



STATE OF NEW JERSEY

In the Matter of John Mulligan
 East Jersey State Prison,
 Department of Corrections

DECISION OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-2469
 OAL DKT. NO. CSV 02610-17

ISSUED: JUNE 8, 2018 BW

The appeal of John Mulligan, Institutional Trade Instructor 1, East Jersey State Prison, Department of Corrections, removal effective January 23, 2017, on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia, who rendered his initial decision on April 18, 2018 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on June 6, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits and seniority for the period of separation to the actual date of reinstatement. *See N.J.A.C. 4A:2-2.10*. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

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 Public Safety*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues

concerning back pay or 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 permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of John Mulligan. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. 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. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and 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 shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2018

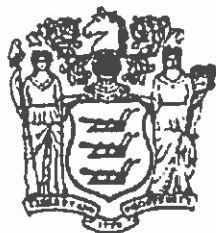


Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

attachment

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 02610-17

AGENCY DKT. NO. 2017-2469

**IN THE MATTER OF JOHN MULLIGAN,
EAST JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.**

Rashidah N. Hasan, Esq., for appellant

Aimee Blenner, Esq., Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of The State of New Jersey, attorney)

Record Closed: March 26, 2018

Decided: April 18, 2018

BEFORE JUDE-ANTHONY TISCORNIA, ALJ:

STATEMENT OF THE CASE

Appellant, John Mulligan, (Mulligan) appeals removal by respondent New Jersey Department of Corrections (DOC) from employment as an Institutional Trade Instructor 2 at East Jersey State Prison. Respondent alleges that appellant stole a wristwatch that belonged to another DOC employee and that appellant provided false and misleading

statements to investigators. Appellant does not dispute that he took the watch but argues that he owns a nearly identical watch and that he mistakenly took possession of the watch in question thinking it belonged to him.

ISSUE

Did appellant wrongfully take a co-worker's watch and provide misleading statements to investigators and, if so, may respondent DOC remove appellant based on his actions?

PROCEDURAL HISTORY

On January 23, 2017, John Mulligan was served with a Final Notice of Disciplinary Action (FNDA), calling for his removal from the position of Institutional trade instructor 2, cooking. (R-1.) The following charges were sustained against appellant:

1. N.J.A.C. 4A:2-2.3(a)(6) – conduct unbecoming a public employee;
2. N.J.A.C. 4A:2-2.3(a)(12) – other sufficient cause;
3. HRB 84-17, as amended, C.8 – falsification: Intentional misstatement of material fact in connection with work, employment application, attendance of any record, report, investigation or other proceeding;
4. HRB 84-17, as amended, C.11 – conduct unbecoming an employee;
5. HRB 84-17, as amended, C.13 – actual or attempted theft of state property or equipment or the property of other employees, residents, clients, or inmates;
6. HRB 84-17, as amended, E.1 – violation of a rule, regulation, policy, procedure, order or administrative decision.

The matter was transmitted to the Office of Administrative Law on February 22, 2017. A Motion for Summary decision was filed by respondent, heard by me on November 8, 2017, and ultimately denied. A plenary hearing was conducted on January 3, 2018. The record was kept open pending submissions of post-hearing transcripts and closing arguments. Closing arguments were received on March 26, 2018, at which time the record was closed.

FINDINGS OF FACT

The alleged theft at the center of this appeal was caught on surveillance camera. The recording was admitted into evidence and was viewed several times during the hearing. Having had an opportunity to consider all the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

Appellant has been employed with East Jersey State Prison since 2000, where he served as an institutional trade instructor charged with supervising and instructing inmates in preparing meals.

On September 28, 2016, Senior Correction Officer Carr, (Carr) an employee of East Jersey State Prison, entered into what has been described on the record as the "inner front door area" of the prison, herein after referred to as the "area." This area is under twenty-four-hour surveillance and is heavily guarded. There is a free-standing metal detector in the area. All who enter the front door of the prison must pass through this metal detector including prison employees. Immediately in front of the metal detector there is a heating element attached to the wall, the top of which is a flat surface. This flat surface is about waist high and is wide enough to accommodate a few small objects being placed upon it.

Upon entry Carr removed the contents of his pockets and placed them on the top of the heater. He then removed his wristwatch and placed it on top of the heater next to

the contents of his pockets. He then proceeded through the metal detector, circled around back to the heater and retrieved the items he had placed there. He neglected to retrieve his wristwatch. The wristwatch remained on top of the heater for approximately fifteen minutes, at which time appellant, returning from a cigarette break, entered the front-door area, emptied the contents of his pockets onto the top of the heater and proceeded through the metal detector. He then circled around back to the heater and collected the items he had placed there and also picked up Carr's wristwatch. He then exited the front-door area and proceeded inside the prison in order to return to work. The timeframe within which appellant entered the area, cleared security, and exited the area was less than ten seconds.

Later that day Officer Carr realized he had misplaced his watch and reported the missing watch to the prison authorities. The authorities viewed the surveillance video wherein Carr is seen leaving his watch on the heater in the area. The authorities noted that the appellant was the next individual to enter the area, and noticed the appellant placed his possessions on the heater in the same location where Carr placed his watch, and thereby deduced that the appellant must have taken the watch from the heater when he went back to retrieve his own possessions.

On October 4, 2016, appellant was formally interviewed regarding the missing watch at which time appellant denied taking the watch or any items that did not belong to him. Appellant explained to the prison authorities that he owned two watches; the one he was wearing at the time (which did not fit the description of Carr's watch) and one that was located in the center console of his vehicle. The missing watch was described as a Movado watch with a silver band and a black face.

The appellant was then briefly excused so that he may go to his vehicle and retrieve his other wrist watch so the authorities could inspect it. The appellant returned a short time later having retrieved two silver colored watches, both with black faces, from his vehicle. One of the watches belonged to appellant, the other was Carr's missing watch. Appellant explained to the authorities that he must have inadvertently

picked up Carr's watch and put it in his center console thinking it was his own, noting that the two watches were very similar in appearance, to which one of the prison authorities responded, "you make me sick." The foregoing removal ensued.

At the hearing, Carr's watch, the item at the center of this case and controversy, was not produced. Appellant did produce his own watch which was silver in color, with a black face with the letters ESQ printed on it. Appellant testified that ESQ was a line of watches manufactured by Movado, the same manufacturer as Carr's watch. The watch produced by appellant appeared to match the description of Carr's watch as described by both respondent's and appellant's witnesses and I therefore **FIND** the two watches to be similar, if not identical, in appearance.

LEGAL ANALYSIS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, 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, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

In the case at bar the sole question is whether appellant wrongfully took the watch. If so, appellant is subject to discipline. In the foregoing case, appellant is

accused of theft of a coworker's property and of providing misleading statements to authorities upon investigation. Given the egregious nature of the alleged act removal may be warranted if it is found appellant actually stole the watch and intentionally mislead the ensuing investigation when he denied the theft.

DISCUSSION

The outcome of this case lies largely on a determination of credibility. Respondent asserts that appellant took the watch with the intent to deprive the rightful owner of same. I **FIND** that appellant could not have possibly known of the presence of the watch on the heater until the moment he entered into the security checkpoint area at the entrance of the prison. Given that the entire occurrence wherein appellant obtained possession of the watch took a matter of seconds and based on all evidence presented at the hearing, I **FIND** that appellant inadvertently took possession of Carr's watch on September 28, 2016.

Respondent argues that due to the lapse of time between September 28, 2016, and October 4, 2016, even if the watch was inadvertently taken on September 28, appellant would have had ample time to realize his mistake and return the watch. Appellant's failure to report the mistaken possession of the watch would then constitute a wrongful act subject to discipline. This argument is rebutted by the fact that appellant kept the watch in the center console of his vehicle. I **FIND** it irrational and improbable that an individual, upon realizing his mistaken possession of another's property, who then makes the affirmative decision to deprive the rightful owner of same, would continuously transport the now stolen item back and forth to work for several days.

Respondent presented two witnesses, Kenneth Luongo (Luongo) and Major James J. Jones (Jones), in support of its case. Luongo is employed with the Special Investigations Unit at the NJ Department of Corrections. He was the lead investigator regarding this matter. He testified that he reviewed the surveillance tape, was involved in the interview of the appellant, but did not make a final determination of intent or

culpability regarding appellant's actions. He simply gathered evidence and reported same to his supervisors who then made the final determination.

Kenneth Luongo testified that appellant went to the parking lot and retrieved two silver watches from his vehicle; one his and the other belonging to Carr. This account was reiterated by the appellant who added that that he would routinely store his own watch in the center console of his vehicle. Appellant further testified that he would periodically retrieve the watch and wear it from time to time.

Jones is the Administrative Major at East Jersey State Prison. He testified that he is responsible for policy and procedures at the prison as well as any disciplinary proceedings. He was not presented as a fact witness but to discuss DOC disciplinary policies generally. Jones testified to the general policies and procedures regarding DOC employees. He noted that truthfulness is a character required of all employees.

Jones then went through some of the rules contained in the employee handbook pertaining specifically to theft. Jones testified that theft of any kind violates the agency's ethics policy and would bring into question an employee's trustworthiness and would therefore be grounds for termination. Jones was asked whether he understood the act of theft to include an element of intent. Jones testified that all DOC employees are held to a higher standard and as such, an employee may still be disciplined even if he inadvertently took possession of another's property. I FIND this testimony to be inaccurate on its face and I FIND that an employee that inadvertently takes another employee's property by mistake cannot be found to have committed theft and cannot be disciplined for theft.

In the case at bar the respondent failed to produce any witness or evidence that tended to show appellant knowingly took wrongful possession of the watch. The surveillance tape at the center of respondent's case shows no evidence of premeditation and no conclusion regarding appellant's state of mind can be drawn from it. Appellant acknowledges that he took the watch but argues he mistook it for his own.

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Respondent's case relies heavily on the argument that appellants own silver colored watch does not match the description of officer Carr's watch. I find appellant's watch does match the description of officer Carr's watch. Since only appellant's watch was presented at the hearing there is no evidence to rebut the argument that the two watches are alike if not identical.

ORDER

Based upon the foregoing, it is **ORDERED** that the forgoing appeal is **GRANTED** and appellant's removal be overturned.

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. 52:14B10.

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.

4/18/18
DATE

J. Anthony Tiscornia
JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Ann James Bencis

APR 20 2018

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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APPENDIX

LIST OF WITNESSES

For Appellant:

John Mulligan

For Respondent:

Kenneth Luongo

James J. Jones

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

Final Notice of Disciplinary Action