
In the Matter of G.B.
Cite as 12 *N.J.A.R.* 217

**IN THE MATTER OF
G.B.**

Initial Decision: June 28, 1989
Final Agency Decision: July 25, 1989
Approved for Publication by the
Merit System Board: July 28, 1989

SYNOPSIS

The Borough of Lodi appealed the determination of the Department of Personnel that respondent G.B.'s name should be retained on a hiring list for the position of police officer. The matter was transmitted to the Office of Administrative Law for a hearing.

Respondent had previously been employed as a police officer by Lodi. A disciplinary action was brought against him, but there was a settlement which resulted in G.B.'s resignation. As part of the settlement, the Borough agreed to seal respondent's employment records and not disclose the reason for his resignation.

In this appeal, respondent claimed his previous employment records could not be considered to exclude him from the employment list, since the files had been sealed in the settlement. The administrative law judge who heard the case rejected respondent's argument. The purpose of sealing respondent's personnel files was to prevent them from being used by third parties. However, the files were not closed to the parties to the settlement agreement. Therefore, the records could be considered.

Based on her review of respondent's previous employment records, the administrative law judge concluded that respondent was unfit to remain on the eligibility list. His conduct was inconsistent with the dependability and personal integrity required in a police officer. Therefore, the judge ordered that respondent's name be removed from the eligibility list.

Upon review, this initial decision was adopted by the Merit System Board.

Anthony Savastano, Esq., for appellant, Borough of Lodi
Nicholas Palma, Esq. for respondent, G.B. (A.J. Fusco, Jr., Esq., attorney)

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LaVECCHIA, Chief ALJ:

Appellant, Borough of Lodi (Borough), appeals the determination of the Department of Personnel's Manager of County and Municipal Government Services to retain the name of G.B. on the Borough's open competitive hiring roster for the position of police officer (M0988N). The Borough bases its appeal on G.B.'s prior employment record as a police officer with the Borough.

PROCEDURAL HISTORY

The Merit System Board transmitted this matter to the Office of Administrative Law on December 18, 1988 for a hearing pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.* When transmitted, there was a pending motion by the Office of the Bergen County Prosecutor to intervene, which motion was denied by Order dated April 18, 1989.

A telephone prehearing conference was conducted on April 21, 1989. A prehearing order memorializing the conference was issued on April 25, 1989. During the conference, the parties determined that an evidentiary hearing was not necessary and that the matter should be resolved on cross motions for summary decision. The parties further agreed that the record in this matter would consist of jointly agreed upon documents from G.B.'s personnel file with the Borough. These documents were to be reviewed by the parties and jointly submitted to the undersigned by April 28, 1989. In fact, the documents were submitted on April 25, 1989.

Pursuant to the prehearing order, the parties were to file their written legal arguments by May 20, 1989, and replies, if any, by May 30, 1989. Due to a mailing error involving the prehearing order, counsel for respondent failed to receive the order. Accordingly, the due date for respondent's legal argument was extended to May 31, 1989, and appellant's reply time extended to June 7, 1989, at which time the record would be closed. Respondent's legal argument was timely filed and appellant has apparently chosen not to file any replies thereto. The record was closed June 7, 1989.

ISSUES

This matter is before this tribunal on cross motions for summary decision on the following two issues:

Whether the documents contained in the Borough of Lodi's per-

sonnel file on G.B., which were sealed as part of the settlement of the earlier disciplinary matter brought against G.B., should be unsealed for use in this proceeding.

If the personnel records are unsealed, whether their contents require the removal of G.B.'s name from the eligibility list for the title of police officer in the Borough of Lodi.

ISSUE NO. ONE

Whether respondent's name should be removed from the eligibility list is dependent upon his prior employment record. As stated by the Merit System Board's decision granting a hearing in this matter, respondent's prior employment record includes his removal by the local appointing authority, the Borough, from his previously held permanent title of police officer in the Borough of Lodi. Respondent appealed that removal to the former Civil Service Commission which referred the appeal to the Office of Administrative Law.

While the matter was pending, G.B. and the Borough, the same two parties in this proceeding, entered into a settlement agreement, which recorded G.B.'s separation from his Borough Police Officer position as a resignation for personal reasons. The settlement agreement sealed G.B.'s employment records, stated the record could only be opened by a "court of competent jurisdiction," and further provided:

in the event that any inquiry is made of the Police Chief, record bureau, or any other representative of the Police Department of the Borough of Lodi, with authority to respond to inquiries concerning the reason for resignation therefrom by Petitioner, G.B., said individuals shall state only that the Petitioner resigned for personal reasons.

The settlement agreement was approved by the Administrative Law Judge assigned to hear the matter, *N.J.A.C.* 1:1-19.1(b)1, and by the Civil Service Commission when at its June 10, 1986 meeting it accepted the initial decision incorporating the settlement terms.

G.B. contends that the sealing order contained in the settlement agreement, terminating his earlier appeal from his separation from his position as a police officer with the Borough, precludes the Board from utilizing the information contained therein as reason to remove him from the eligible list. From that point, respondent contends that his previous employment records cannot be considered when evaluating his fitness to remain on an eligible list for the position of police

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officer with the Borough. In furtherance of this argument, respondent notes that the settlement agreement does not specifically prohibit him from reapplying to be a police officer in the Borough. These arguments are disputed by the Borough, which maintains that the sealing was only to pertain to third parties seeking to know the particulars underlying G.B.'s resignation for personal reasons, not to the Borough which was party to the settlement agreement and had knowledge of all of the events culminating with G.B.'s resignation.

I am unpersuaded by respondent's arguments. If the settlement agreement referring to a sealing of the records meant that the facts underlying the earlier disciplinary action could not be used, the settlement agreement would have said so. The action of sealing a record prevents the record's contents from becoming a public record which could be used by third parties. The settlement agreement ordering the sealing of the record does not mandate amnesia, which could lead to a situation where a public official would be forced to make an improvident judgment because pertinent information could not be utilized. Had any of the parties to the earlier settlement agreement contemplated such a far-reaching result, they surely would have said so. They did not. Instead, they entered into the rather typical order which imposes an obligation of confidentiality toward third parties. Hence, the agreement used the word "sealing." The term "sealing" is defined in the *New Webster's Dictionary* (1981) as meaning "to prevent escape", i.e. preventing someone from learning of it.

This tribunal will not tolerate G.B.'s attempt to turn that shielding of information to third parties against his former employer so that the Borough cannot now use its knowledge and records of his past performance as a police officer in evaluating his eligibility to be rehired. The Borough had terminated him from his position as a police officer and G.B. was attempting to overturn that action via his appeal to the Civil Service Commission when he was able to reach a settlement which permitted him to resign instead of being terminated. Having secured that less onerous result, G.B. should not be permitted to turn around, reapply to the Borough and prevent the Borough from considering its past records of G.B. To condone such a result would be unjust. Indeed, G.B.'s argument that the settlement agreement did not specifically prohibit his reapplication to be a police officer with the Borough captures the legal nicety which he would have this tribunal endorse, but which I refuse to accept.

In connection with this issue, I would add that were I to find it necessary to unseal the records, I believe such an unsealing could

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and should be ordered in this proceeding. I interpret the reference in the agreement that the records could only be unsealed by a "court of competent jurisdiction" to mean an order by an administrative law judge within the Office of Administrative Law since the records were originally sealed by this tribunal. As with the settlement agreement, any such order would be subject to review by the Merit System Board. I do not believe it necessary and question whether an order by a trial division of the Superior Court would even be appropriate to unseal these records because I do not believe that private parties acting by agreement can confer jurisdiction upon the Superior Court. Were it to be necessary, I would order the unsealing of G.B.'s employment records with the Borough for purposes of this action in order to prevent a perversion of the previous sealing order. The public interest is always impacted when a public employee's disciplinary record is sealed and that impact should be kept to reasonable limits. Here to apply the sealing to the governing body of the same community wherein G.B. previously served as a police officer would be a miscarriage of justice.

ISSUE NO. TWO

The public position held by a police officer is very special. It is well-recognized that in order to obtain and keep the respect of the public, a police officer must present an unflinching public image of dependability and personal integrity. *Moorestown Township v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), certif. den. 47 *N.J.* 80 (1966). The public policy of this State demands, when a police officer candidate's fitness is under review, a thorough examination of the individual's character because a police officer's express and inherent duty "requires service to the public of the highest fidelity . . . as well as honesty, integrity and good faith." *State v. Stevens*, 203 *N.J. Super.* 59, 66 (Law Div. 1984). Consistent with that salutary public policy, the Civil Service Reform Act encourages a broader fitness inquiry for eligibles for law enforcement titles. See *N.J.A.C.* 4A:4-6.1(a)(7); *N.J.A.C.* 4A:4-4.7.

As stated earlier, G.B.'s prior employment record was stipulated to between the parties and the documents marked into evidence. The parties have proceeded on the basis of these documents in lieu of an evidentiary hearing. In independently reviewing G.B.'s previous employment records maintained by the Borough, I find G.B. unfit to remain on the eligibility list for the position of police officer within the Borough.

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While previously serving as a police officer with the Borough, G.B. was charged with neglect of duty, disorderly or immoral conduct, and conduct unbecoming an employee in the public service. These charges arose out of an incident on November 15, 1984, when G.B. was on duty. In a sworn statement, and after being advised of his Constitutional rights, G.B. admitted to letting air out and thereby flattening a tire on an automobile owned by V.H. He further admitted to running an ownership check through the Division of Motor Vehicles on the license plate of that car previous to November 15, 1984, which enabled him to learn that the car was owned by V.H. and where she lived.

Having let the tire's air out, G.B. admitted going to V.H.'s apartment and offering to fix the tire. After fixing the tire, he returned to her apartment. V.H.'s sworn statement reflects that G.B. asked her to invite him in for coffee in exchange for helping her with the flat, and that she reluctantly agreed, although she was concerned about being late to work. She further stated that G.B. pressed the point by reminding her that she would have been much later for work had he not helped her with the tire. G.B.'s recollection of the exchange was that he could not remember whether he suggested that she invite him in for coffee, or if she suggested it. On this point I find V.H.'s statement more credible, particularly in light of her subsequent action which is not disputed by G.B.'s statement. V.H. stated that she was ill at ease over the incident as it was occurring and called a male friend to come over. This male friend did appear at V.H.'s apartment after G.B. had returned for his coffee, following his return of the air compressor that he had used to fix the flat tire. However, the male friend's appearance was not in time to prevent G.B. from embracing and kissing V.H. in her apartment.

It is noteworthy that in his argument G.B. does not dispute this incident. He argues instead that he was never convicted of any criminal charges as a result of this incident and further, that he never threatened V.H. with violence.

These arguments belie the point. G.B.'s undisputed conduct toward V.H. while in uniform and on duty were entirely inconsistent with the trust which the public has a right to place with its law enforcement personnel. Every member of the public deserves to enjoy faith and confidence in the moral, ethical and professional conduct of the individuals entrusted with the public safety of the community.

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Once doubt in the fidelity of even one of our law enforcement officers is permitted to creep in, the public trust in persons charged with protecting the law is eroded.

This tribunal cannot condone such a result. The high standards demanded of police officers in the State of New Jersey in the past ought not to be bent for G.B. To do so would be a disservice to the Lodi community where this incident in November 1984 occurred, to the police officers in Lodi and other communities who live up to that high standard, to V.H., and to the public generally. The Borough's decision to remove G.B.'s name from the eligible list for police officer based on his prior employment record was correct and should stand. I **FIND** the determination of the Manager of County and Municipal Government Services, which refused to consider the previous employment record and allowed G.B.'s name to remain on the eligible list, to be in error and recommend that it be reversed. I **ORDER** G.B.'s name removed from the eligible list for the position of police officer in the Borough of Lodi.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE MERIT SYSTEM BOARD

The appeal of G.B. concerning the retention of his name on the Police Officer (M0988N), Borough of Lodi open competitive hiring roster, was heard by Administrative Law Judge Jaynee LaVecchia, who rendered her initial decision on June 28, 1989. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on July 25, 1989, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Merit System Board orders that appellant's name be removed from the Police Officer (M0988N), Borough of Lodi open competitive hiring roster.

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This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.