training course. The remedial program's ratio of one instructor to two shooters allowed Moore and Madas to concentrate more attention on each shooter than would be possible during a basic training course.

On cross-examination, he testified that he was periodically present during the classroom instruction. To remediate students, FATS is utilized to analyze deficiencies, but Madas is unaware of any particular curriculum. He acknowledged that he could have spoken to Moore about additional remediation time after students failed the simulated HQC, but he did not; the students were getting "real fatigued" and he did not want to keep pushing them. He described the objective of remediation as identifying a student's "discrepancies" and assisting the student at becoming requalified.

He also described the Glock 17 and the S&W M&P.40 as having the same sites and both being semi-automatic weapons. The M&P.40 is heavier and the Glock's trigger pull is lighter. The JJC is in the process of retrofitting FATS with the M&P.40 because it is now available. Madas said that it admittedly would be a better training

tool, despite the fact that FATS is "a great machine no matter what weapons are on it." On both days, Madas corrected Baker's stance, which had caused problems with recoil. He also corrected her grip, sight alignment, and sight picture, but she reverted to deficits with sight picture and alignment, as well as poor posture, during live fire on the next day.

*Joshua Dooner*

Joshua Dooner, a certified firearms instructor and a certified range master, has been employed at the JJC since 1998 and became a sergeant in 2007. In December 2004 he became supervisor of the Training Academy. On January 20, 2012, Dooner was the range safety officer for the practice session for those who failed the HQC's on December 13, 2011. At Baker's request, Lieutenant Graves, an adjunct firearms instructor assigned to Baker's command at Jamesburg, served as her instructor for this session. Practice drills were run and the instructors helped to identify and correct deficiencies. Participants were allowed to complete these rounds after the whistle was blown, if necessary. Baker scored 33 on this practice round, as indicated on her practice target. (R-33.) In Dooner's assessment, she apparently had problems with anticipation and ambushing the target, possibly due to a poor sight picture and improper trigger-finger placement. At the end of the practice session, the participants were instructed to report to the Sea Girt firing range on January 24 for the final requalification attempt.

Before the January 24 requalification session began, Dooner test-fired all weapons, including Baker's, and determined that they were sighted and operating properly. (R-38; R-42.) Dooner was the range safety officer, but the HQC's were conducted by staff from the DCJ, detective Andrew Schrader and deputy director Al Bueker, who was also a range master. According to Dooner, the union's allegations about JJC Training Academy instructors during the fall 2011 requalification cycle resulted in Schrader being assigned the supervising firearms instructor, "as a neutral party," responsible for calling the HQC firing line. Schrader explained to participants how he would give commands, conducted a practice session, and then conducted the first HQC. Then, the participants took a break and were able to review their targets and

scores, after which they returned for a second HQC. Overall, only one of the four participants passed. Baker scored 42 and 44 (R-40), which was an improvement, but not sufficient to meet the requisite 48 out of 60 shots to qualify.

On cross-examination, Dooner testified that prior to the fall 2011 cycle two other JJC officers failed to requalify and were removed from employment. He explained that the ultimate disposition somehow may have involved a "deal" to not have their discipline recorded as an official removal, but the agency had sought removal. He subsequently testified that they faced removal pursuant to the JJC's custody discipline policy and firearms-requalification policy. Currently, however, there are JJC staff who are prohibited from possessing a weapon because of domestic-violence charges and who remain employed by the JJC. Dooner agreed that "if an individual can't possess a firearm and cannot qualify with a firearm, they cannot perform one of the essential functions of the job." (Tr. 1, August 9, 2012, at 72.) In the case of individuals with domestic-violence charges, the Attorney General makes the decision regarding their ability "to do the job" without the ability to carry a gun.

Although the JJC policy on firearms requalification (R-7) indicates termination for failure to qualify, it also states that following failure at the final requalification phase, the range master sends a report to JJC management "for appropriate action up to and including termination." But, under the custody and discipline policy, the penalty for the first infraction is removal. (R-8 at 15.)

On redirect examination, Dooner said that although the firearms requalification policy indicates discipline "up to and including" termination, the custody discipline policy is used to bring discipline against JJC custody officers, and is unambiguous that the sole penalty is termination or removal. Dooner distinguished between the qualification status of staff that are ineligible, either for injury leave or domestic-violence matters, and those like Baker, who attempted but failed to qualify. And as to the two individuals who were previously removed for not qualifying, he believes that one was removed on other charges and the other was allowed to retire.

*Michael Ziabro*

Michael Ziabro is a certified firearms instructor employed by the JJC and assigned to the Juvenile Medium Security Facility in Bordentown. He is sometimes assigned as a temporary firearms instructor at the Training Academy. At Dooner's request, he prepared a weapons log cataloguing records of weapons used by Baker. (R-44.) According to Ziabro, the same weapon that Baker used on November 3 was successfully used by others who requalified. However, the individual who used it on the day after Baker failed also failed, and the firearm was not used after that time, for unknown reasons. To his knowledge, it was not defective when Baker used it to attempt to qualify, but he could not say definitely one way or the other.

*Andrew Schrader*

Andrew Schrader is a detective employed by the DCJ and is assigned as a staff instructor at the DCJ Training Academy in Sea Girt. He is a PTC-certified firearms instructor, a certified range master, and the firearms coordinator for the DCJ.<sup>13</sup> (R-35.) Schrader described how the remediation program is conducted at the DCJ.<sup>14</sup>

On January 24, 2012, he was the assigned supervising firearms instructor responsible for conducting the HQC's at the requalification session, and was assisted by Dooner and Alan Buecker, DCJ deputy chief. Schrader prepared a written report summarizing the January 24 requalification session. (R-36.) Schrader testified that he first conducted a warm-up practice round to put the shooters at ease and get them familiar with his range commands before the actual shooting of the HQC. According to

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<sup>13</sup> Schrader currently serves as the supervising firearms instructor for the DCJ's semiannual in-service firearms program.

<sup>14</sup> According to Schrader, DCJ officers are given two opportunities to qualify on the first day at the firing range. If they fail, they are given a remedial program and given one more opportunity to qualify. If unsuccessful, their weapon is taken and they are scheduled for another remedial program and another opportunity to qualify. The length and content are determined by the skills and needs of the shooter. But, in his experience, the remedial and the third attempt to qualify are conducted in one day. The same applies to the remedial and the fourth attempt to qualify, if necessary. If the DCJ officer fails again, his/her weapon is taken and, according to DCJ policy, it is up to the agency administrator to determine what will happen next with the officer. (Tr. 1 at 110-23.) And once the qualification session was given, that would essentially end the remedial program. (Tr. 1 at 125.)

Schrader's report, Baker was assigned a weapon with a small grip (R-42 at 2), but she failed her first attempt, with a shooting score of 42 (R-40; R-41). The shooters reviewed their targets, went on a break, and then took the second HQC, which was identical to the first. Only one of the four participants passed. Baker scored 44 on the second HQC (R-40).

On cross-examination, Schrader testified that the DCJ's remedial program is tailored to the needs of the shooter, such that he or she would be provided two days of instruction, if required. He agreed that the rate at which an individual learns is related in part to the quality and level of instruction. It is also related to whether the individual has physical or mental limitations, "because they have to have the ability to learn and process and be able to perform those things that are taught to them." Good practice is also a factor in an individual's improvement in shooting ability.

Witnesses for Appellant

*Andrei Martin*

Andrei Martin has been a correction officer for twenty-two years, six years at Rahway under the DOC and fifteen years at Jamesburg under the JJC, and he is currently a JJC correction sergeant who supervises officers and residents. He is also the institutional vice president of the sergeants union at Jamesburg, and is familiar with the JJC's practices regarding firearms requalification. Martin testified that despite weapons restrictions against the officers whose names appear on "Do Not Carry" lists (A-1), most remain employed with the JJC as custody officers, including some who had been unable to carry a weapon for over a year. Like Baker, who failed to qualify, those individuals are not issued a weapons card, which is a "prohibited factor" for working within the institution. Unlike Baker, they are in a category affiliated with a propensity for violence. According to Martin, one does not have to carry a weapon to perform the essential functions of the job. Officers who go on transportation detail, such as escorting an inmate to court or to a funeral, carry a weapon. And he has never carried a weapon in the eight years that he has been a sergeant.

As a union representative, Martin became aware of complaints about an "uncomfortable atmosphere" that was "not conducive to learning" at the firearms range.<sup>15</sup> And a major complaint involved Moore, in particular. Martin had personally observed Moore "talking down" to other officers. According to Martin, Moore was transferred, in part as a result the complaints.<sup>16</sup> After Moore was removed in July or August 2012, there was a "100 percent passing rate," which Martin attributed to a more relaxed atmosphere and actual "hands-on" instruction. (Tr. 3 at 97.)

On cross-examination, Martin admitted that he was not present when the decision to transfer Moore was made. Further, the AG's Standard admittedly states that phases of fire began at the 25-yard line.

#### *John Zamrok*

John Zamrok, former range master for the DCJ, has an extensive background in firearms training and was qualified as a firearms expert on behalf of appellant. Based upon a review of the records and testimony in this matter, he prepared a report regarding Baker's failure to qualify with the JJC duty weapon (A-6), as well as a supplemental report (A-7). He testified with regard to perceived deficiencies in the JJC's administration of the weapons-qualification test and the remedial program; the JJC's failure to make adequate accommodations for officers of different size, gender, and physical stature; and other factors that, in his opinion, contributed to Baker's failure to qualify.

Specifically, the remedial program was inadequate because appropriate drills were ignored and there was a lack of training focusing on basic shooting fundamentals. In his opinion, training tools like FATS were ineffective, given the use of a Glock 17 that had different characteristics than the weapon used for qualification.<sup>17</sup> Also, various

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<sup>15</sup> According to Martin, meetings were held with the administration in and after April 2012 relative to complaints for more practice time, hands-on training, improved scoring and the opportunity to practice beginning at the 1-yard line instead of the 25-yard line.

<sup>16</sup> Martin described two particular incidents of allegedly rude and disrespectful behavior.

<sup>17</sup> The Glock provided lesser recoil, a different felt grip, different sight configuration, and different trigger pressure and movement than the weapon utilized during qualification.

instruction techniques were available, depending upon the particular shooting deficiency, that were not utilized. Further, accommodations should have been provided to allow Baker to qualify with a smaller weapon. Zamrok opined that different types of firearms must be provided to individuals such as Baker with smaller statures in order to maximize their potential for qualifying, and he gave the example of a female officer employed by the DCJ who eventually was able to qualify after being provided with a smaller weapon. Other factors in Baker's unsuccessful qualification attempts included: (1) the JJC's failure to understand the varying capabilities of differently skilled shooters; (2) the JJC's transition to a different weapon, which immediately resulted in lower scores for Baker; (3) a lack of instructional oversight and in-service remediation; (4) the fatigue that resulted from practicing and qualifying in the same day; and (5) a firearms staff obsessed with a course of fire rather than basic shooting fundamentals. Thus, Zamrok opined that Baker would have rectified her mistakes and requalified, if she had been given the right tool and instruction by JJC. (A-6; A-7.)

On cross-examination, Zamrok acknowledged that his conclusion regarding Baker's inability to requalify with the JJC's M&P.40 was premised in part upon the understanding that JJC's "prior service weapon was a 9mm S&W semi-automatic handgun." In pertinent part, his report states:

This termination was based on her inability to requalify with the agency's service handgun, a .40 caliber Smith & Wesson (S&W) Military & Police (M&P) utilizing 180 grain .40 caliber S&W ammunition. This handgun was selected as the JJC sidearm circa 2008. Prior to the selection of this handgun, the JJC service weapon was a 9mm S&W semi-automatic handgun." . . . After a review of this case, it is my opinion that Sgt. Baker failed to requalify with the JJC's service handgun because of the weapon's size and especially because of its caliber. The Juvenile Justice Commission firearms staff conducted testing to replace the prior 9 mm Smith & Wesson handgun with a .40 caliber handgun and required all existing officers as well as new incoming officers to qualify on the .40 caliber handgun.

[A-6 at 1-2.]



When presented with the proposition that the JJC's service weapon prior to fall 2008 actually was a .40-caliber semi-automatic Smith and Wesson 4046 handgun, Zamrok admitted uncertainty that it had been a 9mm S&W semi-automatic handgun as indicated in his report.

With that, he testified that the chamber pressure in both the S&W 4046 and the S&W M&P.40 would be the same since the same .40-caliber ammunition was used in both weapons. An exception would be that there would be more felt recoil with the M&P.40 with a polymer frame, rather than the steel frame on the older S&W 4046, as well as lighter trigger pull.<sup>18</sup> Further, although he had cited fatigue as another factor contributing to Baker's failure to qualify, Zamrok ultimately agreed, applying his own standard on fatigue,<sup>19</sup> that it was not a factor contributing to her failure to pass six HQC's on three separate days.

As to inadequate instruction and remediation, Zamrok acknowledged that the basic fundamentals of shooting were covered during the remedial training. Zamrok also acknowledged that repetition and muscle memory were important for a shooter to be able to shoot consistently. He agreed that the instructors moved the participants through the course and were working with them to attempt to improve skill, although he would have employed a different methodology using less distance, small targets and more trigger control. Repetition with corrective action along the way could be considered a valid training method, but he disputed that is what the instructors actually did. He did agree that the ratio of one instructor to two students would yield a more intensive level of supervision.

Despite criticizing the JJC's remedial program supervised by Moore, Zamrok acknowledged that he had previously served as a JJC range master when Moore was a JJC firearms instructor, and later recommended Moore to the PTC, through the DCJ, for certification as a range master. (R-48.) Zamrok had not seen Moore in a classroom

<sup>18</sup> According to Zamrok, the trigger pull on the M&P.40 is 6.5 pounds, significantly less than the 12-pound trigger pull on the former duty weapon, the S&W 4046.

<sup>19</sup> Zamrok's standard is that fatigue sets in when a shooter, particularly a marginal/level-one shooter, has fired 200–250 rounds during an eight-hour range, which, he agreed, did not apply to Baker.

setting, but probably had observed his teaching skills at a live-fire session.

*Annie Baker*

Appellant Annie Baker testified that she began to encounter difficulty with qualifying with her JJC duty weapon around 2008 or 2009 because she "never had a chance to get acclimated to the new weapon." (Tr. 3 at 111.) In describing the prior duty weapon, she said, "I believe it was a 46 Smith & Wesson." (*Id.* at 111.) She described the actual caliber of the round for that gun as "a 9 mm, a .40-caliber round." (*Id.* at 111.) Baker is not sure of the caliber of the current gun, because she "never had any training on it." (*Id.* at 112.) According to Baker, "there's a big difference in the trigger pull and the [recoil]. It just felt like I went from a limousine to a Volkswagen." (*Id.* at 112.) And training with the new gun was limited to fifteen rounds of practice shooting in 2008.

During fall 2011, Baker was out of work for approximately seven weeks, until the second week of October, due to a strangulated hernia in her abdomen area. A letter from her physician dated September 5, 2012, (A-5) stated that she was then under his care and that she had undergone a surgical procedure in September 2011. He further stated that she was medically cleared to return to work beginning October 17, 2011. According to Baker, she rushed back to work, though she was not 100 percent recuperated, because she had to pay for her child's tuition and the JJC does not offer light duty to its employees. She was required to attempt requalification two weeks after her return. Baker felt that her medical condition, including pain in her abdominal area, contributed to a poor performance on October 26, and November 3, 2011, which is why at that time she wanted to start at the 1-yard line rather than the 25-yard line.

At the December 2011 remedial program, there was one hour of verbal instruction to the class. Moore spoke to her "specifically as to what [her] problems were" and determined that she needed a smaller grip. (Tr. 3 at 121.) Baker described that interaction as the only hands-on training that he provided. After that, he did not continue to discuss her deficiencies that had been identified during that session. Moore did not assist her in perfecting her stance or sight picture. Following the class, Madas

gave instruction to the group on the use of FATS, but she received no assistance with correction of grip or eye sprinting. When asked whether he told her anything about "getting sight alignment or sight picture," she replied, "Not that I recall, unless that correlated with a color, you know, and it would say, you know, yellow is trigger pull or something, but him discussing it, no." (Tr. 3 at 127.) He did give feedback as she actually shot the weapon and also did so with the program that simulated the range, though actual range practice was not allowed at the time.

On the second day of remedial training, participants went straight to the range, and there was a practice round but no coaching. After the first qualification attempt, no instruction was given.

With regard to advance practice, Baker testified that her regular days off previously had been Saturday and Sunday, which created problems for getting to the range. However, for the past two years, her regular days off have been Sunday and Monday. She had called to arrange practice at the range, but there was no answer. Therefore, she did not even know how to schedule practice at the range. In order to practice before the final qualification attempt in January, she joined a private range, but she could not practice with the M&P.40 because it was being serviced at the time and was thus unavailable. She was able to get assistance with instruction from others, namely, Lieutenant Graves, Sergeant Fisher and Officer Young.

On cross-examination, Baker acknowledged that she did not report her abdominal pain to range staff, although staff had directed participants to report and document any injury occurring at the range, "even if you break a fingernail." When asked if she attempted to talk to anyone at her facility to explain that attempting to requalify in the fall 2011 would present a problem due to her recent surgery, she responded, in part, "I wouldn't even know who to go talk to."

Baker could not recall whether the staff explained the operation and features of the M&P.40 when it was introduced in 2008. Since the JJC's transition to the M&P.40, she practiced privately only on two or three occasions before January 2012. And, for requalification, she had not been allowed to begin shooting at the 1-yard line, except the

final time when the DCJ instructors conducted the line. She acknowledged that her prior scores included a 48 in fall 2001 and spring 2002, a 54 in spring 2003, and a 49 in fall 2003. As best she could tell, her problem was with trigger pull and recoil.

Witness for Respondent on Rebuttal

*John Moore*

In rebuttal testimony, Moore stated that the JJC never had a 9mm service weapon. The JJC service weapon between 2001 and 2008 was the .40-caliber semi-automatic Smith and Wesson 4046 handgun. It used the same ammunition as has been used in the current JJC duty weapon, the M&P.40, since fall 2008, namely, a 180-grain .40-caliber round made by Winchester.

Based upon the testimony and exhibits, as well as the opportunity to observe the appearance and demeanor of the witnesses, I further **FIND AS FACT**:

1. JJC custody staff, including sergeants, are required to qualify with the JJC duty weapon semi-annually, regardless of their post assignment, unless excused.
2. JJC custody staff do not carry a firearm within the perimeter of the facility at Jamesburg, but do carry a firearm on duty in the gatehouse and outside the perimeter for purposes of security, as well as for transporting inmates. Officers must be able to handle the weapon proficiently and accurately when in public for their own safety and the safety of the public.
3. The ability to requalify with the JJC's duty weapon is essential for full performance of the duties of JJC correction sergeant.
4. JJC staff who are prohibited from qualifying for firearms because of domestic-violence matters remain employed on a temporary restricted status, pursuant to the Office of the Attorney General guidelines, and JJC does not control that process. Those individuals who appear, for instance, on the "Do Not

Carry List” have not failed the semi-annual requalification exam and must requalify when the restriction is lifted, or face removal. Similarly, JJC staff who are on administrative leave must return to the range and qualify once their status has changed.

5. In fall 2008, JJC changed its in-service firearm from a .40-caliber semi-automatic S&W 4046 to a .40-caliber semi-automatic S&W M&P. The JJC had not used a 9 mm duty weapon. The chamber pressure in both the S&W 4046 and the S&W M&P.40 are the same, as both use .40-caliber ammunition, but there would be more felt recoil with the M&P.40 with a polymer frame, as well as lighter trigger pull. Baker had used the M&P.40 to qualify prior to the fall 2011 qualification cycle.

6. Baker was critiqued on her performance following her unsuccessful attempt to requalify in November 2011.

7. In December 2012 the remedial program consisted of one and one-half days instruction and a half-day for qualification. It included a review of the participants’ deficiencies, including Baker’s performance the month before; explanation of the instructor’s target evaluation; at least two reviews of fundamental shooting principles, including stance, grip, sight alignment, trigger control, follow through, scan and breathing control; simulated practice rounds and a simulated HQC, each with an instructor’s analysis of the results and participants’ deficiencies; and range practice and a practice HQC, with like analysis and feedback.

8. The simulated weapon used on FATS was a Glock 17 9mm. It is similar in weight to the S&W M&P.40, though having a somewhat different trigger pull, and both are double-action semi-automatic firearms. Though the use of an M&P 40 on FATS would have been ideal, it was not in production for that application at the time. Nonetheless, FATS as then configured adequately served as a valuable tool in the JJC’s remedial program.

9. Although additional course time may have been optimal, instructors did move the participants through the course and were working with them to attempt to improve skill in the time allotted.

10. For the actual qualification phase, after remedial instruction, Moore and Madas inspected and test-fired each of the weapons and found all firearms to be intact, operating properly, and firing accurately. Likewise, before the start of the January 24, 2012, firearms requalification session Dooner test-fired all weapons that were being used and concluded that they were all sighted and operating properly.

11. In the Fall 2011 requalification cycle, 354 officers succeeded and six failed to requalify. (R-26.) Two of those 6 were exempted for medical reasons. One of the 4 officers participating in the fall 2011 remedial program succeeded in requalifying. Overall, the JJC has a low rate of failures for requalification.

12. JJC policy provides that staff may request practice time at the range and such requests will be accommodated. The JJC's shooting range had normal hours of operation, Monday through Friday between 7 a.m. and 3 p.m., or sometimes between 8 a.m. and 4 p.m. Baker's regular days off had been Saturday and Sunday, until 2010 when they changed to Sunday and Monday.

13. Baker could have maintained, but did not maintain, a regular practice schedule at the JJC range. She practiced only a few times with the M&P.40 before January 2012. In January 2012 she practiced at a private range, with the independent assistance of knowledgeable JJC staff, though the M&P.40 was not then available at that range.

14. Fatigue was not a factor contributing to Baker's failure to pass a total of six HQC's on three separate days.

15. Baker had surgery in September 2011 and was medically cleared by her physician to return to work on October 17, 2011. At that time, she returned to

work, although she did not feel fully recovered.

16. Baker did not request a medical exemption from participation in the fall 2011 requalification cycle. She did not feel 100 percent recuperated during the November 2011 qualification attempt, but she did not report any medical condition. She also did not report any medical condition during requalification attempts in December 2011 and January 2012.

### **LEGAL ANALYSIS AND CONCLUSION**

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, including inability to perform duties, N.J.A.C. 4A:2-2.3(a), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12) (formerly (a)(11)), N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action and the employee's guilt by a preponderance of competent, credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Pursuant to N.J.A.C. 13:92-10.3(a), each JJC staff member shall meet the minimum qualifications for his or her position as established by the New Jersey Department of Personnel. The New Jersey Civil Service job specification for JJC Correction Sergeant affords that position "all powers and rights of . . . a law enforcement officer for the detection, apprehension, arrest, custody, and prosecution of offenders against the law," and requires that "[a]ppointees shall have qualified in the usage of firearms and the ability to requalify on a semiannual basis." (R-4.) The job specification for JJC Correction Sergeant further describes one of the responsibilities as follows:

Responds to dangerous and hazardous situations, takes appropriate action to correct and/or mediate to restore order, and calls for assistance and/or redeployment of officers as required.

Restores order and issuance of disciplinary actions necessary to ensure a safe, clean, orderly, secure

environment.

[Id. at 2.]

**New Jersey Attorney General's Semi-Annual Qualification and Requalification Standards for New Jersey Law Enforcement (the AG's Standard)** requires that all law enforcement personnel requalify with their firearms at least twice a year, including semi-annual qualification with handguns and semi-annual qualification with the agency-authorized shotgun utilizing standardized courses of fire under daylight and night-firing conditions. (R-6 at 9-7, 9-9.) The AG's Standard further provides that unsuccessful participants shall receive remedial instruction in which the supervising firearms instructor determines the method and duration of remedial training:

The time allotted and method of remedial training to be conducted shall be determined by the supervising firearms instructor. The supervising firearms instructor, in consultation with firearms instructors and the participant, will:

1. Review factors which may have contributed to or caused a participant's failure to qualify, including a check of the participant's firearm.
2. Document any subsequent attempts to qualify and the results of those attempts.

[Id. at 9-20.]

All JJC custody staff members, as required by N.J.S.A. 2C:39-1 et seq., "shall be initially trained and shall qualify in the use and handling of approved on-duty firearms," N.J.A.C. 13:95-4.2(a), and custody staff members "shall requalify in accordance with the New Jersey Attorney General's Semi-Annual Qualification and Re-qualification Standards for New Jersey Law Enforcement," N.J.A.C. 13:95-4.2(b). "Only those custody staff members who achieve and maintain the required level of proficiency during range qualification and re-qualification shall be authorized to possess firearms while on-duty." N.J.A.C. 13:95-4.2(c).<sup>20</sup>

<sup>20</sup> Once a custody staff member has qualified on his or her Commission-approved firearm, the custody staff member shall receive the official State of New Jersey, Firearms Unit Weapons Card. N.J.A.C. 13:95-4.2(d). The Director of Custody Operations, or designee, at each secure facility shall be



The JJC policy on firearms requalification, Policy 11H-3.2, requires JJC law enforcement personnel to achieve and maintain an active firearms qualification status. It provides that officers will be allowed opportunity to practice on the range, to assist in meeting the minimum requirements necessary to requalify, and the administration must reasonably accommodate such efforts. Under Policy 11H-3.2, the officer is responsible to maintain the capability to requalify with JJC duty weapons semi-annually, and an officer who does not so qualify as required, under the direction of the JJC Training Academy, cannot fully meet the job requirements of a JJC law enforcement officer. (R-7.)

In pertinent part, Policy 11H-3.2 (Firearms Requalification), effective September 29, 2011,<sup>21</sup> states:

It is a job requirement for JJC law enforcement personnel that they must achieve and maintain an active firearms qualification status. The New Jersey Attorney General's SemiAnnual Firearms Qualification and Requalification Standards for New Jersey Law Enforcement require that all law enforcement officers must qualify semi-annually with service and off-duty weapons based on uniform standards and procedures contained in The Semi-Annual Firearms Qualification and Requalification Manual.

If JJC law enforcement officers cannot requalify with firearms semi-annually as required, they cannot fully meet the job requirements of a JJC law enforcement officer. It is the responsibility of all JJC law enforcement personnel to

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responsible for preparing and maintaining a current list of each custody staff member authorized to carry a firearm, from a Commission-wide master list provided for that purpose by the Commission's Office of Training. N.J.A.C. 13:95-4.2(e). In the event that a custody staff member is assigned to a post that requires the issuance of a firearm for that custody staff member's exclusive use while on-duty, the Director of Custody Operations or his or her designee shall maintain a list that indicates the custody staff member's issued firearm, model name and number, and serial number of the firearm. N.J.A.C. 13:95-4.2(e)(2).

<sup>21</sup> The purpose of the policy is. (1) To provide a clear policy regarding the obligation of Juvenile Justice Commission law enforcement staff to comply with the Attorney General's Semi-Annual Firearms Qualification and Requalification Standards for New Jersey Law Enforcement; (2) To provide a clear and fair policy to ensure that JJC law enforcement officers are afforded ample opportunities and remedial training to requalify semi-annually with firearms; (3) To provide clear and fair guidelines for the termination of JJC law enforcement officers for failure to maintain a current firearms qualification status after remediation.

maintain the capability to requalify with the JJC duty weapons semi-annually throughout the course of their careers with the JJC. If JJC law enforcement personnel fail to qualify with firearms as required after remedial firearms instruction, it is the policy of the JJC to terminate such officers from service since they cannot perform fully all the duties of a JJC law enforcement officer as delineated in the Department of Personnel job specification and as required by the Office of the Attorney General (OAG).

.....

JJC management recognizes that its law enforcement personnel have varied skill levels regarding proficiency with firearms and has no interest in terminating sworn officers from service without undertaking intensive retraining efforts intended to assist sworn officers to achieve compliance with mandated semi-annual requalification standards. If officers are not able to requalify after undergoing an intensive retraining program, the JJC will have no recourse but to seek their removal from their law enforcement position.

.....

Officers who have failed four (4) HQC's during their initial and second attempts to requalify during either the Spring or Fall cycles, will be scheduled to attend a two (2) day remedial firearms course designed and conducted by the JJC Training Academy. This will be a shortened version of the basic training firearms course taught at the Academy to new JJC law enforcement officers. It will review all the principles of proper shooting techniques and include live fire practice rounds. The intent of this training is to ensure that all officers who have not been able to qualify previously have had an intensive and thorough review of the basic firearms training they received when they originally went through the Academy. With this refresher training, it is anticipated that all officers will be able to complete the HQC successfully. At the end of this two (2) day training, officers will be given two (2) more opportunities to complete the HQC successfully and requalify.

If an officer fails to requalify after six (6) attempts to complete the HQC successfully during a requalification cycle (Spring or Fall), the JJC Range Master supervising this final requalification phase will prepare and send a report to JJC management documenting the officer's failure during the three requalification phases for appropriate action up to and including termination.

[Ibid. (emphasis added).]

Additionally, JJC's custody discipline policy (R-8) classifies a failure to qualify with a firearm after remediation as a safety and security violation, carrying a penalty of removal for the first infraction.

Regarding use of firearms while on-duty, "[t]he authorized on-duty firearm shall be the responsibility of the custody staff member at all times." N.J.A.C. 13:95-4.3(a).<sup>22</sup>

Further,

[t]he custody staff member shall not draw or exhibit his or her firearm except for one of the following circumstances:

1. For maintenance of the firearm;
2. To secure the firearm;
3. When commanded by the firearms staff during training exercises, range practice, qualification or re-qualification with the firearm, or by a supervisor for purposes of inspection;
4. When circumstances create a reasonable belief that it may be necessary to use the firearm in the performance of the custody staff member's duties;  
or
5. When circumstances create a reasonable belief that display of a firearm as an element of constructive authority will help establish or maintain control in a potentially dangerous situation in an effort to discourage resistance and ensure custody staff safety.

[N.J.A.C. 13:95-4.3(b) (emphasis added).]

<sup>22</sup> "Custody staff member" means any juvenile corrections officer working in a job title authorized under the provisions of N.J.S.A. 52:17B-174, or successor thereto. Such titles include, but are not limited to, Correction Sergeant." N.J.A.C. 13:95-1.3. "Secure facility" means any Commission facility which houses juveniles and employs custody personnel (N.J.S.A. 52:17B-174) to provide security. Ibid.

The regulation also states:

[t]he custody staff member entering any facility of the Commission either shall temporarily transfer custody of his or her firearm to an authorized custody staff member, or shall store his or her firearm at the main secure facility, at a Commission authorized weapons storage unit or secure it in a Commission approved vehicle lock box.

1. Except when firearms are issued under the provisions of N.J.A.C. 13:95-3.4(c), custody staff members are prohibited from carrying a firearm into any Commission facility beyond any posted weapons prohibited area, and into any area routinely dedicated for use by juveniles, including but not limited to areas for sleeping, living, eating, recreation, training, and education.

[N.J.A.C. 13:95-4.3(d) (emphasis added)].

Pursuant to regulations governing JJC's restrictions on issuance and use of firearms, deadly force, which includes the use of firearms, "may be used under limitations consistent with the provisions of the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 et seq., and with any applicable guidelines issued by the Attorney General," when the custody staff member "reasonably believes that deadly force is immediately necessary to protect the custody staff member or another person from imminent danger of death or serious bodily harm." N.J.A.C. 13:95-3.4(b)(1). "Deadly force is not justifiable if the custody staff member can otherwise secure his or her complete safety or the complete safety of the protected person." N.J.A.C. 13:95-3.4(b)(1)(i). "Within a secure facility, a firearm shall be issued to a custody staff member only in an emergency situation and only upon the authorization of the superintendent, or a higher ranking official of the Commission."<sup>23</sup> N.J.A.C. 13:95-3.4(c). And written post orders govern the use of deadly force by custody staff members.

<sup>23</sup> The regulations governing the JJC's restrictions on issuance and use of firearms and deadly force further specifically prohibit the use of a firearm in a situations involving: escape; signals for help or as a warning shot; potential of a substantial risk of injury to innocent persons; motor vehicles pursuits, with limited exceptions, where an alternative to the use of deadly force will avert or eliminate an imminent danger of death or serious bodily harm, and achieve the law enforcement objective; persons whose actions are only destructive to property; persons whose conduct is injurious only to themselves.

N.J.A.C. 13:95-3.4(l).

Clearly, a condition of employment for a JJC correction sergeant, as a law enforcement officer, is the ability to carry a gun. N.J.A.C. 13:92-10.3(a). The issue becomes whether the responsibilities of that position can be fulfilled when that condition is not met. The following cases are instructive.

In the consolidated matters of In re Allison, CSV 8422-02 and PTC 8744-02, Initial Decision (October 9, 2003), adopted, MSB (April 13, 2004), <<http://njlaw.rutgers.edu/collections/oal/>>, the issue was whether the county's removal of Allison, a sheriff's officer who did not successfully qualify with a firearm, as required by the Police Training Commission, was proper on the basis that she failed to meet the conditions for continued employment. Also at issue was her dismissal from the basic training course at the Monmouth County Police Academy for failure to successfully complete the handgun qualification course, as required by the Police Training Commission. Allison, who did not dispute that she failed the handgun qualification course, contended that she was not properly trained.<sup>24</sup> The administrative law judge (ALJ) found that Allison had the appropriate original, extra, and remedial training for the handgun qualification course, but failed to qualify based upon her own inability to accurately fire the weapon. He reasoned that she had the same training as forty-one other recruits in her class; trainees were given multiple opportunities to identify the problems they were having and also to be critiqued by their instructors; she was not the only one who needed remedial training; and five out of eight trainees in the remedial class were able to qualify. Thus, she was properly dismissed from the academy and removed from employment.

Similarly, in In re Ivan, Middlesex County, CSV 4720-03 and CSV 8676-03, Initial Decision (July 16, 2007), adopted, MSB (September 17, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>, the issue was whether the county abused its discretion in terminating Ivan, a sheriff's officer, for failure to requalify with her firearm.

<sup>24</sup> Allison, who complained that her hand was too small for the weapon, felt that it would have been more productive to receive help during the shooting rather than receiving help after the session and that she had been ill advised not to train elsewhere

Ivan presented the question of whether there was a divergence from established practice,<sup>25</sup> an inability or refusal to follow State guidelines,<sup>26</sup> and personal animosity.<sup>27</sup> The ALJ found that "none of the factors argued by [Ivan] had any significant effect on her attempts to qualify with her duty weapon." Ivan also alleged failures on the part of the range staff to properly instruct her and contended that it was their responsibility to ensure that she qualified. The ALJ further determined that weapons training was adequate, where: (1) the employee received a critique of performance and remedial instruction or "tips" from various officers, (2) there was no evidence beyond mere assertion that the training was not pursuant to the AG Guidelines, and (3) the employee's failure to practice and prepare, not training inadequacy, was the most significant cause of her inability to qualify. "Her most telling admission was her acknowledgment that she is still not aware of what her problem is with firing her service weapon." Inasmuch as correction officers are legally required to qualify and be proficient in the use of weapons issued by the employer, and the county has discretion to terminate or take other action upon the employee's failure to meet that requirement, the county's removal of the officer was proper.

The necessity of firearms qualification for fulfillment of a correction officer's duties was challenged in the consolidated case of In re Franklin and Canning, CSV 8137-98, CSV 8138-98, PTC 662-99, and PTC 663-99, Initial Decision (November 18, 1999), adopted, PTC (February 25, 2000) and MSB (May 1, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>. Two correction officers appealed their removal from employment for failure to complete the required firearms course. Canning asserted that his duties did not require that he carry a firearm. He also contended that he could have passed the handgun qualification course if he had been given one more day of remedial training. The ALJ found that the remedial class included shooting basics, including stance, grip, breath control, sight alignment, trigger control and follow

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<sup>25</sup> Ivan alleged that her termination deviated from the Sheriff's prior decisions regarding other officers who failed their initial attempts

<sup>26</sup> Ivan alleged that there was a failure of the range personnel to complete a written comprehensive report for each failed attempt at qualification.

<sup>27</sup> Ivan alleged that the instructor's behavior, including "mocking" comments and gestures, had an adverse affect on her qualification attempts. This contention was not found to be credible.

through. There were practice rounds with feedback and a practice HQC, with additional advice. The ALJ concluded that “[t]he Legislature has vested the Police Training Commission with the responsibility for setting the curriculum for Academy training of correction officer recruits,” and that the correction officers “failed to demonstrate that basic handgun qualification is an arbitrary or unreasonable component of that mandatory training.” The ALJ further concluded that since the officers did not pass the basic handgun qualification course as required, and were dismissed from the academy, they could not obtain permanent appointment under N.J.S.A. 52:17B-68.1(a), and the county properly removed them from their positions as county correction officers for failure to meet conditions of employment. See also In re Frazier, OAL Dkt. No. CSV 7489-11, CSC (January 11, 2012) (Commission adopted ALJ conclusion upholding a removal, by summary decision, for inability to perform duties where correction officer was prohibited from possessing or carrying a firearm, a requirement of his position, as a result of a conviction for a disorderly persons offense involving domestic violence).

As indicated above, the ability to qualify with the JJC duty weapon is a requirement for the position of JJC correction sergeant. The fact that firearms are not used within the perimeter of the facility at Jamesburg, does not revoke that requirement. By analogy, where the potential for driving a State vehicle fell within the parameters of a correction officer’s position, his lack of a valid driver’s license rendered him unable to perform his duties. In re Anderson, CSR 8639-11, Initial Decision (February 29, 2012), adopted, CSC (April 4, 2012), <<http://njlaw.rutgers.edu/collections/oal/>>. “The fact that he did not drive daily or often does not change the fact that he might have been assigned to do so in an emergency.” Ibid. Similarly, the fact that JJC custody officers normally do not carry firearms within the perimeter of the facility does not mean that use of such weapons would not be needed for security under emergent circumstances. As a matter of fact, both the job description for JJC sergeant and regulations governing the use of firearms while on-duty provide for the use of a firearm under circumstances in which it reasonably appears to be necessary to maintain security or control of the facility or ensure staff safety or safety of the public. N.J.A.C. 13:95-4.3(a). Indeed, on cross-examination, Sergeant Dooner agreed that “if an individual can’t possess a firearm and cannot qualify with a firearm, they cannot perform one of the essential functions of the job.”

The Office of the Attorney General maintains the standards for semi-annual qualification and requalification for New Jersey law enforcement, requiring that all law enforcement personnel requalify with their firearms at least twice a year. And by its guidelines, the Office of the Attorney General, not the JJC, dictates the temporary restricted status of JJC staff who are prohibited from qualifying for firearms because of domestic-violence matters. Love v. Essex Cnty. Prosecutor's Office, No. A-4743-03T3 (App. Div. February 24, 2006), <<http://njlaw.rutgers.edu/collections/courts/>>, certif. denied sub. nom. Love v. Essex County Prosecutor's Office, 187 N.J. 80 (2006); In re James, CSV 8816-08, Initial Decision (January 21, 2011), <<http://njlaw.rutgers.edu/collections/oal/>>. To the extent that there is any conflict between the JJC's continued employment of staff that is temporarily suspended from qualifying with a firearm, while removing from employment those who fail to requalify with their duty weapon, it can perhaps be said that "[t]he conflicting policy considerations are socially important and far reaching and the proper course to be carefully chosen and ultimately followed will rest with the Legislature rather than with the courts." De Marco v. Bd. of Chosen Freeholders of Bergen Cnty., 21 N.J. 136, 143-44 (1956); DelRossi v. Dep't of Human Servs., 256 N.J. Super. 286 (App. Div. 1992).

Further, the AG's Standard allows JJC discretion regarding the extent of remediation for firearms qualification. Although appellant vigorously challenges the sufficiency of the remediation program, appellant's firearms expert agreed that the basic fundamentals of shooting were covered during the remedial training, and instructors moved the participants through the course and were working with them to attempt to improve skill. He also acknowledged that repetition with corrective action along the way could be considered a valid training method, despite disagreeing that it was done, and that repetition and muscle memory were important for a shooter to be able to shoot consistently. Additionally, it is notable that Sergeant Martin testified on appellant's behalf that there was a 100 percent pass rate when Moore was reassigned. Yet, apparently no change in the curriculum or length of the program occurred at that time. It thus follows that the structure and content of the program were sufficient to meet the requirements under the AG's Standard, particularly where the program included a review of shooting basics, identification and review of deficiencies, analysis and



feedback by instructors, and practice rounds and a practice HQC with added input. In re Allison, supra, CSV 8422-02 and PTC 8744-02, Initial Decision (October 9, 2003), adopted, MSB (April 13, 2004), <<http://njlaw.rutgers.edu/collections/oal/>>; In re Ivan, Middlesex County, supra, CSV 4720-03 and CSV 8676-03, Initial Decision (July 16, 2007), adopted, MSB (September 17, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>; In re Franklin and Canning, supra, CSV 8137-98, CSV 8138-98, PTC 662-99, and PTC 663-99, Initial Decision (November 18, 1999), adopted, PTC (February 25, 2000) and MSB (May 1, 2000), <<http://njlaw.rutgers.edu/collections/oal/>>.

Also, as two other reasons why Baker failed to requalify, appellants' firearms expert had opined that "Sgt. Baker failed to requalify with the JJC's service handgun because of the weapon's size and especially because of its caliber," as the JJC had replaced "the prior 9mm Smith & Wesson handgun with a .40 caliber handgun." However, he conceded uncertainty to the prior use of a 9mm gun. In fact, the prior duty weapon was the S&W 4046, which used the same caliber as the S&W M&P.40. Finally, he further admitted that fatigue was not a factor as he had previously opined.

The record shows that Baker did not practice sufficiently with the M&P.40 to maintain proficiency with her duty weapon. Nor is there any indication that on January 24, 2012, she was medically unfit to participate in the requalification examination. At that time, she was given an additional chance to requalify with "neutral" certified firearms instructors and range masters. Although she scored well on the practice rounds, she failed to qualify, as indicated above.

I therefore **CONCLUDE** that respondent has proved by a preponderance of the credible evidence that appellant lacked the ability to fully perform her duties as a JJC correction sergeant pursuant to N.J.A.C. 4A:2-2.3(a)(3), and that she violated the JJC policy regarding firearms requalification, N.J.A.C. 4A:2-2.3(a)(12).

### Penalty

With regard to penalty, consideration must generally be given to the concept of progressive discipline, involving penalties of increasing severity. West New York v.

Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well established that when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011).

It has been held that termination without progressive discipline is appropriate in circumstances where an employee cannot competently perform the work required of his position. Klusaritz v. Cape May Cnty., 387 N.J. Super. 305, 317 (App. Div. 2006), certif. denied, 191 N.J. 318 (2007). In Klusaritz, the panel upheld the removal of a principal accountant on charges of inability to perform duties, among other things, based on proof that the employee had consistently failed to perform the duties of his position in a timely and proper manner, and had also failed or refused to accept direction with respect to performance of these duties.

A distinction can be made, however, where the inability is merely temporary or has been rectified. In In re Krawczyk, OAL Dkt. No. CSR 10047-12, Initial Decision (March 14, 2013), adopted, CSC (April 17, 2013), a senior correction officer appealed his termination by the JJC on grounds that he was unable to properly perform his duties because he failed to complete a fitness-for-duty evaluation, without which he had not been able to carry a firearm. The requirement of an evaluation came after a domestic-violence incident—although the timing of the referral for an evaluation was more closely linked to a DUI charge—and loss of his weapons privilege. By the time of the hearing, the officer had submitted documentation verifying that he had attended the required counseling and had passed a fitness-for-duty exam. Having determined that the core concern was fitness for duty, which the officer had established, the ALJ concluded that a 120-day suspension was warranted.

In a different vein, where the employee's inability to perform duties is based upon a medical condition, not willful misconduct, separation from employment by resignation in good standing, rather than removal, is appropriate. In re Gore-Bell, CSV 3975-06,

MSB (December 21, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>, (Board modified the removal of county correction officer to a resignation in good standing where inability to perform was due to glaucoma in her right eye); see also Verdell v. Dep't of Military and Veterans Affairs, CSV 6774-02, Final Decision (August 12, 2004), <<http://njlaw.rutgers.edu/collections/oal/>>, aff'd, No. A-0497-04T5 (App. Div. February 16, 2006), <<http://njlaw.rutgers.edu/collections/courts/>>, (Court affirmed Board's modification of the removal of the employee, an insulin-dependent diabetic who suffered unforeseen medical episodes, to a resignation in good standing).

In discussing the application of progressive discipline, the Court has stated:

[N]o employer—whether public or private—should be compelled to retain an employee who is chronically insubordinate, disruptive, underperforming, or some combination thereof.

On the other hand, there must be fairness and generally proportionate discipline imposed for similar offenses by public employers and responsibility in one agency to assure such fairness and proportionality. See N.J.S.A. 11A:2-6 (authorizing Commission to “render the final administrative decision on appeals concerning permanent career service employees . . .” where they are removed or suspended for more than five days).

[In re Stallworth, supra, 208 N.J. at 192.]

The Court further stated:

[P]rogressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty.

[Id. at 199.]

Appellant submits that the penalty is disproportionate to the offense, which was not deliberate misconduct. She urges that rather than removal, she should be returned to duty and placed on a "Do Not Carry List," and given another opportunity to requalify. Appellant relies upon an unpublished Appellate Division case, In re Warren, No. A-5092-09T3 (App. Div. August 3, 2012), <<http://njlaw.rutgers.edu/collections/courts/>>. In that matter, a seventeen-year employee of the Department of Corrections who had an unblemished record was removed on charges of conduct unbecoming a public employee, as well as a violation of a rule, regulation, policy, procedure or administrative decision involving safety and security. The ALJ dismissed the charge of conduct unbecoming, but upheld the administrative violation and modified the removal to a six-month suspension. The Commission rejected modification of the penalty and upheld the removal. The appellate panel reversed the Commission's imposition of removal and remanded the matter to the Commission for consideration of an appropriate penalty. The court reasoned that there was sufficient evidence to conclude that the employee's "actions did not create a 'serious' breach of security" and, considering her unblemished seventeen-year employment history, the penalty was disproportionate to the offense in light of all the circumstances.

Here, it is undisputed that Baker does not have a record of any disciplinary action in her long tenure as a correction officer. (J-1a; J-1b.) Her removal is solely due to her inability to requalify with her duty weapon, which was sufficiently documented. However, it is that very ability to requalify that is a condition of employment, without which she cannot fully perform the duties of her position. Appellant cites no case, nor have I found one, in which removal for failure to achieve a passing score on a required firearms requalification examination was found to be an abuse of discretion. Progressive discipline is not compulsory where an employee cannot competently perform the work required, or when application of the principle would be contrary to the public interest. And law enforcement officers are generally held to a higher standard. In considering whether there has been generally proportionate discipline imposed for similar offenses, it is inescapable that appellant's status is distinguishable from that of

other JJC staff who are temporarily restricted from carrying a firearm. Though their prohibition from carrying a firearm is similar to Baker's, the other employees have not failed the firearms qualification examination. Additionally, JJC staff that previously failed to requalify following remediation faced removal by the agency, notwithstanding any deal that may have been reached following an appeal.

Therefore, though mindful of the tremendous adverse impact on appellant, I am constrained to **CONCLUDE** that the respondent has proven, by a preponderance of credible evidence, the basis for removal from employment.

### **DECISION AND ORDER**

Based upon the foregoing, respondent justifiably charged appellant with inability to perform duties and other sufficient cause, and issued a removal from employment. Accordingly, I **ORDER** that the removal imposed by the respondent upon appellant Annie Baker is hereby **AFFIRMED**.

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

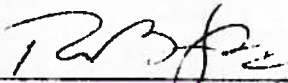
This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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 3, 2013

DATE

  
\_\_\_\_\_  
ROBERT BINGHAM II, ALJ

Date Received at Agency:

May 3, 2013  
\_\_\_\_\_

Date Mailed to Parties:

May 6, 2013  
\_\_\_\_\_

/bdt

**APPENDIX**

**EXHIBITS**

**Joint:**

- J-1a Disciplinary History Report for Sgt. Annie Baker
- J-1b Letter of Frank Crivelli, Esq., dated April 24, 2013, confirming the parties' joint submission of the Disciplinary History Report for Annie Baker

**For Appellant:**

- A-1 Memo listing JJC officers who do not possess a valid/current weapons card ("Do Not Carry List"), dated July 24, 2012
- A-2 JJC In-Service Semi-Annual Qualification Record for Fall 2011
- A-3 Annie Baker's range receipts, January 6, to January 23, 2012
- A-4 Curriculum Vitae of John H. Zamrok
- A-5 Letter of Earl Noyan, M.D., dated September 5, 2012
- A-6 Report of John H. Zamrok, dated November 16, 2012
- A-7 Supplemental report of John H. Zamrok, dated November 16, 2012

**For Respondent:**

- R-1 Preliminary Notice of Disciplinary Action
- R-2 Pre-Termination Hearing Summary
- R-3 Final Notice of Disciplinary Action
- R-4 New Jersey Civil Service job specification for JJC Correction Sergeant
- R-5 Copy of N.J.A.C. 13:95-4.1, -4.2 (use of firearms)
- R-6 New Jersey Attorney General's Semi-Annual Qualification and Requalification Standards for New Jersey Law Enforcement (Attorney General's Standard)
- R-7 JJC Policy 11H-3.2 (Firearms Requalification), effective September 29, 2011
- R-8 JJC Policy 11H-19.7 (Custody Discipline), effective September 19, 2011
- R-9 DJC Firearms Instructor Certification for SCO John Moore, effective

September 1, 2000

- R-10 PTC Firearms Instructor & Range Master Certification for John Moore, dated October 26, 2004
- R-11 PTC Firearms Instructor & Range Master Certification for John Moore, dated January 1, 2011
- R-12 JJC In-Service Firearms Training (Range) Record
- R-13 Annie Baker's HQC targets from October 26, 2011, and November 3, 2011
- R-14 DCJ Firearms Instructor Certification for Timothy Madas, dated March 17, 2006
- R-15 PTC Firearms Instructor Certification Card for Timothy Madas, dated January 1, 2010
- R-16 Certificate of Training for Timothy Madas, dated October 7, 2010 (Meggitt Firearms Training Simulator)
- R-17 PTC Firearms and Range Master Certification for Timothy Madas, dated March 29, 2012
- R-18 Fall 2011 Firearms Remedial Class sign-in sheets, December 12–13, 2011
- R-19 Report of SCO John Moore, dated January 3, 2012
- R-20 Fall 2011 Firearms Remedial Class training materials
- R-21 Report of SCO Timothy Madas, dated December 16, 2011
- R-22 Fall 2011 Firearms Remedial Class practice targets of Sgt. Annie Baker, December 13, 2011
- R-23 Test-fire target for weapon assigned to Sgt. Annie Baker, December 13, 2011
- R-24 JJC In-Service Firearms Training Record, December 13, 2011
- R-25 Sgt. Annie Baker's HQC #1 and HQC #2 targets, December 13, 2011
- R-26 JJC's Annual Firearms Report, dated December 22, 2011
- R-27 Letter from Lisa Bell to Annie Baker, dated January 11, 2012, regarding final requalification attempt on January 24, 2012
- R-28 DCJ Firearms Instructor Certification for Joshua Dooner, dated March 18, 2005
- R-29 PTC Firearms Instructor Certification Card for Sgt. Joshua Dooner, dated



January 1, 2011

- R-30 PTC Firearms and Range Master Certification for Joshua Dooner, dated March 29, 2012
- R-31 JJC Training Academy Remedial Range/Practice sign-in sheet, January 20, 2012
- R-32 Email from Michael Cleary to Lisa Bell, dated January 20, 2012, regarding range practice session
- R-33 Sgt. Annie Baker's practice-round target, January 20, 2012
- R-34 Range sign-in sheet, dated January 24, 2012
- R-35 Letter from Dion Feltri, DCJ Training Academy Director, dated March 8, 2012 (Schrader curriculum vitae)
- R-36 Memorandum of A. Schrader, dated January 24, 2012, regarding firearms requalifications
- R-37 PTC Firearms Instructor & Range Master certification for Allan Buecker, Deputy Chief, DCJ
- R-38 Test-Fire Target—MRJ5782, weapon fired by Sgt. Annie Baker on January 24, 2012
- R-39 Sgt. Annie Baker's warm-up-round target, January 24, 2012
- R-40 JJC In-Service Firearms Training Record, January 24, 2012
- R-41 Sgt. Annie Baker's HQC #1 and HQC #2 targets, January 24, 2012
- R-42 Memorandum from Michael Cleary to Felix Mickens, dated January 31, 2012, regarding Firearms Requalification
- R-43 Not in evidence
- R-44 Weapons Usage Report for Sgt. Annie Baker
- R-45 Not in evidence
- R-46 Sgt. Annie Baker's Firearms Requalification Testing, October 22, 2012
- R-47 Memorandum from John Moore, dated December 17, 2008, regarding In-Service Firearms/Training
- R-48 Memorandum from John H. Zamrok to Dion Feltri, Director, DCJ Academy, dated October 28, 2004, regarding evaluation of SCO John Moore

**WITNESSES**

**For Appellant:**

Andrei Martin

John Zamrok

Annie Baker

**For Respondent:**

John Moore

Timothy Madas

Joshua Dooner

Michael Ziabro