STATE OF NEW JERSEY

In the Matter of Erica Davis-Smith Mercer County, Department of Public Safety CSC DKT. NO. 2013-3349 OAL DKT. NO. CSV 16665-16	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: AUGUST 17, 2018 BW

The appeal of Erica Davis-Smith, County Correction Officer, Mercer County, Department of Public Safety, removal effective November 15, 2012, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on July 17, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

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 August 15, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. However, the Commission modifies the removal to a resignation in good standing.

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 15TH DAY OF AUGUST, 2018

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF ERICA DAVIS-SMITH, MERCER COUNTY DEPARTMENT OF PUBLIC SAFETY.

OAL DKT. NO. CSR 16665-16

CSC DKT # 2013-3349

Jason LeBoeuf, Esq., for appellant Erica Davis-Smith

Kristina E. Chubenko, Assistant County Counsel, for respondent Mercer County Department of Public Safety (Arthur R. Sypek, Jr., County Counsel)

Record Closed: June 26, 2018 Decided: July 17, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

Erica Davis-Smith was employed by the Mercer County Department of Public Safety/Corrections as a County Corrections Officer. She began her employment on August 19, 2002, and on April 23, 2012, she suffered an injury at work and was placed on workers' compensation. She was seen several times by Dr. Hornstein. On July 2, 2012, Dr. Hornstein referred her for a Functional Capacity Examination (FCE). This examination was conducted on July 5, 2012, by Kinematic Consultants, Inc. (Kinematic). The FCE report advised that the examinee had demonstrated ability for light-medium category work, with restrictions on activities. On July 16, 2002, Dr. Hornstein concluded that the appellant had reached maximum medical improvement (MMI). On November 21, 2012, the County issued a Preliminary Notice of Disciplinary

Action, advising Ms. Davis-Smith that she was to be removed from her position due to her inability to perform duties. N.J.A.C. 4A:2-2.3(a)3. On May 23, 2013, the appointing authority issued a Final Notice of Disciplinary Action, removing Ms. Davis-Smith from her position, effective as of November 16, 2012, due to her inability to perform her duties. Ms. Davis-Smith filed an appeal of the appointing authority's action with the Civil Service Commission and the New Jersey Office of Administrative Law (OAL). The parties are unclear as to precisely why that appeal was not initially docketed and why for some reason the contested case was not filed at the OAL until November 2, 2016. The case was initially assigned to Hon. Laura Sanders, Chief ALJ, and when Judge Sanders left the OAL, it was reassigned to Hon. Patricia Kerins, ALJ. Early attempts to schedule the case for hearing apparently were unsuccessful due to witness availability issues. On March 23, 2013, the respondent filed a motion for summary decision, as permitted by N.J.A.C. 1:1-12.5. Ms. Davis-Smith filed a response on April 27, 2018. The County replied on May 1, 2018. Due to the heavy calendar of cases pending before Judge Kerins, the matter was transferred to this administrative law judge, sitting on recall. Oral argument was conducted by telephone conference on June 26, 2018.

Essentially, the appointing authority seeks summary decision based on the allegedly undisputed fact that as of the date of the Preliminary and, most significantly, the Final Notices, Ms. Davis-Smith was undisputedly incapable of performing all of the required duties of a corrections officer, as they are detailed in a job specification entered into evidence for the motion. In response, Ms. Davis-Smith, while not denying that as of those dates she had not been cleared to perform all duties of the position, nevertheless offers additional facts which she believes indicate that the County acted prematurely when it declared her at maximum medical improvement and then concluded that she was unable to perform her duties. According to a Certification filed by Ms. Davis-Smith in response to the motion, when she was advised that she had failed the FCE and was told that surgery would not help her to fully recover, she sought a second opinion from a specialist, an orthopedist at Mercer-Bucks Orthopaedics, who advised her that she had torn the medial meniscus in her left knee and that, despite what she says was Dr. Hornstein's advice that her problem could not be corrected, surgery could be performed to correct the injury. Surgery was performed in January 2013. Following rehabilitation,

she underwent another FCE in October 2013, which cleared her for "medium-heavy" work. Despite this, she was not returned to her position. According to her Certification, her treating physician informed the County that she was able to resume work on October 18, 2013, without restrictions.

The circumstances under which Ms. Davis-Smith underwent this second FCE were the subject of some discussion in both the briefs and the oral argument. As part of her submission in opposition to the motion, Ms. Davis-Smith included a Settlement Agreement and General Release, a document which was signed on October 9, 2013, by both parties. In this Agreement, the parties agreed that Ms. Davis-Smith had been on unpaid leave since November 2012, due to her admitted inability to perform the duties and that they would like to amicably resolve the matter. It was agreed that she would undergo a functional capacity examination on October 10, 2013. The purpose was to determine whether she was physically able to fully perform the essential job functions with no restrictions for the position of corrections officer. If Kinematic determined that she could fully perform the physical demands, specifically, "(heavy category work) with no restrictions or limitations," she would be returned to work following a return-to-work physical and drug screen. She would then withdraw the appeal pending before the OAL. However, if the determination were that she could not fully perform the physical demands without restriction the parties would proceed with the matter pending before the OAL.

The County takes the position that it is inappropriate to make any reference to this settlement agreement in connection with the determination of the motion for summary decision. It notes that settlement discussions are generally not admissible evidence, as "Offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible." N.J.A.C. 1:1-15.5. Alternatively, even if one were to consider the results of this second FCE to be relevant, the results did not clear Ms. Davis-Smith for the performance of all of the duties of a corrections officer and therefore the provision that would require her to be returned to that position did not become operable. All that said, the County's primary position is that the only really relevant fact is that, as of the date of the removal, Ms. Davis-Smith

was unable to perform all of the duties of her position, a fact which Ms. Davis-Smith does not deny. The County cites what it argues is an analogous case, In the Matter of Kamal Abdelall, Bayonne Housing Authority, \http://njlaw.rutgers.edu/collections/oal/final/csv12994-11.pdf, where a laborer had been injured on the job in February 2011. An FCE was performed on June 9, 2011, and on July 14, 2011, the orthopedic doctor placed the appellant at MMI, with permanent restrictions for light/medium category work with occasional lifting up to thirty-five pounds. The Housing Authority issued a Preliminary and a Final Notice of Disciplinary Action and removed Abdelall for inability to perform duties, effective as of August 5, 2011. Eighteen days later, on August 23, 2011, the appellant's personal physician determined that he was able to return to full duty with no restrictions. Concluding that the effective date of removal had already occurred prior to the date on which the personal physician had cleared the appellant to return to full duty with no restrictions, the administrative law judge upheld the removal. The sole issue was whether the appellant was fit for duty as of the date of removal. As a result, the physician's clearance permitting a return-to-work after the date of removal was irrelevant. The Civil Service Commission adopted the judge's decision, nevertheless noting that the removal did not constitute a disciplinary action and that the termination should be changed to a resignation in good standing, citing Newark v. Bellezza, 159 N.J. Super. 123, 128 (App. Div. 1978).

In opposing this motion, appellant first argues that the County has relied solely upon hearsay evidence in support of its motion. She argues that in respect to the determination of the motion for summary decision, reliance upon hearsay is inappropriate, as the judge is required to makes credibility determinations to determine the appropriate weight to give to the hearsay evidence. As an ultimate finding must be based upon competent evidence and not based solely on hearsay, N.J.A.C. 1:1-15.5 (a) and (b), it would be inappropriate to grant summary decision in this case, where no such competent evidence has been offered in respect to the motion.[1] In particular, counsel

[1] First, evidence submitted in support of a motion for summary judgment must be admissible. Sellers v. Schonfeld, 270 N.J. Super. 424, 427, 637 A.2d 529 (App. Div. 1993). Compare R. 1:6-6 (the facts asserted in an affidavit in support of a motion must be "admissible in evidence"). [Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995) (Pressler, J.A.D.)]

for Ms. Davis-Smith notes the County relies upon a "blanket statement" that it does not have light duty positions at the Corrections Center. That statement is contained in a Certification provided by Ollie Young, an Assistant Personnel Director with the County of Mercer since 2008. Young also notes that "corrections officers are required to be capable of performing heavy category work with no restrictions." Noting that the standard for determining motions for summary decision requires that all reasonable inferences arising from the evidence must be accorded to the party opposing the motion, counsel notes that an examination of the job specification provided in the record does not include any reference to there being no light duty available for corrections officers. The absence of any such limitation in the job specification allows the inference that light duty is permissible. As the only evidence refuting this is Young's hearsay statement, there is a material dispute of fact as to light duty that might have been offered to Ms. Davis-Smith during the time when her ability to perform all of the heavy-duty functions of the position was restricted. Additionally, assessment of the credibility of Young's assertion as to the lack of light duty requires that a plenary hearing be held.

In addition, Ms. Davis-Smith asserts that she was inexplicably determined to be at maximum medical improvement and a premature FCE was scheduled while she was still healing from a workplace injury. Given the opportunity to heal and the surgical intervention in January 2013, she was able to demonstrate in October 2013 that she was able to perform the duties of her position. To this point, counsel notes that the report on that second FCE provided that she could perform "Medium-Heavy category work (occasional lift and work up to 75 lbs.)." As for the County's reliance upon Abdelall, counsel argues that that determination was only made after an evidentiary hearing.

Summary Decision

N.J.A.C. 1:1-12.5 provides that a party may move for summary decision. The procedure is set forth in N.J.A.C. 1:1-12.5(b),

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may

> be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

The summary decision motion is the administrative law equivalent of the Judiciary's summary judgment motion. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986)(Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill at 530. Brill

concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson at 477 U.S. 251-52, 106 S. Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Discussion

The appointing authority determined that Ms. Davis-Smith was to be removed from her position because she could not perform the full duties for which a corrections officer is responsible. This decision was made after she suffered a knee injury and an FCE determined that she was restricted to "light-medium category work." As her counsel agreed during oral argument, at no point after that FCE was issued, through the dates upon which the Preliminary and Final Notices of Disciplinary Action were issued, was Ms. Davis-Smith cleared for full duty. There is simply no factual dispute regarding this. While the appellant disputes that she should have been sent for the FCE when Dr. Hornstein ordered it in July 2012, she does not contend that she was capable of performing all of the duties for which a corrections officer might be responsible, either in July 2012 or anytime thereafter, until she was, as she asserts, cleared in October 2013. While she had surgery on the knee in January 2013, she does not contend that the surgery resulted in an immediate resolution of her problems such that she then became

capable of performing even heavy category work at any time after this surgical procedure until that October FCE cleared her for "Medium-Heavy" work.

The County contends that the only relevant issue is whether the appellant was capable of performing all of the duties of the position as of the data of her removal, at which date she was admittedly not so capable. Therefore, the motion for summary decision must be granted. As for the October FCE, it is irrelevant to the determination of this case, as her removal had already occurred at a time when she unquestionably was unable to perform all of the duties of a corrections officer. However, the County notes that even if it were relevant, the wording of the October 2013, FCE does not actually clear Davis-Smith for heavy-duty work without restriction. The FCE report categorizes the work that Davis-Smith could perform as "Medium-Heavy category work (occasional lift and work up to 75 lbs.) with precautions" and with recommendations concerning allowing changes in activity during periods of prolonged or repetitive in the range left knee flexion or moderate weight-bearing due to her "demonstrated gait movement," and provides that certain activities are not recommended, including "running to codes, involvement with altercations, restraining unruly individuals" and "activities requiring pivoting on the LLE." Thus, even if one word to read all of this in the most favorable light possible toward Ms. Davis-Smith, the County offers that this report does not demonstrate that Davis-Smith met the standard for return-to-work established in the settlement agreement, which required that she be capable of performing "(heavy category work) with no restrictions or limitations."

Ms. Davis-Smith questions the County's assertion in Ollie Young's Certification that "the County does not have light duty positions at the correction center." Presumably, if light duty was available, then Davis-Smith could have possibly been returned to work long before the Preliminary Notice was issued, even though she could not have performed all of the duties for which a corrections officer might be liable. There is no indication in the record that she made a request for such accommodation, and Ms. Smith-Davis does not mention any such request in her Certification. While it is true that Young's certification is hearsay, Young was the assistant personnel director for the County and presumably in a position to know whether the County offered light duty

positions at the Correction Center.[2] He could certainly testify to this fact at a hearing. In response to this claim, Davis-Smith offers no evidence to the contrary. She provides no indication that there are any facts indicating that the County does in fact offer light duty at this institution. She only offers that the Civil Service job specification, provided as evidence by the County, does not say that light duty is not available. While it is correct that there is no such statement in the job specification, there appears no warrant to imply the availability of light duty merely from the absence of any reference to it, positively or negatively, in the four corners of the written job description. More importantly, counsel for the County notes that the availability of light duty has been determined by the Public Employee Relations Commission (PERC) to be a management prerogative. In the context of a correctional facility, the fact that management may have determined not to offer light duty as an exercise of that prerogative seems understandable. Be that as it may, Young's certification that no light duty positions were available at the Correction Center is not opposed by any evidence whatsoever on the part of the appellant. Thus, she has not demonstrated any basis for concluding that the existence of light duty constitutes a genuine dispute of material fact. And, the appellant does not claim that she was capable of performing all of the tasks set forth in the job specification. Indeed, she agrees that she could not do so as of the time of her termination.

As for the Settlement Agreement and the second FCE, it is true that while the appeal of the termination was pending, the parties entered into an agreement that provided for this FCE and also for what would occur following the receipt of the report on the outcome of the FCE. This agreement offered the appellant the possibility of a return to her position if she was found capable of "fully" performing "the essential job functions with no restrictions." Once the FCE results were issued, the parties had to decide how to respond to them. The County did not advise Ms. Davis-Smith that it

[2] As the County notes, the determination of whether to have any light duty is a management prerogative. The Public Employee Relations Commission has so held.

> The City has a non-negotiable managerial prerogative to determine whether it wishes to maintain a light duty policy. [South Brunswick Tp., P.E.R.C. No. 2001-035, 27 NJPER 40 (¶32021 2000).]

understood her to have met the standard set in the Agreement and that she should return to work.[3] Thus, it must be understood that as far as the County was concerned, she had failed to meet the test set forth in the Agreement and as such, as the Agreement stated, the matter pending at the OAL (this case) "shall proceed." As for Davis-Smith, if she believed that the results of the October FCE were such that she met the test, then, from her perspective, the County's failure to return her to her position could be seen as constituting a violation of the settlement agreement, allowing her to proceed with action to enforce that agreement. Such action presumably would have been by means of a motion to enforce the settlement, compelling the County to return Ms. Davis-Smith to her position based upon the terms of the settlement agreement. Given that there was a pending case before the Civil Service Commission regarding her employment status with the County, that motion could presumably have been made in the pending case. And if it was determined that she did meet the test, presumably an order would have emerged ordering the County to return her to her position. If it did not do so, presumably an action could have been brought in the Superior Court to compel the County to comply with the Civil Service Commission's order for her return. As agreed by her counsel, no such proceedings were instituted after the FCE results were received and the County did not return her to her position. As such, this case will determine whether the County's action terminating Ms. Davis-Smith as of November 2012, was valid.

Based upon the record provided for this motion for summary decision, I **FIND** that it is undisputed that following her injury in April 2012, she was placed on workers' compensation. As of that date, the appellant was unable to perform all of the essential requirements of the position of County Corrections Officer as set forth in the Civil Service job specification. An FCE was performed In July 2012, and the report provided that she could not do "heavy" category work. She was declared at MMI by Doctor Hornstein in July 2012. After obtaining a second opinion, she had surgery in January

[3] Indeed, it must be said that the wording of the second FCE does not appear to completely clear Ms. Davis-Smith to perform all duties that she might be expected to be capable to perform as a corrections officer, as it notes the need for "precautions" and recommends against her performing a number of tasks that might be expected to arise in prison settings, such as "running to codes, involvement with altercations, restraining unruly individuals" and "activities requiring pivoting on the LLE."

2013. She underwent rehabilitation and in October 2013, following entry into a settlement agreement with the County, she underwent a second FCE. After the report of that examination was received she was not returned to her position.

I **FIND** that Ms. Davis-Smith does not dispute that she was not cleared for the performance of heavy category work until, giving her the benefit of the doubt, October 2013, and, as such, prior to that time she had not been cleared for the performance of all of the essential duties of the position. I **FIND** that there is no evidence in the record to refute the appointing authority's assertion that there is no light duty available in the Corrections Center. While the appointing authority's proof is a Certification, and thus hearsay, it was authored by someone who, due to the position that person holds in the County's personnel department, was quite likely to know if the County had permitted such light duty as an exercise of its managerial prerogative and as such if such work was available, and the assertion therefore has a reasonable indicium of reliability. Additionally, the facts asserted through this certification would be admissible at hearing, and the author of the document would, no doubt, be competent to testify on this subject. In addition, I **FIND** that the Civil Service job specification is silent as to any reference to light duty for one in this position. Given this, and considering the nature of the setting in which this position operates, that is, in a correctional facility, if Ms. Davis-Smith were to demonstrate the existence of a genuine dispute of material fact as to the existence of light duty in opposition to the movant's position, she would have to offer something more concrete than the mere absence of any reference, one way or the other, to light duty in the job description. She offers no evidence that the County has determined to allow light duty, that it has been allowed for other employees during any relevant period of time, that there is any legal duty on the part of this correctional facility to permit light duty, or that the claim made by the assistant personnel director is incorrect. Nor does she claim to have sought light duty. As such, I **FIND** that light duty did not exist in this facility. And, while it is of course the case that at any given time a corrections officer may not be called upon to perform all duties relevant to the position, or more, specifically to undertake "heavy" duties, in the absence of specific "light duty" assignments provided with the understanding that personnel so assigned will not under any circumstances be required to also undertake duties that are not "light," an employee

incapable of performing all of the essential duties incumbent on a corrections officer is not capable of performing that position.

I **CONCLUDE** that Ms. Smith-Davis was incapable of performing the duties of her position at the time of her termination. And to be clear, I **CONCLUDE** that this inability was existent from the date of her accident on through both on the date that the appointing authority deemed the effective date of removal, November 16, 2012, as well as the much later date on which the Final Notice was issued, May 23, 2013, a date itself nearly five months earlier than the issuance of the results of the second FCE, which, as noted, are, on its face, limited by the need for precautions and recommended restrictions.

ORDER

IT IS HEREBY ORDERED that the motion for summary decision is **GRANTED**. The appeal from Ms. Davis-Smith's separation from her position must fail. However, as the reason for this separation was her inability to perform her job due to physical injury and not as the result of any conduct or action that is properly worthy of discipline, in accord with prior decisions, her termination is hereby **changed to a resignation in good standing.**

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

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

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

July 17, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 7-17-18

Date Mailed to Parties: 7-17-18

mph

EXHIBITS:

For appellant:

P-1 Certification of Erica Davis-Smith, with attached Exhibits A through C

For respondent:

R-1 Certification of Ollie Young, with attached Exhibits A through J