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STATE OF NEW JERSEY

In the Matter of James Kielwasser, Township of Union	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2014-2541, 2014-2542, and 2014-2813	Requests for Reconsideration and Stay Request for Enforcement

ISSUED: FEB 09 2015 (DASV)

The Township of Union, represented by Robert J. Merryman, Esq., requests reconsideration and a stay of the attached Civil Service Commission (Commission) decision, rendered on February 26, 2014, which reversed the May 5, 2011 removal of James Kielwasser, an Animal Control Officer, and modified his October 20, 2011 removal to a 15 working day suspension. Additionally, Kielwasser, represented by Susan B. Fellman and Brian J. Manetta, Esqs.,[1] requests reconsideration of the Commission's decision to impose the 15 working day suspension and seeks enforcement of the Commission's order to reinstate him. Kielwasser also seeks resolution of a dispute concerning back pay and counsel fees arising from the decision.

By way of background, Kielwasser was served with two Final Notices of Disciplinary Action (FNDA) removing him from employment, effective May 5, 2011 and October 20, 2011, on various charges. The first FNDA asserted that he was convicted of six third degree criminal offenses relating to the possession of a controlled dangerous substance with the intent to distribute, which would negatively interfere with the performance of his duties. The second FNDA alleged that Kielwasser contacted Pellegrino Mazza, a Truck Driver with the Township of Union, and asked him if he would be interested in taking a Siberian Husky. Kielwasser then released the dog to Mazza without approval from John Ferraioli, the former Health Officer, and without completing any paperwork and verifying

[1] Fellman represents Kielwasser with regard to his May 5, 2011 removal, and Manetta represents him on his October 15, 2011 removal.

that the proper medical examinations were performed on the dog. Upon Kielwasser's appeals to the Commission, the matters were transmitted to the Office of Administrative Law (OAL) for a hearing where they were consolidated before an Administrative Law Judge (ALJ). As to the first removal, the ALJ dismissed the appointing authority's argument that Kielwasser could not serve as an Animal Control Officer because his criminal conviction would damage his credibility in any proceeding in which he is a witness. The ALJ indicated that it was not possible to ascertain Kielwasser's credibility in advance. Regarding the second removal, the ALJ found that since there were no policies prohibiting trial periods for the animals or specific procedures concerning the duties of an Animal Control Officer, the charges against Kielwasser could not be sustained.

Upon its *de novo* review, the Commission found no evidence that Kielwasser's criminal conviction, which occurred prior to his employment, prevented him from performing his duties. It stated that, while there was a possibility that the conviction *may* be used to impeach Kielwasser's credibility, it was a very remote possibility in the type of matters in which Kielwasser would testify in court. Therefore, the Commission dismissed the charges against Kielwasser with respect to his May 5, 2011 removal and reversed his removal. The Commission also awarded him counsel fees since there was a complete reversal of the charges. As to the October 20, 2011 removal, the Commission found that Kielwasser obtained authorization to release the dog, documented the same in the daily activity log which he forwarded to Ferraioli, and observed the compatibility of the dog at Mazza's house. However, Kielwasser failed to ensure that the dog was examined by a veterinarian, vaccinated, and licensed per the instructions of Marconi Gapas, the Assistant Health Officer at the time. Therefore, the Commission found that incompetency and failure to perform duties were evident in Kielwasser's inaction, regardless of whether the dog's release was on a trial basis or not. As to the penalty, the Commission determined that removal was too harsh a penalty for the second FNDA, given the nature of the offense and Kielwasser's lack of a prior disciplinary record in over nine years of service. The Commission therefore modified Kielwasser's second removal to a 15 working day suspension and granted him back pay, benefits and seniority for the period following his suspension. However, the Commission denied counsel fees with respect to the second removal since the penalty was only modified in that case.

In its requests, the appointing authority maintains that there were clear material errors in the Commission's decision regarding both removals, which warrant modification of the decision and/or remand to the OAL for further proceedings. Initially, it claims that Kielwasser "repeatedly lied" about the circumstances surrounding his arrest and involvement in "the drug distribution ring and possession of illegal anabolic steroids." It also argues that Kielwasser's drug conviction negatively impacts on his credibility as a witness in animal control and cruelty cases. The appointing authority notes that the one time that

Kielwasser was called as a witness, the prosecutor did not know about Kielwasser's prior conviction. Had the prosecutor known, he would have had to disclose this information during discovery. Pursuant to court rules, Kielwasser's prior conviction could have been used to impeach his credibility. Thus, the appointing authority submits that, to the extent that the Commission "did not understand" that Kielwasser could not have been impeached on that basis because the prosecutor was unaware of the conviction, the Commission's decision was based on a clear material error.

Moreover, the appointing authority argues that the Commission's findings are contradicted by the record. In particular, it states that the Commission found that Kielwasser was authorized to release the dog by Gapas. However, the ALJ and the Commission excluded evidence regarding the global positioning system (GPS) records of Kielwasser's animal control van. The appointing authority submits that the GPS records would show that Kielwasser was already travelling to Mazza's home to deliver the dog at the time of his cell phone call to Gapas. Thus, he did not obtain authorization to release the dog prior to the dog's removal from the shelter. Furthermore, the appointing authority maintains that the evidence that the Commission found credible which supported the authorization to release the dog was limited to the "self-serving testimony" of Kielwasser. In contrast, Gapas testified that he never authorized the release of the dog to Mazza on a trial basis or without the proper clearances and documentation pursuant to a State regulation. In addition, the appointing authority indicates that Ferraioli testified that dogs are not supposed to leave the shelter on a trial basis, as it was not "an accepted practice." The appointing authority also disputes the Commission's finding regarding Animal Control Officer Magda Margato, who the Commission noted had previously been involved in a trial period of a dog for one of the Board of Health members. The appointing authority contends that she testified only to her belief that the dog *may* have been on a trial period. She had no direct involvement in the release of the dog or what paperwork was completed. Therefore, the appointing authority maintains that the Commission's acceptance of "the vague practice" of trial periods was a material error of fact and warrants reconsideration of the matter. Accordingly, it requests that Kielwasser's removals be reinstated, or alternatively, the matter of his October 20, 2011 removal be remanded to the OAL for consideration of the GPS records.

Additionally, the appointing authority requests a stay of the Commission's decision pending its request for reconsideration. It contends that given the foregoing arguments, clear material errors have occurred. As such, it states that there is a "substantial" likelihood of success on the merits of its case. Further, it asserts that failure to grant a stay will cause irreparable harm, given that Kielwasser has been convicted of six counts involving the possession and distribution of a controlled dangerous substance. It also argues that the public interest will be harmed if a fully qualified Animal Control Officer is displaced to

allow for Kielwasser's reinstatement. The appointing authority claims that for the past two years, the animal shelter and animal control services have operated in an effective and efficient manner. When Kielwasser was an Animal Control Officer, the animal control services "were plague[d] with operational problems." In support of the foregoing, it submits the certification of Gapas, who is currently the Health Officer. Thus, the appointing authority maintains that the taxpayers will be harmed if Kielwasser is reinstated. However, Kielwasser's loss will only be monetary, and as such, can be remedied by back pay. Conversely, the appointing authority indicates that it would be unlikely that it and the taxpayers would be reimbursed if Kielwasser's removal is ultimately sustained.

Kielwasser responds to the appointing authority's petition and also requests enforcement of his reinstatement. Regarding the May 5, 2011 removal, Kielwasser states that there is more than a sufficient basis for the Commission's determination to reverse the removal. He emphasizes that the conviction of the six criminal counts, which resulted from a guilty plea, occurred prior to his application for employment with Union. Moreover, he authorized the appointing authority to conduct a background search and there is no claim that he ever misrepresented or failed to disclose his criminal record. Further, Kielwasser only testified once in court and the other Animal Control Officers had not been called to testify. Moreover, he contends that his credibility was not at issue when he testified since he did not testify as to his personal knowledge, but rather, his testimony was based on information as he was the only Animal Control Officer available at the time. Even if the prosecutor knew of his conviction, Kielwasser argues that there was no evidence that it would have been admitted into evidence and had a bearing on the case. Therefore, Kielwasser contends that there is no basis for the Commission to reconsider the reversal of his May 5, 2011 removal and he should be reinstated.

Regarding the request for reconsideration of the October 20, 2011 removal, Kielwasser responds that the appointing authority "rehashes" the same arguments previously made to the Commission in its exceptions to the ALJ's initial decision and has not demonstrated that a material error has occurred with regard to the GPS records. Kielwasser states that the Commission properly determined that the ALJ may limit the presentation of evidence. Even if the GPS records were admitted into evidence, Kielwasser emphasizes that the Commission found that the outcome would ultimately be the same since he received authorization to release the dog. Kielwasser sets forth the series of events that led to the approval and underscores the fact that he noted on the daily activity log that he "dropped off trial dog . . . supervised and all went well." He indicates that during the OAL hearing, the appointing authority's counsel conceded that the GPS records would not prove that Kielwasser "was here at this point." The appointing authority also does not argue that Kielwasser's call to Gapas came after he dropped off the dog to Mazza. Thus, Kielwasser maintains that the ALJ's exclusion of the GPS records and the Commission's affirmance of that action were correct.

Moreover, Kielwasser indicates that the Commission's conclusion with respect to the existence of trial periods was proper and it appropriately accepted the ALJ's credibility determination in that regard. He does not object to the appointing authority's statement that no document was entered into evidence that used the term trial period because no policies or procedures were actually in place. Thus, Kielwasser maintains that he could not have violated non-existing policies or procedures. In addition, although the appointing authority contends that Kielwasser did not complete any records prior to releasing the dog as required by a State regulation, he submits that this regulation merely requires that records be kept at the shelter but does not indicate who is responsible for such records. Kielwasser also indicates that Margato was in fact personally involved in a trial period when she was dispatched to retrieve the animal from the board member's home. Thus, Margato was personally aware that trial periods were allowed. Further, Kielwasser notes that Ferraioli did not testify that he had ever done anything to stop the practice of trial periods, although he testified that they were not supposed to engage in such a practice. Additionally, Kielwasser states that he was never informed that his actions were improper. Kielwasser argues that even if trial periods were not an accepted practice, that information is irrelevant since he obtained proper authorization to release the dog.

Additionally, Kielwasser requests reconsideration of the 15 working day suspension, asserting that Gapas did not instruct him to have the dog examined by a veterinarian, vaccinated, or licensed. Rather, Kielwasser claims that Gapas told him not to take the dog to the veterinarian because Gapas did not want the Health Department to incur any fees if Mazza did not want the dog. Kielwasser states that the ALJ found the foregoing as fact. Further, Gapas testified that dogs were not generally vaccinated in 2010 when they were released. Thus, Kielwasser maintains that the Commission's determination that he was guilty of incompetency and failure to perform duties was in effect a reversal of the ALJ's credibility determinations without a finding that they were arbitrary, capricious, unreasonable or unsupported by the evidence in the record. He notes that once he released the dog to Mazza, he no longer had a role in the process since Mazza was instructed to return to the Health Department to complete the forms. Kielwasser was not aware of what occurred thereafter although he testified that he may have contacted Mazza afterwards to see how the dog was doing and to remind Mazza of the instructions. Kielwasser emphasizes that he did not violate a regulation or a policy, and therefore, a clear material error occurred in the Commission's decision. Alternatively, Kielwasser submits that the 15 working day suspension is too harsh a penalty considering that the alleged infraction involved only paperwork or record keeping and he is a good employee with no prior disciplinary record.

As to the appointing authority's request for a stay, Kielwasser submits that it has not met the elements for a stay. He maintains that there is "absolutely no evidence" that his criminal conviction renders him unable to perform the duties of

an Animal Control Officer. In addition, he emphasizes that the Commission found that Gapas gave him authorization to release the dog to Mazza. Kielwasser also states that remanding the matter to the OAL to review the GPS records of the animal control van would be a "waste of the Commission and the [OAL's] time" since the information is irrelevant and would not change the outcome of the case. Moreover, he reiterates that the Commission's acceptance of the ALJ's credibility determination regarding trial periods was appropriate. Thus, contrary to the appointing authority's arguments, there is not a clear likelihood that it will succeed in its case. Further, Kielwasser contends that reinstating him with benefits "is the price [the appointing authority] has to pay for wrongfully terminating [him] and replacing him with another Animal Control Officer in the first place." Thus, there would not be any harm to the public interest if the appointing authority's request for stay is denied.

In response, the appointing authority opposes Kielwasser's request for reconsideration of the 15 working day suspension. It states that contrary to Kielwasser's assertions, his responsibilities included animal adoptions, which is evidenced by the records he kept and involved taking the dogs to the veterinarian for vaccination and neutering. Moreover, the appointing authority maintains that Kielwasser was the individual designated to enforce the licensing of the dogs in the Township. In this case, he "did absolutely nothing." It reiterates that Kielwasser was required to make certain that the required steps were taken with respect to the release of the Siberian Husky, but he failed to do so.

Regarding his back pay and the counsel fee award, Kielwasser submits that there are disputes as to the calculation. The appointing authority acknowledges the dispute and requests that the matter be remanded to the OAL to determine the proper amounts. With respect to the back pay award, it indicates that Kielwasser "has refused" to provide information regarding mitigation efforts during his period of separation. In that regard, the appointing authority states that Kielwasser has an ownership interest in General Sweets, Limited Liability Company (LLC), which was established in 2012 and owns a Rita's Italian Ice. However, he has not provided it with his tax returns or the profit or income he has received from the business. He only has presented his "salary" from Rita's Italian Ice. Moreover, the appointing authority asserts that there were at least 13 advertised positions for Animal Control Officer within a reasonable proximity to Kielwasser's home and he made no effort to apply for these positions.

In support of his back pay award, Kielwasser submits a certification and supporting documentation, including W-2 and 1099-G forms, regarding his income and receipt of $7,683 and $31,323 in unemployment benefits in 2011 and 2012, respectively. For 2013, Kielwasser was employed with Rita's Italian Ice and worked there and earned $25,600 until the end of October 2013 when the store closed for the year. He then applied for unemployment benefits and received $3,360 for 2013.

In 2014, he received $2,400 through the week ending January 25, 2014 "at which time [his] benefit balance was zero." As of June 13, 2014, he received a salary from Rita's Italian Ice in the total amount of $6,400. Thus, Kielwasser calculates that he is owed $17,448.12 for 2011 following his 15 working day suspension and after deduction of unemployment benefits ($7,683). For 2012, he was unemployed, and as noted above, received $31,323 in unemployment benefits. Therefore, Kielwasser states that, considering across the board increases, he believes that his back pay for 2012 should be $14,299 ($45,552 gross wages less $31,323 in unemployment). For 2013, Kielwasser contends that he is owed $17,503.04, which is the difference between his income ($46.463.04) as an Animal Control Officer and salary from Rita's Italian Ice ($25,600) and his unemployment benefits ($3,360). In addition, as of June 13, 2014, he indicates that he is owed $12,713.76 in back pay after the deduction of his salary from Rita's Italian Ice ($6,400) and his unemployment benefits ($2,400). Accordingly, Kielwasser's calculation of his back pay award thus far totals $61,963.92.

In addition, although the appointing authority claims that he has an ownership interest in General Sweets LLC or Rita's Italian Ice, Kielwasser certifies that the owner is his mother, Antoinette Kielwasser. In this regard, he submits the "Consent to Transfer of Interest in Rita's Franchise Agreement," which identifies General Sweets, LLC and Antoinette Kielwasser as the "transferee" and Antoinette Kielwasser as a "member," with 100% ownership being transferred to the "transferee." In addition, Kielwasser presents documents, which purport to be exhibits to the Operating Agreement of General Sweets, LLC that are signed by his mother asserting her 100% ownership in the company and the receipt of 100% of the profits. There is also a notice from the Internal Revenue Service referencing that Antoinette Kielwasser is the sole member of the company. Moreover, Kielwasser indicates that the appointing authority requested that he produce his tax returns. However, he contends that he should not be compelled to produce private records based on the appointing authority's false assertion that he has an ownership interest in the business. He notes that he would submit his tax returns to the Commission for an *in camera* review if requested.

Furthermore, Kielwasser certifies that throughout his separation, he actively attempted to find employment and looked for positions on-line. He notes that he met the conditions for receipt of unemployment benefits. He also disputes that he did not attempt to obtain a position as an Animal Control Officer and submits a list of 46 employers that he contacted, which include the Jersey Animal Coalition. Bergen County Animal Control, New Jersey Society for the Prevention of Cruelty to Animals, Edison Animal Control, Associated Humane Society, and Stafford Township Animal Control. He states that he contacted some of the prospective employers on the list on more than one occasion but does not recall the specific dates of contact. Kielwasser notes that it would have been highly unlikely that any employer would have hired him given the pendency of the removal charges against

him. There was also an attempt to revoke his Animal Control Officer and Animal Cruelty Investigator certifications, which occurred between July 2012 to May 2013. In that regard, he states that he had to appear before the State Board of Health, which ultimately determined that there was insufficient evidence to support the request for revocations.

For counsel fees, Kielwasser presents the affidavit of Susan Fellman, Esq., in support of reasonable counsel fees and an invoice for legal services rendered from April 21, 2011 through June 16, 2014. Fellman, who is a partner in Breuninger & Fellman, states that Kielwasser initially retained her law firm at the rate of $300 per hour for legal services rendered. When Kielwasser appealed the May 5, 2011 removal to the Commission, he entered into a new retainer agreement whereby he would compensate Fellman's firm at a reduced rate of $200 per hour. Fellman notes that Kielwasser was also charged $15 per hour for services rendered by Fellman's law clerk. Regarding his departmental-level motion to dismiss, Fellman maintains that the motion "was as much a part of seeking the [Board of Health's] decision to remove Mr. Kielwasser from his position as was requesting a departmental hearing." Moreover, Fellman contends that the initial rate of $300 per hour, which were for services rendered from April 21, 2011 through October 31, 2011 (the date of receipt of the hearing officer decision), is appropriate given that she has been practicing law for 30 years and has extensive experience in litigation, including representing plaintiffs in employment cases and in departmental hearings. She indicates that the $300 per hour rate is less that her firm's usual hourly rate in employment cases. Moreover, Fellman claims that the charges brought against Kielwasser were "unique and very fact sensitive." The legal preparation involved, among other things, gaining understanding of Kielwasser's position, his employment history, how animal control services were rendered, the review of applicable statutes and municipal ordinances, and the review of numerous documents.

In addition, Fellman states that the appointing authority should be required to pay for services relating to Kielwasser's reinstatement and the requests for reconsideration and stay pursuant to *N.J.A.C.* 4A:2-1.5(b) because of the appointing authority's unreasonable failure to carry out the Commission's order, as evidenced by "delay tactics" and "baseless" requests. In that regard, Fellman claims that the appointing authority delayed in responding to her communications with respect to Kielwasser's reinstatement and further delayed by claiming that the issue was to be discussed at the next Board of Health meeting. Eventually, the appointing authority informed Fellman that Kielwasser should not report to work since it was seeking reconsideration and a stay of the Commission's decision. In addition, Fellman indicates that on or about May 30, 2014, Kielwasser became aware of the examination announcement for Animal Control Officer (M0412S), Township of Union. She states that the announcement "is of considerable concern" given that the appointing authority was ordered to immediately reinstate Kielwasser and

there are only two budgeted Animal Control Officer positions and two employees are already serving in the positions.[2]

Fellman's invoice for legal services rendered from April 21, 2011 through June 16, 2014 amounts to $40,020 for 192.5 hours, which includes 12 hours of work by a law clerk at a rate of $15 per hour for a total of $180; 37.4 hours of work by Fellman at a rate of $300 per hour for a total of $11,220; and 143.1 hours of work by Fellman at a rate of $200 per hour for a total of $28,620. Additionally, there are entries for .2, 1.7, and .45 hours on April 21, 2011, May 2, 2011, and May 3, 2011, respectively, regarding reviewing criminal charges, emails, and a settlement agreement. However, the Preliminary Notice of Disciplinary Action (PNDA) with respect to the May 5, 2011 removal was personally served on Kielwasser on May 5, 2011. The PNDA had immediately suspended Kielwasser on that date. Further, with the exception of entries on April 29, 2014 and May 27, 2014 for a total of .4 hours of work which appear to be related to the enforcement of the counsel fee award, the entries dated March 21, 2014 through June 16, 2014 involved 38 hours of services relating to Kielwasser's reinstatement and back pay and the requests for reconsideration and stay.[3]

In response, the appointing authority indicates that Kielwasser would have earned the following during his separation: $25,131.12 in 2011 (after deducting $2,564.40 for his 15 working day suspension); $45,449.72 for 2012; $48,244.56 for 2013; and $49,221.74 for 2014.[4] It does not dispute the income and unemployment benefits that Kielwasser has disclosed. However, it reiterates that Kielwasser has not provided his income from his ownership interest as one the principals of General Sweets, LLC. In support, the appointing authority presents a status report, dated April 28, 2014, for General Sweets, LLC from the New Jersey Business Gateway Business Information and Records Service, which lists Kielwasser and his mother as principals of the company.

Moreover, the appointing authority maintains that Kielwasser "made no effort to find suitable employment that was readily available during the period of his unemployment." It lists 16 Animal Control Officer positions which were

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[2] Mariama Teixeira and Joseph Eckernrode were appointed provisionally pending open competitive examination procedures as Animal Control Officers, effective January 28, 2013 and June 23, 2013, respectively. As a result of their provisional appointments, the examination for Animal Control Officer (M0412S), Township of Union, was announced with a closing date of June 13, 2014. The resulting eligible list promulgated with five names on October 2, 2014 and expires on October 1, 2017. All eligibles are ranked number one, and Teixeira and Eckernrode appear on the eligible list. Additionally, the five eligibles were certified on October 7, 2014. The certification has a disposition due date of January 7, 2015 and is still pending.

[3] Fellman's entry on March 17, 2014 was for work relating to the receipt and review of the Commission's written decision, which was issued on March 13, 2014.

[4] Although Kielwasser has a different calculation for his gross wages, which is slightly more in 2012 and less in 2013 than the appointing authority's figures, he does not dispute the appointing authority's representation of his gross wages.

advertised during Kielwasser's separation and the average salaries of such positions. Regarding Kielwasser's list of employers, the appointing authority points out that the list was provided by Kielwasser in response to its request for mitigation information and he did not report the dates when he made the inquiries nor did he supply it with copies of applications, advertisements, or communications related to any of the positions. The appointing authority claims that Kielwasser also did not search for positions posted on the website of the New Jersey Certified Animal Control Officers Association. Thus, it requests that Kielwasser's claim for back pay be denied, or at least, reduced to the extent of the available positions to which he did not apply.

As to counsel fees, the appointing authority objects to the hourly rate of $300 charged by Fellman, as the rate exceeds the amount set by regulation. The appointing authority also disagrees with the billing of 6.6 hours for services rendered for a motion to dismiss brought by Kielwasser during the departmental proceedings as unnecessary and unreasonable to the defense of the charges against him. The motion was unsuccessful. Moreover, the appointing authority contends that 20 hours of legal services should be deducted from the counsel fee award, since they were billed after the issuance of the Commission's decision and were not awarded by the Commission.

CONCLUSION

Initially, the appointing authority requests that the matter of Kielwasser's October 20, 2011 removal be remanded to the OAL for further proceedings. Additionally, it requests a hearing at the OAL to determine the proper amounts of Kielwasser's back pay and counsel fee award. However, reconsideration requests and disputes concerning back pay and counsel fees are generally treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). As set forth below, no material issue of disputed fact has been presented which would require additional hearings at the OAL. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

REQUESTS FOR RECONSIDERATION, STAY, AND ENFORCEMENT

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. A review of the record in the instant matter reveals that reconsideration is not justified.

The appointing authority essentially presents the same arguments as its exceptions to the ALJ's initial decision. It claims that Kielwasser "repeatedly" lied about the circumstances of his criminal conviction for drug distribution, which would be admissible and undermine his credibility in a case where he is called to testify as the Animal Control Officer. The appointing authority also asserts that the prosecutor did not know of the conviction at the time Kielwasser was called to testify. However, as indicated in the prior decision, the criminal conviction occurred before Kielwasser's employment and in no way did it prevent him from performing the duties of his position. Further, it is uncertain whether Kielwasser would have been impeached at the prior trial based on his conviction, regardless of the fact that the prosecutor was unaware of the conviction. Thus, the Commission is not persuaded by the appointing authority's argument in that regard. Therefore, the Commission does not find that a material error occurred in its prior decision or that new evidence exists that would change the outcome of Kielwasser's May 5, 2011 removal. Accordingly, the appointing authority's request for reconsideration of that removal is denied.

Regarding the October 20, 2011 removal, the appointing authority reiterates its arguments with respect to the GPS records, which it argues would show that Kielwasser was already travelling to Mazza's home to deliver the dog at the time of his cell phone call to Gapas. Furthermore, it maintains that Gapas never authorized the release of the dog and disputes the Commission's reliance on the testimony of Margato. However, the appointing authority once again presents arguments that the Commission already reviewed and found to be unpersuasive. As indicated in its prior decision, the credible evidence in the record demonstrates that Kielwasser did in fact obtain authorization from Gapas to release the dog to Mazza, documented the same in the daily activity log which he forwarded to Ferraioli, and observed the compatibility of the dog at Mazza's house. Thus, the GPS records would not provide information that would change the Commission's determination. Further, although the appointing authority attempts to claim that Margato did not have direct involvement in the release of a dog to a Board of Health member on a trial basis, it does not dispute the fact that she picked up the dog or negate her awareness that trial periods occurred and were not specifically disallowed by the appointing authority. Thus, the request for reconsideration of that matter is also denied.

Likewise, Kielwasser has not presented a sufficient basis to reconsider the modified penalty of a 15 working day suspension. Kielwasser contends that once he released the dog to Mazza, he no longer had a role in the process since it was incumbent on Mazza to return to the Health Department to complete the forms. The Commission disagrees. Kielwasser had testified that Gapas approved Mazza's request on the condition that Mazza complete an adoption form, pay the adoption fee, and "have the shots and everything done." Kielwasser failed to ensure that

Gapas' conditions were met. Therefore, the Commission properly found that Kielwasser was guilty of incompetency and failure to perform duties. As such, the Commission rejects Kielwasser's argument that the Commission had reversed the ALJ's credibility determinations without appropriate findings or evidentiary review. Additionally, contrary to Kielwasser's argument, the Commission does not find that a 15 working day suspension is too harsh a penalty. The Commission considered Kielwasser's lack of a prior disciplinary record in over nine years of service and the nature of the charges, particularly that the charges related to the proper processing of a dog prior to its release. Further, it is noted that the dog was involved in a biting incident and was eventually euthanized. Accordingly, a suspension of 15 working days is clearly reasonable under the circumstances.

Therefore, because the Commission has denied the appointing authority's request for reconsideration to reverse Kielwasser's May 5, 2011 removal and modify his October 20, 2011 removal to a 15 working day suspension, its request for a stay of the determinations has been rendered moot and Kielwasser's request for enforcement is granted. Consequently, the appointing authority must take immediate steps to effectuate compliance with the prior decision to reinstate Kielwasser to his former position with mitigated back pay, benefits and seniority following his 15 working day suspension and to compensate him with counsel fees in accordance with this decision as follows. The Commission notes that the appointing authority need not displace the current employees serving as Animal Control Officers if there is an additional position for Kielwasser.

BACK PAY

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or a suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make reasonable efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary

action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4v.

Kielwasser was first removed effective May 5, 2011 and was reinstated by the Commission following a 15 working day suspension based on the circumstances of the October 20, 2011 removal and awarded mitigated back pay. A review of the record indicates that the issues presented by the appointing authority do not affect his back pay award. Therefore, as set forth below, Kielwasser is to receive mitigated back pay following the 15 working day suspension to the date of his reinstatement.

Initially, the appointing authority presents Kielwasser's gross salary amounts during the period of his separation. Although Kielwasser's calculation of his salary is slightly different, he does not dispute the amounts presented by the appointing authority. The appointing authority is in a better position as the employer to determine the amount of compensation. As such, the appointing authority's salary figures should be utilized. Further, the appointing authority has not objected to the figures Kielwasser has already provided as his income and unemployment benefits. Thus, these amounts must be deducted from Kielwasser's back pay award. However, the appointing authority submits that Kielwasser is a principal of General Sweets, LLC, which may have earned him a profit that he has failed to disclose. Although the corporate filing lists Kielwasser as a principal, Kielwasser has certified and provided documentation that his mother owns a 100% interest in the company, including receipt of 100% of the profit. Therefore, Kielwasser need not disclose his tax returns, since the Commission is satisfied that Kielwasser has supplied sufficient information, such as his W-2 form which documents his income during his separation, in order for the appointing authority to calculate his back pay award.

Moreover, Kielwasser has shown that he made reasonable efforts to find suitable employment during the period of his separation. Although the appointing authority objects that Kielwasser merely provided it with a list of contacts and did not provide supporting documentation, Kielwasser certifies that he actively attempted to find employment, which included looking for positions on-line and for positions as an Animal Control Officer. It is emphasized that "reasonable efforts" is defined broadly. Furthermore, Kielwasser received unemployment benefits. There is a presumption that the receipt of unemployment benefits evidences that an employee sufficiently mitigated during the period of separation, since searching for employment is a condition to receiving such benefits. *N.J.S.A.* 43:21-4(c)1 states

that "an unemployed individual shall be eligible to receive [unemployment] benefits with respect to any week only if . . . The individual is able to work, and is available for work, and has demonstrated to be actively seeking work." However, this presumption may be rebutted where the appellant did not make a diligent effort to seek employment. *In the Matter of Donald Hicks*, Docket No. A-3568-03T5 (App. Div. September 6, 2005); *See also, In the Matter of Alphonso Hunt* (MSB, decided September 21, 2005); *In the Matter of Philip Martone* (MSB, decided February 9, 2005). In the present case, Kielwasser was employed during a period of his separation and he also contacted 46 employers for a position, including positions as an Animal Control Officer. This is more than sufficient to consider him to have made a diligent effort during his separation. Therefore, the appointing authority has not persuasively challenged the sufficiency of the Kielwasser's mitigation efforts and must pay him **$64,175.47** in back pay for the period 15 working days after his May 5, 2011 removal through June 13, 2014, as follows:

2011 Gross Salary	$25,131.12
Less Income	0
Less Unemployment Benefits	$7,683.00
	$17,448.12
2012 Gross Salary	$45,449.72
Less Income	0
Less Unemployment Benefits	$31,323.00
	$14,126.72
2013 Gross Salary	$48,244.56
Less Income	$25,600.00
Less Unemployment Benefits	$3,360.00
	$19,284.56
2014 Pro-Rated Salary (through June 13, 2014)	$22,116.07
Less Income(through June 13, 2014)	$6,400.00
Less Unemployment Benefits(through June 13, 2014)	$2,400.00
	$13,316.07
Back Pay Award through June 13, 2014	**$64,175.47**

It is it emphasized that Kielwasser's back pay award for 2014 was pro-rated through June 13, 2014. Any additional income or unemployment benefits he receives after that date and prior to reinstatement must be deducted from his pro-

rated salary as an Animal Control Officer for June 14, 2014 through his reinstatement.[5]

COUNSEL FEES

N.J.S.A. 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) indicates that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appeal of major disciplinary action before the Commission.

N.J.A.C. 4A:2-2.12(c) provides fee ranges for different categories of attorneys, based on the attorney's experience. Specifically, it provides as follows: an associate in a law firm is to be awarded an hourly rate between $100 and $150; a partner in a law firm with fewer than 15 years of experience in the practice of law is to be awarded an hourly rate between $150 and $175; and a partner in a law firm with 15 or more years of experience practicing law, or notwithstanding the number of years of experience, with a practice concentrated in employment or labor law, is to be awarded an hourly rate between $175 and $200. *N.J.A.C.* 4A:2-2.12(d) states that, if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth above may be adjusted. *N.J.A.C.* 4A:2-2.12(e) indicates that the recommended fee ranges may be adjusted, based on the circumstances of a particular matter, taking into account the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to performing the legal service properly, the fee customarily charged in the locality for similar legal services, the nature and length of the professional relationship with the employee, and the experience, reputation and ability of the attorney performing the services.

In the instant matter, Kielwasser requests $40,020 for 192.5 hours of legal services rendered by Fellman's law firm with respect to his May 5, 2011 removal. The appointing authority challenges items in the invoice, namely, services rendered by Fellman in connection with a departmental-level motion to dismiss and work billed after the issuance of the Commission's decision. Moreover, it objects to the hourly rate of $300 initially charged by Fellman, which she contends is appropriate given her experience and the nature of the case.

At the outset, the Commission notes that *N.J.A.C.* 4A:2-2.12 contains no provision regarding compensation for law clerks. It is settled that work performed

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[5] It is noted that Kielwasser was no longer obligated to mitigate his damages after the Commission rendered its decision on February 26, 2014, since he was reinstated after a 15 working day suspension. However, all income and unemployment benefits *actually received* prior to reinstatement must be deducted.

by paralegals is not reimbursable under Civil Service rules. *See* 33 *N.J.R.* 3895(a); *In the Matter of Trust of Brown*, 213 *N.J. Super.* 489, 493-494 (Law Div. 1986). Based on the items attributed to a law clerk, the Commission finds that the duties performed by the law clerk are akin to those of a paralegal. As such, they are not compensable. *See also In the Matter of Joseph Renna* (MSB, decided February 23, 2005). Moreover, as set forth in *N.J.A.C.* 4A:2-2.12(a), counsel fees may be awarded for services in major disciplinary proceedings at the departmental level. Service of the PNDA was the commencement of disciplinary proceedings in Kielwasser's case. Therefore, the entries in the invoice on April 21, 2011, May 2, 2011, and May 3, 2011 for .2, 1.7, and .45 hours , respectively, are not compensable.

Regarding the appointing authority's objections, *N.J.A.C.* 4A:2-2.12(a) does not exclude motions filed by counsel during the departmental level, so long as the motions are related to the disciplinary proceedings. In this case, it is clear that the motion to dismiss was an attempt to resolve the major disciplinary proceedings at the departmental level. Therefore, work connected with the motion to dismiss is compensable.[6] However, the Commission is in agreement with the appointing authority that certain work billed after the issuance of the Commission's decision is not compensable. Specifically, 38 hours of legal services rendered from March 21, 2014 through June 16, 2014 relating to Kielwasser's reinstatement and back pay and the requests for reconsideration and stay are not compensable by the Commission under the regulatory scheme. In this regard, *N.J.A.C.* 4A:2-2.12(a) is not applicable since counsel fees were not incurred in major disciplinary proceedings before the Commission or at the departmental level. Moreover, *N.J.A.C.* 4A:2-1.5(b) provides that counsel fees may be awarded where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation. In the instant matter, the Commission does not find that the appointing authority unduly delayed in implementing the prior orders of reinstatement and payment of back pay and counsel fees. Although it has not reinstated Kielwasser, the record indicates that a timely request for reconsideration and a stay was received. Under these circumstances, the appointing authority's action cannot be considered as "delay tactics," as it entitled to pursue such matters. The record also fails to establish that the appointing authority's actions were based on any improper motivation. Rather, the appointing authority presents what it believes to be material errors and new information which, while unpersuasive, were

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[6] It is noted, however, that if Kielwasser were successful in his motion to dismiss, counsel fees would not be awarded by the Commission. *N.J.A.C.* 4A:2-2.12(f) allows for, *inter alia*, an award of counsel fees for representation at the departmental level for appeals of major disciplinary actions which are presented to the Commission. *See also, Rachel Ann Burris v. Township of West Orange*, 338 *N.J. Super.* 493 (App. Div. 2001). Thus, counsel fees incurred at the departmental level are properly denied if the disciplinary charges are dismissed during the departmental proceedings.

clearly not evidence of bad faith or invidious motivation. Further, there were legitimate disputes regarding back pay and counsel fees. Accordingly, the Commission finds no sufficient cause in the record to award counsel fees for the foregoing matters. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001). However, as noted above, the entries on April 29, 2014 and May 27, 2014 for a total of .4 hours appear to be related to the enforcement of the counsel fee award. In that regard, an appellant is entitled to counsel fees regarding an enforcement request for his or her counsel fee award since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application. *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education*, 269 *N.J. Super.* 394, 411 (Ch. Div. 1993)].

With respect to the rate of payment, Fellman should clearly be compensated at an hourly rate of $200 pursuant to *N.J.A.C.* 4A:2-2.12(c). Fellman is a partner in her law firm and has more than 15 years of experience. She also indicates that she has extensive experience in representing employees in departmental hearings. However, although Kielwasser initially retained Fellman's law firm at an hourly rate of $300, there is not sufficient justification to deviate from the rate of $200 per hour set by regulation. Given that numerous removal cases have come before the Commission involving criminal convictions and the effect of that conviction on an employee's job responsibilities, the Commission cannot find that Kielwasser's case involved novel, difficult, or "unique" issues of law. Moreover, many, if not most, disciplinary cases are "very fact sensitive" and this characterization does not warrant compensating Fellman at a higher amount than articulated in the regulatory schedule. Therefore, based on the appropriate exclusions as set forth above, Fellman is entitled to **$28,030** in counsel fees.

Total Hours Billed	192.50
Less Law Clerk Hours	12
Less Work Prior to May 5, 2011	2.35
Less Non-compensable Work from March 21, 2014 through June 16, 2014	38
Total Compensable Hours	140.15
At $200 per hour	**$28,030**

ORDER

Therefore, it is ordered that the requests for reconsideration of the appointing authority and James Kielwasser be denied. It is further ordered that the appointing authority's request for a stay of the Commission's prior decision be dismissed as moot and Kielwasser's request for enforcement of his reinstatement be

granted. Additionally, it is ordered that the appointing authority pay Kielwasser mitigated back pay in accordance with this decision and counsel fees in the amount of **$28,030.**

In the event that the appointing authority fails to make a good faith effort to fully comply with this decision within 30 days of receipt of this decision, the Commission orders that interest on Kielwasser's back pay award be assessed pursuant to *R.* 4:42-11 and a fine be assessed against the appointing authority in the amount of $100 per day beginning on the 31st day from receipt of this decision, continuing for each day of continued violation up to a maximum of $10,000.

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 4TH DAY OF FEBRUARY, 2015

Richard E. Williams

Richard E. Williams
Member
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
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Attachment

c: Jackie Carter
Robert J. Merryman, Esq.
James Kielwasser
Susan B. Fellman, Esq.
Brian J. Manetta, Esq.
Kenneth Connolly
Joseph Gambino
Beth Wood

A-4

STATE OF NEW JERSEY

In the Matter of James Kielwasser, Township of Union	:	DECISION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2012-1465 and 2012-2890	:	
OAL Docket Nos. CSV 14314-11 and CSV 4800-12 (consolidated)	:	

ISSUED: MAR 13 2014 (DASV)

The appeals of James Kielwasser, an Animal Control Officer with the Township of Union, of his removals, effective May 5, 2011 and October 20, 2011, on charges, were heard by Administrative Law Judge Imre Karaszegi (ALJ), who rendered his initial decision on December 16, 2013. Exceptions were filed on behalf of the appointing authority, and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on February 26, 2014, accepted and adopted the Findings of Fact as contained in the initial decision and the recommendation of the ALJ to reverse the appellant's removal effective May 5, 2011. However, the Commission modified the appellant's removal, effective October 20, 2011, to a 15 working day suspension.

DISCUSSION

The appellant was served with a Final Notice of Disciplinary Action (FNDA), removing him from employment, effective May 5, 2011, on charges of inability to perform duties and other sufficient cause. Specifically, the appointing authority asserted that the appellant was convicted of six third degree criminal offenses relating to the possession of a controlled dangerous substance with the intent to distribute. The appointing authority stated that "[k]nowledge of and the required disclosure of [the appellant's] criminal record will significantly and negatively

interfere with his ability to perform the duties of his position." Additionally, the appellant was served with a second FNDA, removing him from employment, effective October 20, 2011, on charges of incompetency, inefficiency, or failure to perform duties and conduct unbecoming a public employee. Specifically, the appointing authority asserted that the appellant contacted Pellegrino Mazza, a Truck Driver with the Township of Union, and asked him if he would be interested in taking a Siberian Husky. The appellant then released the dog to Mazza without approval from the Health Officer or designee and "[w]ithout completing any paperwork; without verifying that the dog was examined by a veterinarian; without verifying compatability; without verifying that the dog was vaccinated; [and] without verifying that the dog was licensed." The husky was a stray which was picked up on or about September 21, 2010 by Animal Control Officer Magda Margato, who noted on the intake form that the dog was "not trustworthy." Further, it was alleged that the appellant's conduct was completely contrary to the normal procedures followed for the adoption of animals from the shelter and created an unnecessary risk to the public. The dog was involved in a biting incident and was eventually euthanized. Upon the appellant's appeals to the Commission, the matters were transmitted to the Office of Administrative Law (OAL) and consolidated for a hearing as a contested case.

Regarding the May 5, 2011 removal, the ALJ set forth that in 1999, the appellant was charged with six counts of possession with intent to distribute drugs. He pled guilty and was sentenced to 180 days in jail. He served a lesser sentence of approximately two and one-half months, was placed on probation for three years, and lost his driver's license for six months. Thereafter, on April 23, 2001, the appellant completed an application for employment for a position with the Township of Union. The appellant authorized the appointing authority to conduct a background check. The appellant was then appointed as a Laborer from 2002 through 2004 and as an Engineering Aide from 2004 to 2005. In early 2007, the appellant received an appointment as an Animal Control Officer.[1] He had obtained the necessary certifications for the position. The ALJ noted that the appellant did not have a prior disciplinary history.

John Ferraioli, a retired Health Officer with the Township of Union, testified that an individual would not receive an Animal Control Officer certification if he or she were found guilty of animal cruelty. Further, Ferraioli noted that the issue concerned the appellant's credibility and his testimony at a possible trial rather than his past drug conviction. Municipal prosecutors also testified that the appellant's criminal conviction would have to be disclosed if he were called as a witness. However, the appellant indicated that "ninety-nine percent" of the time, a

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[1] Personnel records indicate that the appellant served in the following titles: Laborer 1 from February 2002 to August 2004 and Inventory Control Clerk from September 2004 to February 2007. He was appointed as an Animal Control Officer effective February 5, 2007.

fine would be paid in animal control cases as opposed to having a trial. The ALJ found that the appellant had not been called to testify as an Animal Control Officer based on his personal knowledge.

Regarding the appellant's October 20, 2011 removal, the ALJ set forth the testimony of Margato, who stated that she wrote that the dog was "not trustworthy" because the dog was fearful and fearful dogs may bite. However, she indicated that the dog was not vicious or aggressive. Margato recalled that one day Mazza had come to the shelter and was playing with the dog. Mazza repeatedly asked the appellant for the dog, as he had a similar one at home. According to Margato, the appellant kept saying, "No." Mazza insisted that the appellant call his supervisor and request whether Mazza can "have a trial period" with the dog. Margato indicated that the appellant informed Mazza that he would call Marconi Gapas, the Assistant Health Officer at the time,[2] who was responsible for the shelter's supervision. The ALJ stated that Margato recalled that the appellant "took out his cell phone, stepped away and spoke to someone on his cell phone for approximately four or five minutes." Moreover, Margato testified that she was not aware that trial periods were "specifically disallowed" by the appointing authority. She had previously been involved in a trial period of a dog for one of the Board of Health members. In addition, the ALJ set forth the testimony of Mazza, who maintained that the dog was "nasty," vicious, and wanted "to bite" when he saw the dog at the shelter. He also claimed that the appellant did not tell him that he needed to pay fees. However, Mazza knew that the dog needed shots and a license. Nevertheless, Mazza did not obtain the license nor vaccinate the dog. Mazza indicated that he had the dog for nine months and the dog bit a man's hand. He returned the dog to the shelter after the incident. Furthermore, the ALJ set forth the testimony of Gapas, who testified that he was not aware of trial periods. Had he permitted the dog to leave the shelter on a trial period, he would have gotten into trouble. Gapas confirmed that he spoke with the appellant about the dog and reported that he advised the appellant to make arrangements to conduct a disposition and compatibility assessment. Gapas and Ferraioli explained that for each adoption, an adoption application, an intake form, and a release form must be completed. Ferraioli indicated that only he and Gapas could approve adoptions. He also stated that there were no Township policies and procedures governing Animal Control Officers.

In his testimony, the appellant explained that the shelter attendant was responsible for preparing and filing the paperwork for the adoption. However, if no shelter attendant was available, an Animal Control Officer would complete the intake form. The appellant recalled that Mazza liked huskies, and he informed Mazza about the dog "three or four" days after its arrival. Mazza came to the shelter and repeatedly asked the appellant if he could bring the dog home. The

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[2] Gapas was appointed as the Health Officer effective October 20, 2012.

appellant replied that he could not give Mazza the dog. However, the appellant eventually called Gapas. The appellant testified that Gapas approved the request and told him to have Mazza complete an adoption form, pay the adoption fee, and "have the shots and everything done." The ALJ indicated that the appellant conveyed to Mazza that his request was approved on the condition that he report to Town Hall to "fill out the adoption form, fill out the correct paperwork and pay the adoption fee and all the medical and everything." The appellant then brought the dog to Mazza's house on October 1, 2010 and observed it playing with Mazza's other dog. He remained at Mazza's house for approximately 20 to 30 minutes. The appellant recorded his actions in the daily activity log, noting that he "Dropped off the Trial dog" to Mazza's house and he supervised the event which "all went well." The appellant further indicated that he handed the log to Ferraioli at the end of the day. He was not told that he did anything improper.

Based on the foregoing, the ALJ found the testimony of the appellant, Margato, and Ferraioli to be credible. The appellant's testimony was "straightforward, consistent, and clear" and was corroborated by Margato. Moreover, the ALJ emphasized that Ferraioli did not deny that animals could be released on a trial basis. On the contrary, the ALJ considered Mazza's testimony to be incredible and self-serving. The ALJ stressed that although Mazza insisted that the dog was vicious, the appellant and Margato witnessed him playing with the dog. Further, the ALJ stated that Mazza kept the supposed vicious dog for approximately nine months and only returned the dog when "he thought he could be held financially liable" due to the dog bite incident. In addition, the ALJ found Gapas' testimony "often vague and inconsistent." Gapas denied the existence of trial periods, while the appellant, Margato, and Ferraioli acknowledged that they occurred.

As to the charges relating to the appellant's May 5, 2011 removal, the ALJ determined that it was not possible to ascertain in advance the credibility of the appellant in cases in which he is called to testify as a witness. The ALJ analyzed *N.J.R.E.* 609 and 404(b) in conjunction with *N.J.A.C.* 1:1-15.1 and found that the admissibility of a criminal conviction was determined by a judge on a case-by-case basis. Thus, the ALJ dismissed the appointing authority's argument that the appellant could not serve as an Animal Control Officer because his criminal conviction would damage his credibility in any proceeding in which he is a witness. Accordingly, the ALJ concluded that the appointing authority did not meet its burden of proving the charges of inability to perform duties and other sufficient cause.

As to the appellant's October 20, 2011 removal, the ALJ found that since there were no policies prohibiting trial periods or specific procedures concerning the duties of an Animal Control Officer, the charges of incompetency, inefficiency, or failure to perform duties and conduct unbecoming a public employee could not "be

sustained, much less substantiated." The ALJ indicated that the appellant acted upon the approval of Gapas to provide Mazza with the dog on a trial basis. He memorialized his actions in the daily activity log, which he submitted to Ferraioli, and there was no subsequent adverse action against him by his supervisors. Additionally, Mazza's assertion that the dog was vicious was not sustained. The ALJ noted that the appointing authority also failed to prove that the appellant violated an implicit standard of good behavior even in the absence of any policy or procedure. Therefore, the ALJ recommended dismissal of all of the charges against the appellant and the reversal of his two removals. The ALJ also awarded the appellant mitigated back pay, benefits, and reasonable counsel fees.

In its exceptions, the appointing authority maintains that the ALJ erred in not permitting it to present relevant evidence obtained from the global positioning system (GPS) regarding the appellant's animal control van. It contends that the GPS records completely undermine the appellant's version of events and will show that the appellant was already travelling to Mazza's home to deliver the dog at the time of his cell phone call to Gapas. In other words, the appellant did not obtain authorization to release the dog prior to the dog's removal from the shelter. The appointing authority indicates that the ALJ deemed this evidence as irrelevant. Therefore, the appointing authority asserts that this error warrants the reversal of the ALJ's determination or, at the very least, the remand of the matter to the OAL to allow the "highly probative and competent evidence" to be admitted and considered. Moreover, the appointing authority argues that the ALJ "ignored and/or excused" the appellant's alleged violations of State regulations and the Board of Health policies with respect to the release of the dog from the shelter. In this regard, it emphasizes that the appellant did not ensure that the following items were completed: documentation regarding the disposition of the dog after it was released from the shelter; a veterinarian health assessment; licensure of the dog; vaccination of the dog; and the dog being spayed or neutered. The appellant also did not sign the release form and admitted delivering the dog in the Animal Control Officer van, which is contrary to normal procedures.

Furthermore, the appointing authority takes exception to the ALJ's credibility findings. It outlines what it declares to be numerous misstatements made by the appellant in his testimony which the ALJ allegedly ignored. Additionally, the appointing authority contends that the ALJ erred in accepting the "unauthorized and unrecognized practice" of releasing animals from the shelter on a trial basis without completing State regulated documentation as described above, such as the required examination and vaccination of the dog. The appointing authority also challenges the ALJ's finding that the appellant would not be called to testify in his position and his criminal conviction would not undermine his ability to testify. It notes that in nearly all cases in which the appellant issues a summons, he would be the primary, and most likely, only witness. It maintains that the appellant's criminal conviction for drug distribution would likely be admissible and

would undermine his credibility. The appointing authority also contends that the ALJ's reliance on *N.J.R.E.* 404(b) was misplaced, as that rule involves the evidence of other crimes to show commission of similar acts. The ALJ also inappropriately reviewed the rule *sua sponte*. Accordingly, it requests that the Commission reject the ALJ's recommendation and uphold the appellant's removal.

In his cross exceptions, the appellant initially states that he fully admitted to his drug conviction and the circumstances surrounding the conviction. He contends that the appointing authority has failed to show that his conviction adversely relates to his performance as an Animal Control Officer and his ability to testify in animal control cases. Further, he underscores that the ALJ found his testimony consistent. The appellant also emphasizes that throughout his tenure as an Animal Control Officer, he was only called to court to testify once and his testimony was based on information and belief and not on personal knowledge. Other witnesses also verify that no other Animal Control Officer was required to testify in court. Moreover, the appellant argues that the ALJ was correct in analyzing the Rules of Evidence which show that it is highly unlikely that his prior drug conviction would be admitted, given the remoteness of his conviction and since it was not a crime of dishonesty.

As to the release of the dog, the appellant contends that the ALJ's credibility determinations were properly supported and should be afforded great deference. He states that the ALJ fully analyzed the testimony and demeanor of the witnesses and properly credited his testimony, as well as the testimony of Margato and Ferraioli. The appellant emphasizes that there were no policies and procedures in place regarding trial periods or the duties and responsibilities of the Animal Control Officer. Therefore, he submits that he could not have violated the policies and procedures of the animal shelter. He also highlights Margato's testimony that the Department of Health had allowed animals to be released on a trial basis. Additionally, the appellant indicates that the forms used by the shelter were constantly changing and the disposition of animals was documented on the intake form and not the release form. Regarding the exclusion of the GPS records, the appellant maintains that the ALJ properly determined that the testimony of the GPS consultant and the GPS documents would not aid in a final determination of the case. Moreover, the appellant sets forth the ALJ's findings regarding the lack of credible evidence that the dog was vicious and the credible testimony surrounding the dog's release which show that his actions were proper. In addition, the appellant indicates that he was not charged with violations of State regulations. He argues that, as the person in charge of the shelter, Gapas should have ensured that proper records were kept. He notes that State regulations do not mandate what records an Animal Control Officer should keep. Nevertheless, the appellant contends that he complied with the regulatory requirements by informing Gapas of Mazza's request for the dog and obtaining authorization from him. He also wrote Mazza's address in the daily activity log.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the charges relating to the appellant's May 5, 2011 removal, but it does not agree with the ALJ's evaluation of the charges relating to the second removal effective October 20, 2011. Notwithstanding the latter, the Commission finds that the ALJ's credibility determinations regarding both removals were proper. It is emphasized that the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. The ALJ explicitly delineated his credibility findings, appropriately crediting the appellant's testimony, as many issues in dispute were corroborated by Margato's testimony. The ALJ also properly discredited the testimony of Mazza and Gapas as self-serving and set forth the reasons for his determination, which are supported in the record. Accordingly, the appointing authority's exceptions in this regard are not persuasive.

As to the appellant's May 5, 2011 removal, the Commission finds no evidence that the appellant's criminal conviction, which occurred prior to his employment, in any way prevents him from performing his duties as an Animal Control Officer. While there is a possibility that the conviction ***may*** be used to impeach his credibility, it is a very remote possibility in the type of matters in which the appellant would testify in court. Thus, contrary to the appointing authority's exceptions, the ALJ properly reviewed the applicable rules to arrive at the foregoing determination. Moreover, although the appointing authority maintains that the appellant would be the primary, and most likely, only witness, the credible evidence in the record demonstrates that the appellant was called only once to testify in court as an Animal Control Officer. Furthermore, there was no claim that his credibility in that trial was impeached due to his prior criminal conviction. Therefore, the Commission finds that the appointing authority has failed to meet its burden of proof. Accordingly, the Commission adopts the ALJ's Findings of Fact and Conclusions and dismisses the disciplinary charges against the appellant with respect to the first removal effective May 5, 2011. As such, the appellant is entitled to back pay, as set forth below, and benefits. *See N.J.A.C.* 4A:2-2.10. Additionally,

since the appellant's disciplinary charges have been dismissed, he is entitled to reasonable counsel fees, pursuant to *N.J.A.C.* 4A:2-2.12, in relation to services rendered for the May 5, 2011 removal.

Regarding the appellant's October 20, 2011 removal, he was charged with incompetency, inefficiency, or failure to perform duties and conduct unbecoming a public employee. The credible evidence in the record demonstrates that the appellant obtained authorization from Gapas to release the dog to Mazza, documented the same in the daily activity log which he forwarded to Ferraioli, and observed the compatibility of the dog at Mazza's house. However, it is indisputable that the appellant failed to ensure that the dog was examined by a veterinarian, vaccinated, and licensed per Gapas' instruction. The appellant testified that Gapas approved Mazza's request on the condition that Mazza complete an adoption form, pay the adoption fee, and "have the shots and everything done." Therefore, notwithstanding the fact that the appointing authority failed to charge the appellant with violations of State regulations or an actual policy as raised by the appellant, the Commission finds that incompetency and failure to perform duties were evident in the appellant's failure to ensure that a proper examination, vaccination, and licensure of the dog were complete regardless of whether the release was on a trial basis or not.

Furthermore, the ALJ's credibility determinations were proper, as set forth above, and sufficiently documented to evaluate the charges without the necessity of testimony and documentary evidence concerning the GPS records. *N.J.A.C.* 1:1-15.1(c) generally provides that all relevant evidence is admissible except as otherwise provided by regulation. However, *N.J.A.C.* 1:1-14.6(k) provides that the ALJ may limit the presentation of oral or documentary evidence, the submission of rebuttal evidence and the conduct of cross-examination. Even if evidence were presented as proffered by the appointing authority on the timing of the call to Gapas, the fact remains that the appellant received the authorization to release the dog. Thus, it appears that the excluded evidence would not likely have changed the determination of the ALJ nor the Commission in regard to the release of the dog. Accordingly, under these circumstances, there is no basis to remand the matter to the OAL for further proceedings.

With regard to the penalty, the Commission's review is *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). However, in this case, considering the appellant's offense and his lack of a prior disciplinary record in over nine years of service, removal is too harsh a penalty. The charges that were upheld relate to the appellant's failure to ensure that proper processing of a dog was conducted prior to its release. Thus, a more fitting penalty is a 15 working day suspension. The Commission recognizes that the appellant's conduct is unacceptable and emphasizes that, in imposing major discipline, it is not acting to minimize the offense. The Commission is mindful that this penalty should serve as a warning to the appellant that future offenses may result in a more severe penalty up to and including removal. Accordingly, the foregoing circumstances provide a sufficient basis to impose a 15 working day suspension with regard to the appellant's second removal. *See N.J.S.A.* 11A:2-19 and *N.J.A.C.* 4A:2-2.9(d).

Since the penalty has been modified, the appellant is entitled to back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10, following the 15 working day suspension to the actual date of reinstatement. However, the appellant is not entitled to counsel fees with regard to services rendered for his October 20, 2011 removal. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission upheld charges and imposed major discipline. Thus, the appellant has not prevailed on all or substantially all of the primary issues of this portion of his appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved. In the interim, as the court states in *Phillips*, *supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing James Kielwasser, effective May 5, 2011 and October 20, 2011, was not justified. Therefore, the Commission dismisses the charges against the appellant with respect to the May 5, 2011 removal and reverses that removal. Additionally, the Commission modifies the October 20, 2011 removal to a 15 working day suspension and orders that the appellant be granted back pay, benefits and seniority for the period following his 15 working day suspension. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10.

The Commission further grants counsel fees, pursuant to *N.J.A.C.* 4A:2-2.12, in relation to services rendered for the May 5, 2011 removal. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. However, counsel fees in relation to services rendered for the October 20, 2011 removal are denied pursuant to *N.J.A.C.* 4A:2-2.12.

Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of these issues.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 26TH DAY OF FEBRUARY, 2014

Robert E. Brenner

Robert E. Brenner
Presiding Member
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
(CONSOLIDATED)
OAL DKT. NO. CSV 14314-11
AGENCY DKT.NO. 2012-1465
AND
OAL DKT. NO. CSV 04800-12
AGENCY DKT. NO. 2012-2890

IN THE MATTER OF JAMES KIELWASSER, TOWNSHIP OF UNION DEPARTMENT OF HEALTH.

Susan B. Fellman, Esq., for petitioner/appellant (Breuninger & Fellman, attorneys) and **Brian J. Manetta**, Esq., (Mets Schiro & McGovern, attorneys)

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record closed: October 18, 2013 Decided: December 16, 2013

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent, Township of Union Department of Health (Township), brings two major disciplinary actions against appellant, James Kielwasser (Kielwasser), an animal control officer/animal cruelty investigator (ACO/ACI), for removal effective March 5, 2011, and removal effective October 20, 2011. The Township alleges, as to the first

action, that appellant violated N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. As to the second action, the Township alleges that he violated N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties; and N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

On May 5, 2011, the Township prepared a Preliminary Notice of Disciplinary Action (PNDA) against appellant. After departmental hearings were conducted on July 12, 2011, and September 28, 2011, the Township prepared a Final Notice of Disciplinary Action (FNDA) dated November 1, 2011. In addition, on October 20, 2011, the Township prepared a PNDA against appellant. Departmental hearings were conducted on November 21, 2011, and January 25, 2012, and a FNDA, dated March 14, 2012, was prepared against appellant. Kielwasser requested a hearing as to each FNDA and forwarded appeals to the Civil Service Commission on November 7, 2011, and March 22, 2012, respectively. Each matter was transmitted to the Office of Administrative Law (OAL), for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The first matter, with an effective removal date of May 5, 2011, was transmitted to the OAL on November 29, 2011, and docketed under CSV 14314-11. The second matter, with an effective removal date of October 20, 2011, was transmitted to the OAL on April 11, 2012, and docketed under CSV 04800-12. I consolidated both matters by Order dated April 20, 2012. I heard the matter on July 20, 2012, September 25, 2012, January 3, 2013, January 16, 2013, January 28, 2013, March 18, 2013, and June 24, 2013. The parties submitted written summations, and following their receipt, the record closed on October 18, 2013. An Order was entered extending the time for filing this decision.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following undisputed **FACTS**:

Prior to his employment with the Township of Union, Kielwasser had been charged with six counts of possession with intent to distribute drugs in 1999. He

subsequently pled guilty and was sentenced in January 2001 to 180 days in the county jail; placed on probation for three years; and lost his driver's license for six months. He served approximately two and one-half months in jail.

In April 23, 2001, Kielwasser completed an application for employment with the Township of Union and executed an authorization for the Township to conduct a background search. Thereafter, Kielwasser commenced his employment with the Township as a laborer from 2002 through 2004. Between 2004 and 2005, he worked as an engineering aide, and between 2005 and 2007, he worked in accounts payable and receivable. In early 2007, Kielwasser agreed to leave his permanent civil service position and transfer to the Township's Department of Health in order to take on the responsibilities of a newly created animal control officer (ACO) position. He obtained State certification as an ACO on February 16, 2007. He also obtained certification as an animal cruelty investigator (ACI) on May 13, 2008. Kielwasser has had no prior disciplinary actions against him.

November 1, 2011 FNDA – Removal, effective May 5, 2011

As to the November 1, 2011, FNDA, respondent seeks petitioner's removal for the following reason: "knowledge of and the required disclosure of Kielwasser's criminal record will significantly and negatively interfere with his ability to perform the duties of his position" as an ACO.

John Ferraioli, retired Director and Public Health Officer for the Township of Union, testified on behalf of respondent. Ferraioli stated that the duties of an ACO are provided for in the New Jersey Administrative Code. He noted that in order to obtain ACO certification from the State Department of Health, an individual cannot be found guilty of animal cruelty or a "Title Four" violation. Ferraioli recalled that in a letter from a local citizen, dated April 4, 2011, the issue of Kielwasser's past criminal conviction was first raised. Ferraioli stated that after a closed session meeting of the Township Board of Health, it was his opinion that Kielwasser's credibility and his testimony at a hearing were the real issues versus his past drug conviction.

Ferraioli indicated that the civil service job description for the position of ACO does not include a requirement or ability to "testify in court." When questioned as to the amount of times that Kielwasser had to testify in court as ACO, Ferraioli admitted that he "can't cite an example where Kielwasser had to testify on any summons."

Dawn Donohue, a municipal prosecutor for the Township, affirmed that the prior conviction of the State's witness would have to be disclosed to the opposing party by the prosecutor.

Michael Wittenberg, the chief municipal prosecutor for the Township, added that "credibility is always an issue" in the event of a trial. Specifically, Wittenberg stated, "Presumably, if Mr. Kielwasser – if he's a witness of mine, either a complaining witness or a witness – a fact witness in the case, I'm going to have to disclose his prior criminal convictions and it kind of puts me as the attorney representing the State of New Jersey, 'behind the eight ball,'" in every case. Wittenberg elaborated as to the impact of Rule 609;

> Presumably, 609 talks about criminal convictions affecting one's credibility and I have not sat in the judge's chair nor have I sat in the jury's chair, so I can't – I don't know what impact it has, but I do know that when I'm presenting a case and I have a witness that is presumably tainted, I am not starting with a level playing field.

Kielwasser, testifying on his own behalf, stated that "ninety-nine percent" of the time, the prosecutor would offer a fine and the fine would be paid in matters related to animal-control summonses.

March 14, 2012 FNDA – Removal, effective October 20, 2011

As to the March 14, 2012, FNDA, respondent seeks Kielwasser's removal because petitioner released a dog, noted to be "not trustworthy," from the Union Township animal shelter to a Township employee, without first completing the necessary paperwork for adoption.

Ferraioli affirmed that the duties and responsibilities of an ACO are set forth in the New Jersey Civil Service Commission job description and State regulations. Respondent had no policies and procedures concerning ACOs. Ferraioli indicated that he, as the Township's Health Officer, was ultimately responsible for the animal control program and shelter. Ferraioli stated that he would review all of the daily activity logs submitted. He added that during the period Kielwasser was employed as an ACO, Marconi Gapas assumed responsibility for shelter supervision.

Ferraioli testified that only he and Gapas could approve animal adoptions. When an animal is adopted, there should be an intake form, an adoption application and a release of animal form. The completion of paperwork was one of the duties of the shelter attendant. Ferraioli indicated that the forms used for adoptions were consistently being revised. As part of the adoption process, Ferraioli explained that the veterinarian would perform the health assessment while the ACO would perform a compatibility assessment. Apart from the adoption process, Ferraioli stated that he assumes that animals have been released from the shelter on a trial basis.

Magda Margato, testified on behalf of respondent. Margato, a part-time ACO employed by respondent from October 2009 through May 2012, stated that she was involved in the initial intake of a Husky, referenced by name as "Lou," in September 2010. Margato wrote that the dog was "not trustworthy" because the dog was fearful and fearful dogs may bite. Margato stated, however, that the dog was neither vicious nor aggressive.

Margato recalled the day a Township employee, Pellegrino Mazza, came to the shelter. Margato testified that Mazza, "pulled up in a Township vehicle . . . and then started to walk over to the shelter." Margato recalled Mazza playing with the dog, Lou, and wanting to keep him. She stated that Mazza;

> kept asking for the dog and he wanted the dog and he basically stated that this is the dog he wanted and he has another one similar to it at home and he wanted another companion for his other dog and basically he kept asking for the dog and Mr. Kielwasser kept saying, "No." He wanted the Husky and he said, "No one has to know about it, just put

> him in my backyard, no one has to know about it," and Mr. Kielwasser kept saying, "No."

Margato stated that Mazza insisted that Kielwasser call his supervisor and "ask if he could have a trial period" with the dog. She affirmed that Kielwasser told Mazza that he was going to call Gapas. She recalled that Kielwasser took out his cell phone, stepped away and spoke to someone on his cell phone for approximately four or five minutes. At that point, Margato left the shelter.

Margato recalled that she had been personally involved in a trial period of a dog for one of the Township's Board of Health members. However, she was not aware of who had authorized that trial period. She also added that she was not aware of trial periods being "specifically disallowed" by respondent.

Pellegrino Mazza testified on behalf of respondent. Mazza, a nineteen-year employee of the Township's road division within the Department of Public Works, stated that Kielwasser had contacted him about a Husky named Lou that was at the shelter. Mazza drove to the shelter in his "work truck." He recalled that the dog was "nasty" and vicious when he saw the dog at the shelter and the dog just wanted "to bite."

Mazza stated that Kielwasser initially told him that he "couldn't just have the dog." He recalled Kielwasser telling him that the dog was "dangerous." Mazza claimed that Kielwasser did not tell him that he needed to pay any fees; however, Mazza admitted that he knew that the dog would have to get shots and a license when he obtained the dog. Mazza also claimed that Kielwasser told him that the dog would be given "the injection" if he did not take the dog home. He added that Kielwasser gave him permission to take the dog, which Mazza wanted, in order to see if the dog got along with his other Husky at home. Mazza later conceded that he never obtained a license or took the Husky to get shots, even though he knew he was supposed to.

Mazza affirmed that he had the dog for nine months and that the dog bit a Mr. Alvino on the hand. After the incident, Mazza decided to take the dog back to the shelter;

Q. And you realized -- you knew that you could get in trouble because you got a ticket from the police.

A. Yes.

. . .

Q. Were you contacted by an insurance company with regard to the dog bite?

A. No. Mr. Alvino's attorney called me and he wanted the homeowner insurance.

Q. Okay. So you knew at that point that you could incur some monetary liability?

A. Yes, I knew.

Q. Okay. So you decided then to give the dog back. Correct?

A. Yes, yes.

Marconi Gapas testified on behalf of respondent. Gapas has been the health officer for the Union Township Board of Health since January 2012. He noted that he was the assistant health officer from 2010 to January 2012, and principal registered environmental specialist from 2004 through 2010. As the assistant health officer, he assisted Ferraioli in the operation of the Health Department and supervised the ACO. He also oversaw the animal adoption process.

Gapas stated that he was not aware of "trial periods." He indicated that the ACOs had his cell phone number and could call if they had questions. Gapas confirmed that he had spoken to Kielwasser about a Husky while also noting that there was one at the shelter in September 2010. Gapas noted in a report;

> I do remember a DPW worker being interested in a Husky through a call by Mr. Kielwasser who thought this worker would be a good candidate because of his experience with the breed. Mr. Kielwasser expressed concern over compatibility with an existing pet so I advised him to make arrangements to conduct a disposition and compatibility assessment.

Gapas affirmed that the four-minute telephone call that he had with Kielwasser on October 1, 2010, "may have been the phone call" where he told Kielwasser to conduct a disposition and compatibility assessment. However, Gapas could not recall whether he instructed Kielwasser to provide him with paperwork regarding the Husky or whether he told Kielwasser that Mazza could have the Husky. On cross-examination, Gapas admitted that if he had permitted the Husky, Lou, to leave the shelter on a trial or grace period, he would have gotten into trouble. As to each adoption, Gapas indicated that there should be an adoption application, an intake form, and a release form. The disposition line appearing on the bottom of the intake form is not a substitute for the release form. Gapas added that the completed paperwork would be kept at the shelter.

James Kielwasser testified on his own behalf. As the ACO, his duties included picking up dead animals, trapping animals, chasing loose animals, cleaning the shelter, feeding the animals, interacting with the public, releasing animals back to the public, attending meetings and court appearances, and responding to calls around the Township. He stated that the shelter attendant was responsible for the preparation and filing of paperwork. If no shelter attendant was available, the ACO would complete an intake form. The release of an animal would be noted on the bottom of the intake form. Kielwasser stated that there was no policy against "trial periods." He noted that a Board of Health member had taken a dog from the shelter for a trial period but subsequently returned it. ACOs would be required to submit daily activity logs to either Ferraioli or Gapas. At the end of each day, Kielwasser would park the animal control van at Town Hall, hand in his daily activity log and punch out.

Kielwasser recalled coming upon Lou the Husky at the shelter in late September 2010. Kielwasser stated that the dog "loved to roll around, loved to play . . . ." The dog did not act aggressively or violently towards Kielwasser or any other person. Kielwasser indicated that he knew Mazza from the time he worked at the Department of Public Works and he also was aware that Mazza liked Huskies. Kielwasser contacted Mazza approximately "three or four" days after he first saw the dog, Lou, in order to inform Mazza of this male Husky. Mazza subsequently came to the shelter on October 1, 2010. After Kielwasser brought the Husky outside, Mazza began to play with the dog. Mazza repeatedly asked Kielwasser to bring the Husky to Mazza's home.

Kielwasser testified that he told Mazza that he could not give him the dog and Mazza insisted that Kielwasser contact his supervisor for approval.

After Mazza continued to demand that Kielwasser contact his supervisor, Kielwasser decided to contact Town Hall to ask his supervisor if Mazza could have the Husky on a trial basis. After unsuccessful attempts to locate Ferraioli or Gapas in their offices, Kielwasser contacted Gapas's cell phone and advised Gapas of Mazza's request to take the Husky home on a trial basis. Kielwasser stated that Gapas approved the request. Kielwasser further recalled that he told Gapas that the dog's disposition was "very good"; however, Kielwasser admitted that he was not aware of the dog's "shot history or medical history." Kielwasser recalled Gapas telling him by telephone;

> Well, then you know what, give him until Monday, and then he said, "Wait a minute," he said, "Only two days is not enough time for him to get an exact assessment," he said, "Give him until next Monday and tell him to come directly to the Health Department and fill out the adoption form and pay the adoption fee." He said, at that point, let him run down to the vet, you know, with the money for the adoption fee and have the shots and everything done and hit it neutered and all that. He said, "Because I don't want to have it all done now before he takes the [dog] and if he doesn't end up keeping the dog, we'll have money into a dog that's going to be sitting in the Shelter which is going to be a waste of money."

After speaking to Gapas, Kielwasser told Mazza that his request was approved on condition that Mazza report to Town Hall, "fill out the adoption form, fill out the correct paperwork and pay the adoption fee and all the medical and everything . . . will be taken care of out of your adoption fee." Kielwasser indicated that Mazza agreed and Kielwasser brought the Husky to Mazza's home. At Mazza's home, Kielwasser observed the Husky, Lou, play with Mazza's female Husky. Kielwasser noted that he observed the two dogs playing and Mazza playing with the dogs without any problem. Kielwasser remained at Mazza's house for "approximately twenty minutes to half an hour." Before leaving, Kielwasser reminded Mazza; "They did you a favor by letting you try it out, I said, don't make it backfire, don't make me look bad for calling and don't

make yourself look bad, I said, just make sure you go there next Monday and fill out the paperwork like he said," and Mazza agreed.

Kielwasser noted his actions in the daily activity log for October 1, 2010. He recorded the time, and in the column marked "Location of Call or Activity," Kielwasser wrote, "Dropped off Trial dog to 974 Park Terr." In the "Disposition" column, he noted, "Supervised + all went well." Kielwasser testified that he handed the log, dated October 1, 2010, to Ferraioli at the end of the day in the same "typical manner" in which he normally turned in his logs. Kielwasser was questioned about the log that he submitted;

> Q. Okay. And after you handed this document in, did anyone ever tell you or indicate to you that you had done anything improper?
>
> A. No, because they're the ones that told me to do it.
>
> Q. Okay. Were you ever disciplined after you handed this document in – between the time you handed this document in and the time of the dog bite?
>
> A. No.

Kielwasser also disputed Mazza's assertion that the Husky would be euthanized if Mazza did not take the dog home. Kielwasser stated that no time frame existed that required animals to be euthanized in a given period. He also noted that he knew of various animal rescue groups that would take a dog if no one wanted to claim or adopt it. He added that euthanization is more prevalent with cats and that the only conceivable time that euthanization would be considered for a dog would be if the dog is either "terminally sick" or "insanely dangerous."

When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact-finder gives to the testimony of a witness. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is

inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I primarily credit the testimony of Kielwasser, Margato, and Ferraioli more than the testimony given by Mazza or Gapas. Kielwasser's testimony was straightforward, consistent, and clear. Kielwasser's testimony, specifically related to Lou the Husky, was corroborated by Margato. Margato confirmed that the Department of Health had allowed animals to be released on trial periods and that such trial periods were never specifically disallowed. Margato also confirmed that Mazza had driven to the shelter in a Township vehicle, a fact that Mazza himself admits. She testified that her notation on the dog's intake form, specifically that the husky was "not trustworthy," related to the dog's appearance of being fearful and not that it was vicious or aggressive. Margato testified to Mazza's persistence in wanting the Husky at the shelter. Margato also corroborated the sequence of events when Kielwasser told Mazza that he could not just give the dog to Mazza without approval, and Kielwasser subsequently advising Mazza that a call would be made to a supervisor and Kielwasser then taking out his cell phone to make that call.

Ferraioli also testified credibly and truthfully. He admitted that respondent had no policies and procedures concerning ACOs. He stated, unequivocally, that only he and Gapas could approve adoptions. Ferraioli did not deny that animals may have been released from the shelter on a trial basis.

I do not credit the testimony of Mazza. His testimony was incredible and self-serving. Though Kielwasser and Margato witnessed Mazza playing with the Husky at the shelter, Mazza inexplicably insisted that the dog was vicious and just wanted "to bite." His testimony was even more incredible given his continued demands to take this supposed "vicious" dog home to his family and then keeping the dog for approximately nine months, until he thought he could be held financially liable as a result of a dog bite incident involving the Husky.

Gapas's testimony was often vague and inconsistent. While Gapas stated that he was not aware of "trial periods," Kielwasser, Margato, and Ferraioli acknowledged their existence. Admitting that he would have gotten into trouble if he permitted the Husky to have left the shelter on a trial basis, Gapas was often vague in recalling whether he instructed Kielwasser to provide him with paperwork regarding the Husky or whether he told Kielwasser that Mazza could have the Husky.

Taking all the testimony into consideration, I **FIND** that Kielwasser has not had to testify, based on personal knowledge, regarding any summons issued in his capacity as ACO while employed by respondent; I **FIND** that respondent had no policies and procedures concerning ACOs and their duties and/or responsibilities; I **FIND** that there were no policies or procedures concerning the issue of "trial periods" for animals at the shelter; I **FIND** that only Ferraioli and Gapas could approve animal adoptions; I **FIND** that Kielwasser contacted Gapas for approval of a trial period for the Husky, Lou; I **FIND** that Kielwasser acted upon the approval, subsequently delivered the dog to Mazza's home and memorialized his actions in the daily activity log for October 1, 2010; I **FIND** that Kielwasser submitted the daily activity log for October 1, 2010, to Ferraioli at the end of the day with no subsequent comment or discipline from any of Kielwasser's supervisors.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. 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. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and 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). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State

v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The Township has charged Kielwasser as to the first action (November 1, 2011, FNDA) with violating N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. As to the second action (March 14, 2012, FNDA), the Township has charged Kielwasser with violating N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties; and N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee.

As to the November 1, 2011, FNDA, respondent argues that Kielwasser cannot serve as ACO because his criminal background would damage his credibility in any proceeding in which he may have to serve as a witness. I **CONCLUDE** that it is not possible to determine in advance whether Kielwasser would be a credible witness in every case in which he may potentially need to provide testimony because the issue of whether his criminal background could be admitted into evidence must be determined on a case-by-case basis. Therefore, I **CONCLUDE** that respondent could not meet its burden of proving by a preponderance of the credible evidence, the charges of inability to perform duties and other sufficient cause. Even though evidence of a witness's past convictions may be admissible for credibility determinations, a judge has the discretion to determine when such evidence may be excluded because of its irrelevance to any material issue in dispute or its potential prejudicial effect.[1]

N.J.R.E. 609 provides: "For the purpose of affecting the credibility of any witness, the witness's conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence." It is difficult to envision many situations in which Mr. Kielwasser would need to testify on behalf of the

[1] See N.J.R.E. 609 (specifically, the judge may exclude evidence of a witness's criminal conviction if it is "remote" or for "other causes," including irrelevance and prejudice). See also N.J.R.E. 404(b), N.J.A.C. 1:1-15.1, and State v. Cofield, 127 N.J. 328, 338 (1992).

respondent in relation to the responsibilities of his office in which his credibility could be impeached based on his prior drug convictions.

N.J.R.E. 609 works in conjunction with N.J.R.E. 404(b), which provides:

> Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Furthermore, N.J.R.E. 404(b) applies to civil cases as well as criminal cases. Harris v. Peridot Chemical (New Jersey), 313 N.J. Super. 257 (App. Div. 1998).

N.J.R.E. 404(b) essentially has two components:

> 1. It does not allow evidence of a witness's prior bad conduct to establish that the witness acted in conformity with such conduct. For example: he sold marijuana before, so he probably sold marijuana again. Past conduct cannot be used to establish present conduct.
>
> 2. It does allow evidence of past conduct to be admitted for "other purposes," such as motive, intent, opportunity, etc., when the past conduct is relevant to a material issue in dispute. Without explicitly stating it, this portion of the statute basically permits evidence of prior conduct to be admitted if it is relevant to a witness's credibility in regards to one or more specific issues in dispute. Such evidence cannot be used to show that the witness is generally untrustworthy. [In the instant case, whether or not petitioner sold drugs would not be relevant to a dispute where petitioner's testimony contradicts the testimony of a Township resident over issues pertaining to animal removal.]

The second component of N.J.R.E. 404(b) is where N.J.R.E. 609 comes into play. If a judge determines that a prior conviction is not too "remote" in establishing one of these "other purposes," then the prior conviction can be admitted into evidence. See State v. Lykes, 192 N.J. 519, 523 (2007) (since defendant's prior conviction was similar

to the charges he was currently facing, the conviction itself could not be admitted; it had to be "sanitized." However, the details of the conviction, including having knowingly held crack vials in his hand, were relevant for determining a material issue of the case (knowledge), the issue being one of the exceptions or "other purposes" under the second component of 404(b), and therefore deemed admissible. The Court appropriately determined the evidence was relevant by applying the Cofield test).

The New Jersey State Supreme Court established a four-prong test in State v. Cofield, 127 N.J. 328, 338 (1992) (the Cofield test), which lays out the relevant factors to be weighed and considered when determining if and the extent to which any evidence of a witness's prior bad conduct should be considered under N.J.R.E. 404(b). The four factors are:

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[Ibid.]

A judge's decision is reviewed de novo if he or she fails to apply the Cofield test before admitting or denying prior bad conduct evidence. Lykes, supra, 192 N.J. at 534.

Again, a general application of this balancing test to Mr. Kielwasser's prior convictions, particularly factors (1) and (4), would lead one to conclude that Kielwasser's prior convictions would be irrelevant or prejudicial to most if not all disputes in which he may potentially need to provide testimony on the respondent's behalf.

Also, N.J.A.C. 1:1-15.1 captures the essence of both of the foregoing statutes. In pertinent part, it provides:

> (b) Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.
>
> (c) Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:
>
> 1. Necessitate undue consumption of time; or
>
> 2. Create substantial danger of undue prejudice or confusion.

In conclusion, the foregoing statutes basically preclude a judge from considering evidence of a witness's prior bad conduct, including convictions, when the prior conduct is either irrelevant to, or otherwise has a prejudicial effect, on any material issues. It is difficult to imagine how Kielwasser's former drug convictions could be relevant to any material issue in a disputed case involving the functions of his office. Having sold, possessed, or used drugs would not be relevant to establishing such "other purposes" as "motive," "intent," or "knowledge" when considering issues involving the capture or removal of animals, or any of the paperwork or processing issues involved therewith.

As to the March 14, 2012, FNDA, I **CONCLUDE** that respondent has not met its burden of proving by a preponderance of the credible evidence, the charges of incompetency, inefficiency or failure to perform duties and conduct unbecoming a public employee. Absent any policy prohibiting "trial periods" or specific policies or procedures concerning the duties of the ACO with the Township of Union Board of Health, the charges cannot be sustained, much less substantiated.

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons,

63 N.J. Super. 136, 140 (App. Div. 1960). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In this case, Kielwasser acted upon the approval of his supervisor to provide a dog from the shelter to a Township employee, Mazza, on a trial basis. Kielwasser then memorialized his action in the daily activity log which he submitted to his supervisor. No subsequent action or discipline from Kielwasser's supervisors occurred. Mazza's assertion that the dog was vicious at the time he was provided the animal is not substantiated by any witness or subsequent action by Mazza in wanting to take this alleged "vicious" dog home to his family. I **CONCLUDE** that respondent has failed to meet its burden of proving by a preponderance of the credible evidence, the charge of conduct unbecoming a public employee. Even in the absence of any policy or procedure of respondent, I further **CONCLUDE** that respondent has failed to prove that Kielwasser violated any implicit standard of good behavior in his capacity as ACO.

ORDER

It is **ORDERED** that the charges against appellant, James Kielwasser, contained in the November 1, 2011, FNDA, and the March 14, 2012, FNDA, be **DISMISSED**. It is also **ORDERED** that the two penalties of removal, be **REVERSED**.

It is further **ORDERED** that the appellant be reinstated to his position as an animal control officer/animal cruelty investigator.

Accordingly, it is **ORDERED** that the appointing authority pay back pay and benefits from the initial removal date of May 5, 2011. Consistent with the appellant's duty to mitigate his damages, I **ORDER** the appellant to submit to the appointing authority a certified statement detailing any employment and income for the period of his suspension, with copies of relevant tax and other records and names and addresses

of employers. N.J.A.C. 4A:2-2.10; see also Phillips v. Dep't of Corr., A-5581-01T2F (App. Div. Feb. 26, 2003), http://njlaw.rutgers.edu/collections/courts/. Since the appellant has prevailed, I **ORDER** the appointing authority to pay reasonable attorney's fees to appellant's attorneys. The appellant's attorneys will submit to the appointing authority a certified bill itemizing their services. N.J.A.C. 4A:2-2.21.

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, P.O. 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.

December 16, 2013

DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency:

Date Mailed to Parties: DEC 17 2013

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner/Appellant:

James Kielwasser

For Respondent:

John Ferraioli
Marconi Gapas
Dawn Donohue
Michael Wittenberg
Magda Margato
Pellegrino Mazza
Peggy Gehrig

LIST OF EXHIBITS IN EVIDENCE

For Petitioner/Appellant:

P-1(a) to P-1(o) Letters/emails dated December 18, 2007, through April 22, 2011
P-2 Township of Union Animal Shelter Canine Adoption Application (Calderone)
P-3 Township of Union Animal Shelter Canine Adoption Application (Jernigan)
P-4 Township of Union Government Records Request Form (November 14, 2011)
P-5 Letter dated November 22, 2011
P-6 Inspection Report dated August 17, 2011
P-7 ACO Daily Activity Log (10/6)
P-8 ACO Daily Activity Log (10/20)
P-9 ACO Daily Activity Log (9/7)
P-10 ACO Daily Activity Log (7/30)
P-11 Animal Report (2010)
P-12 Intake Form dated November 19, 2009
P-13 Intake Form dated April 10, 2010

P-14 Intake Form dated March 16, 2010
P-15 Animal Surrender Form dated November 10, 2009
P-16 Intake Form dated June 3, 2010
P-17 Release of Animal Form dated September 3, 2010
P-18 ACO Daily Activity Log (10/1)
P-19 Application for employment (April 23, 2001)
P-20 Background check, reference check, and drug screening release (April 23, 2001)
P-21 Anthony Nardiello letter dated April 4, 2011
P-22 Animal Cruelty Investigators Course document
P-23 N.J.S.A. 4:19-15.16b
P-24 Various New Jersey Statutes Annotated citations
P-25 Memorandum dated July 13, 2007
P-26 Report of Marconi Gapas dated September 29, 2011
P-28 Intake Form dated April 10, 2010
P-29 Intake Form dated September 22, 2010
P-30 Mazza drawing of house and yard
P-31 Kielwasser ACO certification dated February 16, 2007
P-32 Kielwasser ACI certification dated May 13, 2008
P-33 Kielwasser cell phone records for October 1, 2010
P-37 Kielwasser appointment as a seasonal laborer (April 25, 2001)
P-38 Kielwasser appointment as a permanent laborer (September 26, 2001)
P-39 Kielwasser appointment as a inventory clerk (February 24, 2002)
P-40 Kielwasser State application as ACO
P-41 Kielwasser Health Department application as ACO
P-42 Memorandum dated December 18, 2008
P-43 Letter of suspension dated May 5, 2011
P-44 New Jersey Department of Personnel conversion of appointment form

For Respondent:

R-1 PNDA dated May 5, 2011
R-2 New Jersey Civil Service Job Description for ACO
R-3 Memorandum dated September 1, 2006
R-5 Certification of ACI/Kielwasser dated June 9, 2008

R-6 Memorandum dated September 11, 2008
R-7 Summonses issued by Kielwasser
R-8 Copy of Indictment dated July 1, 2000
R-9 Judgment of Conviction dated October 6, 2000
R-10 PNDA dated October 20, 2011
R-11 Notice of Quarantine, July 9, 2011
R-12 Investigation report, Union Police Department, dated July 1, 2011
R-14 Memo to file from Ferraioli, dated August 2, 2011
R-15 Intake Form dated September 21, 2010
R-16 Animal Surrender Form dated July 9, 2011
R-17 Report of Neil Lanza and Magda Margota dated July 11, 2011
R-18 Intake Form dated July 11, 2011
R-19 New Jersey regulations for animal control facility/animal control officer
R-20 Canine Adoption application dated October 30, 2007
R-21 Intake Form/Adoption Application dated December 10, 2010
R-22 Adoption Application/Release Form dated December 21, 2010
R-23 Release Form/Adoption Application dated September 3, 2010
R-24 Animal Shelter Daily Schedule
R-25 Health Officer's Report (March 2007)
R-27 State of New Jersey Inspection Report (October 2007)
R-28 Health Officer's Report (November 2007)
R-29 Kielwasser employment evaluation (September 28, 2007)
R-35 Kielwasser employment application (April 23, 2001)
R-36 Kielwasser cell phone records (September 11, 2010 to October 10, 2010)
R-37 Various ACO Daily Activity Logs
R-38 ACO Monthly Activity Report (January 2010)
R-40 Computer printout
R-43 Dispatch record (October 1, 2010)
R-44 Official Notice of Publication dated January 14, 2011