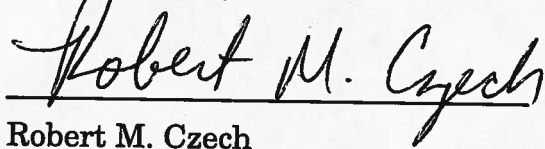




Re: Michael Frank

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  
FEBRUARY 4, 2015



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**

**SUMMARY DECISION**

OAL DKT. NO. CSV 04074-11

AGENCY DKT. NO. 2011-3926

**IN THE MATTER OF MICHAEL FRANK,  
ESSEX COUNTY DEPARTMENT OF  
CORRECTIONS.**

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**Mitchell A. Liebowitz, Esq., for appellant**

**Courtney M. Gaccione, Chief, Labor and Employment, for respondent (James R.  
Paganelli, County Counsel)**

Record Closed: November 10, 2014

Decided: January 12, 2015

**BEFORE MUMTAZ BARI-BROWN, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Appellant, Michael Frank, a Correction Officer, appealed the disciplinary action of removal by Essex County Department of Corrections (DOC or Appointing Authority.<sup>1</sup>) On April 8, 2011, the Merit System Board<sup>2</sup> transmitted the matter to the Office of

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<sup>1</sup> "Appointing authority" means a person or group of persons having the power of appointment to or removal from offices, positions or employment under the jurisdiction of the Police Training Commission. N.J.A.C. 13:1-1.1.

<sup>2</sup>Effective June 30, 2008, the functions, powers, and duties of the Merit System Board in the Department of Personnel were continued and transferred to the Civil Service Commission, which is created and

Administrative Law (QAL) as a contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The Appointing Authority asserts that Frank's appeal before the Civil Service Commission should be dismissed because he failed to simultaneously file an appeal with the Police Training Commission (PTC).

The parties filed cross motions for summary decision and relied on the papers.

### CHARGES

**CHARGE(S):** N.J.A.C. 4A:2-2.2(a)(1): Incompetent to perform duties; N.J.A.C. 4A:2-2.3(a)(3); Inability to perform duties; N.J.A.C. 4A:2-2.3(a)(3); Violation of Federal regulations concerning drug and alcohol use by testing of employees who perform functions related to the operation of motor vehicles, and State and local policies issued there under; N.J.A.C. 4A:2-2.3(a)(11); other sufficient cause; N.J.A.C. 13:1-7.2(a)8; Unfit for duty; Inability to complete state mandated training requirements.

**SPECIFICATION(S):** The suspension is based upon the following allegations: On Wednesday, January 19, 2011, The Essex County Department of Corrections received a "Dismissal Notice" from the Essex County College Police Academy. Specifically, on Wednesday, January 19, 2011, the Essex County College Police Academy informed the Essex County Department of Corrections that the reason for the dismissal is the employee "Failed Drug Testing." Further, Employee's inability to comply with statutorily mandated training requirements renders employee ineligible for certification by the Police training Commission and thus incompetent and unable to perform the duties of a Correction Officer. As such, employee is unfit for duty, is a hazard to his coworkers and his immediate suspension is necessary to maintain safety, health, order and effective directions of public services. Accordingly, the interests of the Department would best be served by this employee's removal as a result of the above stated charge(s).

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allocated in, but not of, the Department of Labor and Workforce Development. N.J.S.A. 11A:11-1 and N.J.S.A. 11A:11-2-1.

**FINDINGS OF FACTS**

Based on the moving papers, certifications, and other relevant evidence I **FIND**  
as **FACT**:

1. On June 15, 2009, the Appointing Authority hired Appellant, Michael Frank in the position of Correction Officer.
2. All Correction Officers must complete basic training at an approved Police Academy in order to continue employment with DOC.
3. Appellant was scheduled to attend mandatory basic Police Academy Training at the Essex County College Police Academy (ECCPA or Academy) from September to December 2010.
4. ECCPA is governed by the New Jersey Police Training Commission.
5. Rocco Miscia, Director of ECCPA is responsible for the operations of the Academy.
6. Trainees are subject to drug testing during their training at the Academy.
7. A consequence of a positive test for illegal drug use is dismissal from the Academy.
8. Appellant received proper notice and acknowledged that a positive test for illegal drug use would result in dismissal from the ECCPA and from his law enforcement position with Essex County.
9. On November 12, 2010, Appellant was involved in a motor vehicle accident and received medical treatment at an area hospital.
10. On November 15, 2010, Appellant arrived at his scheduled start time at the Academy and reported for firearm's qualification.
11. On November 15, 2010, at approximately 7:45 a.m., Edward Bertone, Corrections Physical Training Instructor observed that Appellant's eyes were closed, his head nodding, and that he appeared sluggish and lethargic.
12. Bertone reported his observations and concerns to Director Miscia and the Range Master.
13. On November 15, 2010, Frank met with Director Miscia and disclosed his dependence on Oxycodone and his difficulty discontinuing the medication.

14. Director Miscia reviewed and considered the information he received from Frank, Kelly and Bertone. Based on this information, Director Miscia prohibited Frank from participating in the firearms training and ordered him to undergo a drug test.
15. On November 15, 2010, Frank submitted to a drug test.
16. Commanding Officer Lori Apicelli (female) opened the vault containing the sealed sample cup, gave it to Frank, and directed him to go into the men's room and provide a urine sample.
17. Instructor Brian Kelly (male) and Sgt. Joseph Fernandez (male) monitors the urine collection in the men's room.
18. Officer Apicelli was not present in the men's room when Frank provided the urine sample.
19. The sealed cup containing Frank's urine sample was given to Apicelli outside the men's room and returned to the vault for transport to the lab.
20. Officer Brian Kelly transported the sample to the lab to be tested.
21. The sample was received by the Edwin H. Albano Institute of Forensic Science.
22. As a result of Appellant's withdrawal from the mandatory firearms training on November 15, 2010, he did not complete the basic training program.
23. Therefore, on November 16, 2010, Frank was dismissed from the Academy.<sup>3</sup>
24. On January 18, 2011, Director Rocco Miscia was advised that Appellant's urine sample, taken on November 15, 2010, tested a positive for Cocaine.
25. Director Miscia contacted the Essex County Correctional Facility and advised of his intent to modify Appellant's medical withdrawal from the Academy to a dismissal based on the positive drug result.
26. On January 19, 2011, to the presence of cocaine in Frank's urine sample, Director Miscia dismissed Frank from ECCPA and entered his name on the Central Drug Registry.

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<sup>3</sup> Appellant's dismissal was changed on November 17<sup>th</sup> to a Medical Withdrawal at the request of the Essex County Correctional Facility.

27. On January 20, 2011, Appellant was charged with incompetent to perform duties, inability to perform duties, positive drug test result, and inability to complete state mandated training requirements.
28. Appellant waived his right to a departmental disciplinary hearing on March 10, 2011.
29. On March 17, 2011, a Final Notice of Disciplinary Action was issued.
30. On March 22, 2011, Frank appealed the dismissal before the Civil Service Commission.
31. Appellant did not appeal the dismissal before the Police Training Commission (PTC).

### DISCUSSION

Certification as a Correction Officers requires all trainees<sup>4</sup> to successfully complete the basic training course. Frank's mandatory basic police training and certification were to be completed at the Essex County College Police Academy (ECCPA). Certification is provided in N.J.A.C. 13:1-5.1 as follows:

(a) A trainee shall be eligible for certification when the school director affirms that:

1. The trainee has achieved the minimum requirements set forth in the basic course applicable to his or her appointment and has demonstrated an acceptable degree of proficiency in the performance objectives contained in the particular basic course;
2. The trainee has participated in no less than 90 percent of the total instructional time assigned to those performance objectives designated by the Commission; and
3. The trainee has successfully completed the training required by the Commission to be conducted by the employing law enforcement agency.

The Department of Law and Public Safety prescribes standards for which police training courses shall be conducted. An appeal by a law enforcement officer from his/her termination of a from an approved school or program for failure to meet the standards of N.J.S.A. 52:17B-71 shall be filed before the Police Training Commission.

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<sup>4</sup> A trainee is an individual attending a Commission-approved school. N.J.A.C. 13:1-1.1.

N.J.A.C. 13:1-9.1.

Here, on January 19, 2011, the Director of the Academy served upon Appellant a Dismissal Notice from the Academy due to "Failed Drug Testing" and informed DOC of Appellant's dismissal. On March 17, 2011, the Civil Service Commission through Appellant's employer, DOC served upon Appellant a "Final Notice of Disciplinary Action" of removal. Appellant retained legal counsel and maintains that he expected his counsel would timely file all of the necessary appeals. However, there was no filing of an appeal before PTC. (Appellant's Brief at 5-6).

Appellant argues that his circumstances justify relaxing the rules governing the time to appeal. Appellant relies on State v. Altman, 181 N.J. Super. 539 (App.Div.1981)(The Court relaxed the time to file a Notice of Appeal where an indigent criminal defendant timely requested either private counsel or a Public Defender to file a Notice of Appeal on his behalf) and New Jersey Division of Youth and Family Services v. R.G., 354 N.J. Super. 202 (App. Div. 2002)(The Court granted R.G.'s motion for leave to appeal nunc pro tunc). In R.G., appellant-mother lost her parental rights. After the ruling, both R.G. and M.G. expressed their intention to file appeals and consulted different Public Defenders. M.G.'s counsel filed a Notice of Appeal on his behalf. "The appeal was perfected, the issues were briefed, and the matter was submitted to this court for decision." Id. at 205. Almost one year later, the Court granted R.G.'s motion for leave to appeal nunc pro tunc. The Court relied on Altman, and applied R. 1:1-2, ("any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice"). Id.

Here, compliance with N.J.A.C. 13:1-9.2 required Appellant to file a Notice of Appeal with the PTC no later than February 18, 2011. County Counsel raised the omission three years after Appellant's dismissal. Appellant asserts that in the interests of justice and equity the County and PTC should be estopped from claiming Appellant's failure to file an appeal with PTC. Indeed, the omission is a mere procedural technicality. Appellant further asserts all of the departments and agencies involved in his dismissal had either written or verbal notice of the appeal, and conducted themselves in a manner that reasonably induced Appellant to rely on their participation



in this matter. Therefore, based upon the principals of equity and in the interests of justice, every agency, DOC, PTC and the Academy, should be estopped "from seeking to bar [Frank's] appeal".

Additionally, Appellant asserts that the Academy's drug testing procedure failed to comply with the required guidelines set forth in the State of New Jersey Attorney General's Law Enforcement Drug Testing Policy and the New Jersey Law Enforcement Drug Testing Manual. Moreover, Appellant's references several examples of the Academy's violations of the drug testing procedures, e.g., failure "to prepare a written report documenting the basis for the test before the order to Petitioner to comply with the collection of his urine sample." (Appellant's Brief at 8). Appellant further argues that the Academy failed to provide same-gender monitor.

Appellant urges this tribunal to conclude that strict adherence to the rules is inequitable and will result in a significant injustice. Therefore, the circumstances justify relaxing the rule and allowing him to file a Notice of Appeal with PTC nunc pro tunc.

The County argues that in the matter PTC must be served and named as a respondent. Although the Academy operates under the auspice of Essex County College, it is a separate entity from the County of Essex. While the County and PTC require all Correction Officers to attend the mandatory basic training course to be qualified for continued employment at the Essex County Correctional Facility, the Academy only administers the basic training. Respondent references the "Agency Orientation and Training", which states in part:

Police Training Commission (PTC) The state commission, under the authority of the NJ Police Training Act, who are responsible for the development and certification of basic training courses for county corrections officers as well as several instructor development courses...Commission staff is responsible for the certification of training course curricula, instructors, trainees, and academies authorized to conduct any of the PTC certified training courses. Moreover, PTC staff develop operational guidelines to implement applicable training standards, monitor the operation of all PTC certified academies, review all trainee injuries, investigate possible violations of the Police Training Act or PTC Rules occurring

during authorized training courses, and handle appeals involving challenges to PTC decisions regarding, for example, trainee dismissals from NJ PTC certified courses, training waivers, and drug screening practice of NJ PTC certified academies.

[Respondent's Brief at 10 to 11].

Respondent further argues all appeals concerning dismissals from basic training or the academy, including ECCPA, must be filed before PTC within thirty (30) days of the dismissal. N.J.A.C. 13:1-9.1. Here, Appellant Frank was dismissed from the ECCPA, and he received the Notice of Dismissal on January 19, 2011, informing him that appeals must be filed with PTC. Thus, Respondent submits that Appellant received timely notice of his appeal rights and the proper procedure to file an appeal was with PTC, the agency responsible for reviewing Police Academy dismissals. Indeed, Appellant's concern is with the ECCPA dismissal and the academy's drug testing procedures, not with his termination from the County. Since Appellant's sole objection is to the drug testing procedures conducted by ECCPA, the appeal must be filed with the Police Training Commission. Consequently, Appellant's appeal is out of time.

Thus, Respondent urges this tribunal to conclude that Appellant's appeal is out of time, and therefore the County's Motion for Summary Decision must be granted.

I have carefully considered all the positions of the parties. PTC is authorized to approve academies that offer basic training courses, prescribe minimum courses of basic training, and issue certifications to trainees who satisfactorily complete a basic course. N.J.A.C. 13:1-2.1. Furthermore, the PTC is authorized to issue final decisions regarding the trainee's dismissal and whether the Academy followed proper drug screening procedures in accordance the Attorney General's Law Enforcement Drug Testing Policy and New Jersey Law Enforcement Drug Testing Manual. The doctrine of equitable estoppel is based on the principles of fairness and justice. Knorr v. Smeal, 178 N.J. 169, 178 (2003). The purpose of the doctrine is to prevent a party "from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct." Twp. of Middletown v. Simon, 193 N.J. 228, 250 (2008) (quoting Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493,

503-04 (1955)). The doctrine is "applied only in very compelling circumstances." Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000) and rarely invoked against a governmental entity because of countervailing policies of public interest and legislative intent. See Cnty. of Morris v. Fauver, 153 N.J. 80, 104 (1998). Equitable estoppel may only be invoked against a public entity to prevent manifest injustice. W.V. Pangborne & Co. v. N.J. Dep't of Transportation, 116 N.J. 543, 554 (1989); Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954). The general elements required to invoke an equitable estoppel defense require the party to "show that the alleged conduct was done, or representation made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment." Miller v. Miller, 97 N.J. 154, 163 (1984) (citations omitted).

I am persuaded more by the County's argument that Appellant received proper notice of his right to appeal his dismissal before PTC. Appellant has provided no compelling evidence to invoke the doctrine of equitable estoppel. However, Appellant may seek permission from the Commission to file a Notice of Appeal nunc pro tunc. Should PTC permit Frank to appeal nunc pro tunc his dismissal from the Academy, the Commission will issue the decision on whether the Academy complied with the drug testing procedures pursuant to N.J.A.C. 13:1-7.2 (a)(19)(i).

### Summary Decision

In an administrative proceeding, the administrative law judge (ALJ) must consider whether the pleadings are sufficient to allow a rational fact finder to conclude that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Zaza v. Marquess and Nell, Inc., 144 N.J. 34, 54 (1996); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). It is the movant's burden to exclude any reasonable doubt as to the existence of a genuine issue of material fact. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Where there are no material facts in dispute and the only issue before the court is a matter of law, summary decision may properly be entered. Ibid.

**CONCLUSIONS**

Based on the whole of the record, I **CONCLUDE** that Appellant was dismissed from Essex County Police Academy due to his inability to complete the mandated training requirements and a positive drug test result, which rendered him ineligible for certification by the Police Training Commission. Appellant appealed the dismissal only to the Department of Corrections. The proper forum for a trainee's appeal of his dismissal from the ECCPA is the Police Training Commission. Thus, given the circumstances presented here, Appellant may seek permission from the Commission to file a Notice of Appeal nunc pro tunc.

Therefore, I **CONCLUDE** no genuine issue of material fact exists regarding Appellant's dismissal.

**ORDER**

It is **ORDERED** that Appellant's Motion for Summary Decision is **DENIED** and his petition before Essex County Department of Corrections be **DISMISSED** without prejudice.

It is further **ORDERED** that Respondent's Motion for to Summary Decision is **GRANTED**.

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.

January 12, 2015  
DATE

Mumtaz Bari Brown  
MUMTAZ BARI-BROWN, ALJ

Date Received at Agency:

1-12-15

Date Mailed to Parties:

1-12-15

dr