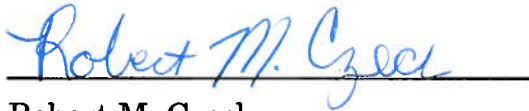




Re: Mark Handler

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  
JULY 16, 2014

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

Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

attachment



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

**INITIAL DECISION**

OAL DKT. NO. CSV 94-11

AGENCY DKT. NO. 2011-2542

**IN THE MATTER OF MARK HANDLER,  
ATLANTIC COUNTY DEPARTMENT OF  
HUMAN SERVICES.**

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**Richard R. Press, Esq.,** for Mark Handler, appellant (Press & Associates,  
attorneys)

**Richard, C. Andrien,** Deputy County Counsel, for respondent Atlantic County  
(James F. Ferguson, County Counsel, attorney)

Record Closed: May 16, 2014

Decided: June 13, 2014

**BEFORE BRUCE M. GORMAN, ALJ:**

**STATEMENT OF THE CASE**

Appellant appeals respondent's action terminating his employment as a human service specialist 1 (HSS1) general assistance counselor.

## **PROCEDURAL HISTORY**

The petitioner requested a fair hearing and the matter was filed at the Office of Administrative Law on January 4, 2011, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on May 16, 2014, and the record closed.

## **FACTS**

On or about June 17, 2010, appellant was served with a Preliminary Notice of Disciplinary Action (31-A) removing him from the position of a HSS1. The charges in the removal notice included “[inability to perform duties; conduct unbecoming a public employee; incompetency, inefficiency, and failure to perform duties; insubordination; neglect of duty; other sufficient cause: reporting false and inaccurate information on documents and applications[;] discriminating against clients based on perceived mental impairments.” (Emphasis added.)

A departmental hearing was conducted and a decision was issued upholding the charges. A Final Notice of Disciplinary Action was issued thereafter.

Appellant filed a timely petition with the Civil Service Commission and simultaneously appellant filed a civil complaint in the Superior Court, Civil Division, Atlantic County (“Complaint”). The instant matter was put on the inactive list pending the outcome of the Superior Court case.

The Complaint contained various allegations, including a claim that the County violated the Conscientious Employees Protection Act, (CEPA), N.J.S.A. 34:19-1 to -14, and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-12. The Complaint also asserted that the County and various supervisors failed to properly train appellant; that defendants retaliated against him; that defendants failed to provide him with a reasonable accommodation; that defendants practiced reverse discrimination against him due to his status as a white male; and that defendants violated the statutorily mandated rules and regulations regarding discipline. Appellant then

amended his complaint to add a seventh count alleging that the County and various administrators violated his First and Fourteenth Amendment Rights by retaliating against him with respect to his right to protect his speech, in that appellant filed multiple grievances and discrimination complaints while employed by the County. Appellant further alleged that the sundry defendants violated the Federal and State Constitutions pursuant to 42 U.S.C.A. § 1983 by denying him an equal opportunity for employment, asserting that the defendant "blackballed" him from any re-employment with Atlantic County.

At some point thereafter, defendants filed a motion for summary judgment seeking a dismissal of all claims raised by the appellant.

On or about November 8, 2013, a Memorandum of Decision ("the Decision") was filed and issued by the Honorable Carol E. Higbee, P.J.Cv. Handler v. Cnty. of Atlantic, Memorandum of Decision and Order, Superior Court Docket No. ATL-L7432-11 (2011) [hereinafter Decision]. The Decision granted the County's motion for summary judgment dismissing all claims pleaded by appellant with prejudice. Appellant has not filed an appeal with the Superior Court of New Jersey, Appellate Division.

The County now moves for summary decision seeking to dismiss the appellant's civil service appeals of the County's disciplinary action. The County argues that the Superior Court's finding of inability to perform essential functions of appellant's job substantiates both the fifteen-day suspension and the removal, both of which are based in part upon appellant's alleged inability to perform the duties of his position. The County relies on collateral estoppel, res judicata, and the entire controversy doctrine in support of its position.

The Decision provides numerous factual findings. They include the following:

On or about December 27, 2006, Plaintiff submitted an application for employment with Atlantic County for the positions of Program Development Specialist and/or Human Services Specialist for the Department of Family and Community

Development. Plaintiff on his application and resume claimed that he has an ability to manage time effectively and that he had previously been employed as a claims examiner for the New Jersey Division of Unemployment and Disability Insurance Department of Labor. On or about April 23, 2007, Plaintiff was provisionally hired by Atlantic County in the position of Computer Service Technician. On June 6, 2007, Plaintiff acknowledged receipt and notification of an open competitive examination for the position of Computer Services Technician. Upon review of Plaintiff's application materials for the position of Computer Services Technician, the New Jersey Department of Personnel determined that Plaintiff did not have the requisite educational background for the position of Computer Services Technician. Defendant, Birdie Cody, met with Plaintiff and advised Plaintiff that he may be eligible for an HSS1 position. In March of 2008, Atlantic County transferred Plaintiff into the provisional position of Human Services Specialist 1 (HSS1); the effective date being March 18, 2008. Mr. Appellant later received permanent status as an HSS1, effective November 3, 2008. (Decision at 3-4.)

The trial judge found: Between November 3, 2008 and October 8, 2009, appellant was placed on notice of unsatisfactory job performances via written and verbal warnings and discipline. (Decision at 4-6.) In October of 2009, Dr. Mariann Pokalo evaluated Appellant and found him to be "suspicious, had heightened emotionality, failed to take any responsibility for the problems at the job and is not at a point where a change could be expected." (Decision at 6.)

The trial judge found: Appellant was also evaluated by his treating psychiatrist, Dr. Kammiel. Dr. Kammiel certified "that due to Plaintiff's medical condition (i.e., depression, obsessive compulsive disorder and anxiety) the Plaintiff is unable to "focus and cope." (Ibid.) Dr. Kammiel found that "Plaintiff's psychiatric problems are interfering with his work efficiency, speed and productivity." (Ibid.)

The trial judge found: On March 9, 2010, Dr. Kammiel wrote a report indicating that Appellant's "condition substantially limits him from performing a major life activity."

The specific life activity was Plaintiff's ability to perform work at his job as an HSS1." (Decision at 6–7.)

The trial judge found that "Dr. Kammiel issued a report opining that a reasonable accommodation for the Plaintiff's condition would be 'less work load' and to remove the 'emergency assistance' cases from him." (Decision at 7.)

The trial judge found "Plaintiff submitted a job accommodation request proposal from March 22, 2010, in which he requested the following accommodation: less of a workload, constructive, not destructive help from a supervisor, no emergency assistance work, less threats of discipline from supervisor, more help with walk in customers and the lessening of his anxiety, stress and panic attacks." (Decision at 7.)

The trial judge found: "Plaintiff's duties consisted of being responsible for expediting the benefits process for the Jewish Family Services (JFS), which serves homeless individuals, and to secure the necessary documentation in a timely manner in order to expedite the process." "Plaintiff's specific role at JFS was to process the applications, yet the Plaintiff was not processing timely and was not returning phone calls." "Plaintiff's role was later changed from regular work at the Rescue Mission and the John Brooks Recovery Center to handling only a small number of different cases once or twice a month." (Decision at 8–9.)

Birdie Cody was identified as chief of administrative services and deputy department head of Family & Community Development. The trial judge wrote: "Ms. Cody explained that the workers in the unit carry a massive case load and because Plaintiff had limited ability in handling general assistance and emergency assistance, [a] transfer would not have been in the interest of the agency, nor could Plaintiff have possibly succeeded in that task." (Decision at 9.)

The trial judge found "Plaintiff was disciplined and terminated for inability to do his job." (Decision at 14.) "There is substantial, in fact, overwhelming evidence that the

decision to dismiss the Plaintiff was a legitimate business decision” and “the Plaintiff simply did not grasp the job.” (Decision at 15, 16.)

The trial judge found: “[T]he Plaintiff was unable to perform the essential functions of the job of HSS1. This is conceded by his physician's report stating same. Specifically, Dr. Kammiel opined that Plaintiff could not perform his duties as an HSS1 given his psychiatric conditions. She recommended that certain work be removed from him and that he be given less cases. Further, Plaintiff admits that his emotional issues prevented him from working as an HSS1. Plaintiff explained that due to the nature of the environment, it was too stressful. He explained that with the phone ringing and clients waiting to be seen, it was too much pressure for him; he admits that he is unable to work in such a ‘stressful environment’ therefore, Plaintiff acknowledges that he cannot perform the essential functions of an HSS1. The Plaintiff clearly was unable to do the job.” (Decision at 17–18.)

The trial judge reviewed the job duties of an HSS1 and found: “The job duties of an HSS1 are clearly outlined in the Civil Service Job description for HSS1. The duties are the same for all HSS1’s. The Plaintiff admits that the clients themselves caused him stress. Certainly, the employer cannot change clients, nor is it reasonable for the employer to reduce the caseload for the Plaintiff and force others to do Plaintiff’s assignments.” (Decision at 19.) The Decision continues, “It is not ‘reasonable’—nor is it tolerable—to give one employee limited work, and others more of a caseload in order to ‘accommodate.’ That conduct would surely lead to discord and utter chaos in the workplace. In fact, the County had other employees complete his work but was required to pay them overtime.” (Decision at 19–20 (emphasis added).)

The trial judge found that appellant “wanted to do less than what was required by all HSS1’s doing the same job. . . . He admits that he cannot do the job due to the stressful nature of the job.” (Decision at 21 (emphasis added).)

Finally the Decision also finds:



Plaintiff requested that he be given less work than other HSS1's and actually requested that he not be required to process Emergency Assistance applications. This is an essential part of the HSS1 job duties. Accordingly, Plaintiff must be able to do the critical duties of the job, which includes processing Emergency Assistance applications. Plaintiff's request was therefore unacceptable and not subject to reasonable accommodation. Plaintiff admits that he cannot work as an HSS1 due to the type of clients and the stress of the job. He claims he will 'die of a stroke.' This does not satisfy the required criteria for the County to have somehow invented/created a 'reasonable accommodation.'

[Decision at 21–22 (emphasis added).]

Without question, the trial judge determined that the appellant cannot perform the duties of his job.

### LEGAL DISCUSSION

The County relies upon the doctrine of collateral estoppel in support of its motion. It is well settled that "collateral estoppel bars relitigation of any issue or fact actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Forgash v. Lower Camden Cnty. Sch., 208 N.J. Super. 461, 465-66 (App. Div. 1986) (citing State v. Gonzalez, 75 N.J. 181, 186 (1977)) (emphasis added).

The Court in Forgash also found:

While these rules of issue preclusion are basically judicial in origin, it has been recognized that they have especial relevance for administrative adjudications. . . . "[I]t is consistent with this constitutional philosophy to apply to administrative agencies, in appropriate situations, judicial rules conducive to the ends of intergovernmental compatibility and harmony, such as res judicata, collateral estoppel, the single controversy doctrine and the like. Decisions have stressed that the policy considerations which support these judicial doctrines—namely, finality and repose; prevention of needless litigation; avoidance of duplication;

reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness—have an important place in the administrative field.”

[Id. at 465-66 (alteration in original) (citing City of Hackensack v. Winner, 82 N.J. 1, 31, 32-33 (1980) (emphasis added)).

The criteria for establishing collateral estoppel are well settled:

- (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
- (2) the issue was actually litigated in a prior proceeding;
- (3) the court in the prior proceeding issued a final judgment on the merits;
- (4) the determination of the issue was essential to the prior judgment; [and]
- (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the proceeding.

[Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005) (citations omitted).]

In this case, the issue to be precluded is whether appellant is able to perform his job duties. That issue is identical to the one adjudicated in the Superior Court action. In that case, the trial judge found that “[t]he plaintiff clearly was unable to do the job.” (Decision at 18.)

The issue of whether appellant was able to perform his job duties was litigated in the prior proceeding. The Court in that proceeding issued a final judgment on the merits. The determination of that issue was essential to the prior judgment. Finally, the party against whom the doctrine is the same party in the prior proceeding, namely, the appellant.

Accordingly, collateral estoppel must apply in this case. Appellant's ability to perform his job has been adjudicated in the Superior Court action and cannot be retried here. For that reason, the respondent's motion for summary decision on the appeal from the final notice of disciplinary action resulting in appellant's removal from his employment must be **GRANTED**.

**ORDER**

I **ORDER** that respondent's motion for summary decision on the appeal of the final notice of disciplinary action resulting in appellant's removal from his employment be **GRANTED**.

I **ORDER** that appellant's appeal from the final notice of disciplinary action resulting in his removal from his employment be **DISMISSED**.

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

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

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

June 13, 2014

DATE

  
BRUCE M. GORMAN, ALJ

Date Received at Agency:

June 13, 2014

Date Mailed to Parties:

June 13, 2014

/jb

**WITNESSES AND DOCUMENTS IN EVIDENCE**

**WITNESSES**

**For Appellant:**

None

**For Respondent:**

None

**EXHIBITS**

**For Appellant:**

None

**For Respondent**

None

**For Court**

C-1 Motion for Summary Judgment

# MEMORANDUM

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**DATE:** July 9, 2014

**TO:** Civil Service Commission

**FROM:** Henry Maurer, Director  
Division of Appeals and Regulatory Affairs

**SUBJECT:** Initial Decision on the Appeal of Mark Handler A-2

Mark Handler, Human Service Specialist 1, Atlantic County, Department of Human Services, removal effective November 22, 2010, on the charge of inability to perform duties, conduct unbecoming a public employee, incompetency, inefficiency, or failure to perform duties, insubordination, neglect of duty and other sufficient causes.

The appointing authority asserted that the appellant failed to process applications for food stamps efficiently after multiple disciplines and retraining.

**Recommendation of the Administrative Law Judge** – Grant motion for summary decision and dismiss the appeal.

**The following materials are provided for your review in order that you may render your final decision at the next Civil Service Commission meeting on July 16, 2014.**

Initial Decision rendered by ALJ Bruce M. Gorman, dated June 13, 2014.