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SUPERIOR COURT OF N.J.  
CUMBERLAND COUNTY

AUG 04 2014

WILLIAM BURGESS v. CUMBERLAND COUNTY  
DEPARTMENT OF CORRECTIONS

REC'D & FILED  
CIVIL CASE  
MANAGEMENT OFFICE

Docket No. CUM-L-418-14

### SUPPLEMENTAL MEMORANDUM OF DECISION

This matter arises from a disciplinary proceeding initiated by defendant Cumberland County Department of Corrections against plaintiff William Burgess, a corrections officer. The Department of Corrections seeks to terminate plaintiff as a result of his off duty possession and use of heroin. Plaintiff overdosed after he injected heroin into his arm. His girlfriend called 9-1-1 to summon help. Both EMS and the police responded. The plaintiff was administered Narcon and recovered from the overdose. He was charged by police with possession and use of a controlled dangerous substance in violation of *N.J.S.A. 2C:35-10*. After initially being granted a conditional discharge in municipal court, plaintiff successfully moved to vacate the conditional discharge and dismiss the narcotics charge pursuant to the Overdose Prevention Act, *N.J.S.A. 2C:35-31*.

Plaintiff appealed his termination to the Civil Service Commission, which transferred the matter to the Office of Administrative Law (OAL Docket No. CSV 16749-2013 S). An initial trial date of May 6, 2014 was adjourned to June 11, 2014. That appeal was stayed by an Order issued by this court pending the outcome of this matter.

Plaintiff also filed an expungement proceeding in the Superior Court, seeking to expunge the records of his arrest and prosecution for the narcotics charges. That application was recently denied without prejudice as set forth below.

Plaintiff filed this summary action by way of verified complaint and order to show cause with temporary restraints. Plaintiff seeks judgment enjoining defendant from proceeding further in the pending OAL labor disciplinary appeal, arguing that the use of any evidence obtained as a result of seeking medical assistance for his overdose is barred by the Overdose Protection Act. On June 10, 2014, this court entered an Order preliminarily enjoining defendants from further proceeding in the OAL disciplinary appeal until further order of this court. The court entered a Management Order setting a briefing schedule and head oral argument on August 1, 2014. The court rendered an oral decision denying plaintiff's application, dismissing the Complaint and terminating the stay of the OAL disciplinary appeal. The court now issues this Supplemental Memorandum of Decision augmenting its oral decision.

For the following additional reasons, the court finds that the use of evidence obtained as a result of seeking medical assistance for an overdose is not barred from use in plaintiff's pending OAL labor disciplinary appeal.

## OVERDOSE PROTECTION ACT

*N.J.S.A.* 2C:35-31a provides in relevant part:

- a. A person who experiences a drug overdose and who seeks medical assistance or is the subject of a good faith request for medical assistance pursuant to section 4 of this act shall not be:
  - (1) arrested, charged, prosecuted, or convicted for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of, a controlled dangerous substance or controlled substance analog pursuant to subsection a., b., or c. of *N.J.S.*2C:35-10.

Subsections 2 *N.J.S.A.* 2C:35-31a extends the protections of the Act to possession of paraphernalia and hypodermic syringe charges under *N.J.S.A.* 2C:36-2 and -6.

The narcotics charges clearly resulted from the 9-1-1 call seeking medical assistance for plaintiff's heroin overdose. Plaintiff argues that the language and intent of the statute preclude the use of any evidence obtained as a result of seeking medical assistance for the overdose. The defendant vigorously argues that the statute only precludes the use of such evidence in criminal proceedings, not civil proceedings such as a labor disciplinary appeal.

The clear and unambiguous language employed by the Legislature is limited to barring the use of evidence gained by seeking medical assistance for an overdose in criminal proceedings "for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of," a controlled dangerous substance, drug paraphernalia and hypodermic syringes. By its very terms, a person who experiences a drug overdose and who seeks medical assistance, shall not be: "arrested, charged, prosecuted or convicted" of a narcotics offense. *N.J.S.A.* 2C:35-31. Entirely absent from the statute is any express or implied prohibition against using such evidence in the prosecution of crimes other than narcotics use and possession charges, let alone in civil proceedings. The maxim of *inclusio unius est exclusio alterius*. The Legislature could easily have included language in the Act to prohibit the use of such evidence in the prosecution of crimes other than narcotics use and possession charges and civil proceedings. It did not. Instead, the Legislature limited the scope of the Act to one type of criminal prosecutions.

Since the statutory language is clear and unambiguous, the court need not resort to examining legislative history. Nevertheless, the court notes that the plaintiff has not produced any legislative history indicating an intent to preclude the use of such evidence in civil proceedings. Indeed, plaintiff concedes that the statute would not preclude the use of such evidence in a civil case seeking liability for damages resulting from a motor vehicle accident caused by an individual under the influence of narcotics.

A review of the statutes enacted by eleven other states and the District of Columbia similarly reveals the absence of any prohibition against use of evidence obtained as a result

of seeking medical assistance for an overdose in civil proceedings. In fact, only three of those statutes give protection from criminal prosecution.

### USE OF EXPUNGED RECORDS

Expungement is a statutory procedure available to petitioners to extract and isolate all records on file concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system. *N.J.S.A. 2C:52-1a*. "Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly," subject to certain stated exceptions, including those described below. *N.J.S.A. 2C:52-27*.

Expunged records and the information contained therein may be used in certain statutorily permitted circumstances. Specifically, expunged records may be used in the following circumstances:

- By the Violent Crime Compensation Board in conjunction with any claim which has been filed with the Board. *N.J.S.A. 2C:52-18*.
- In conjunction with supervisory treatment and diversion programs. *N.J.S.A. 2C:52-19*.
- In conjunction with setting bail, preparing presentence reports and sentencing. *N.J.S.A. 2C:52-21*.
- By the Parole Board for the purpose of evaluating the granting of parole. *N.J.S.A. 2C:52-22*.
- By the Department of Corrections for use in the classification, evaluation and assignment of inmates to correctional and penal institutions. *N.J.S.A. 2C:52-23*.
- Pursuant to an Order of the Superior Court upon motion for good cause shown and compelling need based on specific facts, where the subject matter of the records of arrest or conviction is the object of litigation or judicial proceedings. *N.J.S.A. 2C:52-19*.

An expunged conviction cannot be the basis of forfeiture of public employment. *In re Forfeiture of Nunez*, 384 *N.J. Super.* 345 (App. Div.), *certif. denied*, 187 *N.J.* 491 (2006). Notwithstanding same, expunged charges may be used in deciding on employment within law enforcement, corrections and the judiciary pursuant to *N.J.S.A. 2C:52-27c*, which states:

Information divulged on expunged records shall be revealed by a petitioner seeking employment within the judicial branch or with law enforcement or corrections agency and such information shall continue to provide a disability as otherwise provided by law.

The expungement statute also includes an additional significant limitation, providing that "any crime committed by a person holding any public office, position or employment ... shall not be subject to expungement if the crime involved or touched such office, position or employment." *N.J.S.A. 2C:52-2b*.

In *Cicchetti v. Morris County Sheriff's Office*, 194 N.J. 563 (2008), the plaintiff, who had applied for a position as a sheriff's officer, failed to disclose a 1974 arrest and conviction for breaking and entering, N.J.S.A. 2A:94-1, and stealing, N.J.S.A. 2A:119-2, in his employment application because he had obtained a court order in 1990 expunging the arrest and conviction. *Id.* at 568. Plaintiff was hired as a sheriff's officer and claimed that he was subject to workplace harassment and a hostile work environment after the disclosure of his diagnosis of Hepatitis C. *Id.* at 569. The court held that the prior expunged theft convictions did not statutorily disqualify Cicchetti from employment as a sheriff's officer, because he was not a public employee when he committed the theft offenses and he was not subject to a forfeiture of future employment. *Id.* at 584. "That is to say, even in the face of his expunged arrest and conviction, plaintiff remained eligible for employment with the Sheriff's Office; he was not permanently disqualified from that employment." *Id.* at 585-86. In reaching that result, the Court explained:

Certainly the expungement statute itself provides that the information included in expunged records must be disclosed in conjunction with seeking employment in a law enforcement agency and that such information shall continue to provide a disability as otherwise provided by law." N.J.S.A. 2C:52-27(c). However, nothing in the statute imposes an absolute bar on employment with a law enforcement agency. Were evidence of any expunged conviction sufficient to support such an absolute bar, the statute would so state. Compare N.J.S.A. 2C:51-2(d) (per se permanent disqualification from employment), with N.J.S.A. 2C:52-27(c) (providing for disclosure of continued disability, but not per se permanent disqualification). It does not, but merely requires that the information be disclosed in those circumstances.

[*Id.* at 584-85.]

Here, plaintiff's petition for expungement of the records was recently denied without prejudice by the Hon. Robert G. Malestein, J.S.C. due to the pending disciplinary appeal filed by plaintiff in the Office of Administrative Law in which plaintiff is contesting his termination from employment. The court takes judicial notice that Judge Malestein denied the expungement without prejudice pursuant to N.J.S.A. 2C:52-19, upon finding that the subject matter of the records of the arrest was the object of litigation or judicial proceedings, namely plaintiff's disciplinary appeal pending before the Office of Administrative Law ("OAL").

#### THE CONDUCT OF CORRECTIONS OFFICERS

In the employment context, law enforcement officers are held to a higher standard of conduct than most other occupations. See *In re Phillips*, 117 N.J. 567, 576-77 (1990). This higher standard applies to conduct both on and off duty. *Id.* at 577. Corrections officers fall within that expected higher standard of conduct. *In re Smith*, 2012 N.J. Super. Unpub. LEXIS 2233, at \*12 (App. Div. Oct. 2, 2012) (correction officer "is a special kind of public employee, held to a higher standard of personal integrity and dependability than civilian

employees because he is a sworn law enforcement officer.”). “In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction.” *In re Carter*, 191 N.J. 474, 485 (2007).

The higher standard of conduct imposed on corrections officers is reflected by the oath of office and Code of Conduct for corrections officers in the Cumberland County Department of Corrections.<sup>1</sup> The oath of office given by plaintiff included the following language:

I will be exemplary in following the laws of the United States and the regulations of the Cumberland County Department of Corrections.

I recognize that my badge is a symbol of public faith and I accept it as a public trust to be held as long as I am employed with the Cumberland County Department of Corrections.

The Code of Ethics contained in the Department’s Personnel Manual as Policy Number 4.13, includes similar language:

I will keep my private life unsullied as an example to all .... I will be exemplary in obeying the laws of the land and regulations of my department.

I recognize the badge of my office as a symbol of public faith and I accept it as public trust to be held as long as I am true to the ethics of official service. I will constantly strive to achieve these objectives and ideals ....

Article 6 of the Code of Ethics governs private conduct. It provides:

The Department of Corrections Officers shall be mindful of their special identification by the public as an upholder of the law. Laxity of conduct or manner in private life, expressing either disrespect of the law seeking to gain special privileges, cannot but reflect upon the officer and the Department of Corrections service. The community and the service requires that the Corrections Officer lead the life of decent and honorable men/women. . . . Rather, they will so conduct their private lives so that the public will regard them as [an] example of stability, fidelity, and morality.

Article 13 of the Code of Ethics governs prohibited conduct. It provides in pertinent part:

With the above in mind, no Corrections Officer, except in the discharge of duty, may knowingly associate with persons engaged in, allegedly engaged in, or have a prior history of engaging in unlawful activities.

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<sup>1</sup> Plaintiff’s objection to defendant’s late submission of the oath of office and Code of Ethics is deemed without merit. The oath of office and Code of Conduct were available to plaintiff since his date of hire. The Code of Conduct is a matter of public record, being part of the personnel policies of the Department of Corrections. They come as no surprise to plaintiff or his counsel.

The Department of Corrections raises several problems and risks posed by a corrections officer who uses heroin. These concerns include:

- Undermining the confidence that co-employees have in their peers;
- Undermining the confidence that the public has in law enforcement;
- Susceptibility to drug use, extortion, blackmail, or other improper influence if the officer becomes known to the inmate population as a drug user or former drug user;
- Security concerns for the officer himself and his fellow officers who must rely upon one another to provide protection and backup in the event of emergencies;
- Adversely impacting reliability in the discharge of day to day activities.

Moreover, the problems and risks posed by the presence of narcotics in jails and prisons is obvious. As explained in *State v. Jackson*, 321 N.J. Super. 365, 373 (Law Div. 1999):

The Court's rationale is premised upon the fact that weapons, drugs and other contraband present a serious danger to institutional order within the prison environment. They are an accelerant which, if introduced into the incendiary penal environment, would make the extraordinary difficult undertaking of prison administration a virtual impossibility. *Ibid.* (citing *Hudson v. Palmer*, 468 U.S. 517, 527 (1984).

With respect to the policy issues raised by plaintiff, the court is not persuaded. The secreting and transporting of illegal drugs into jails and prisons is a known, persistent and serious problem which departments of corrections must face on an ongoing, daily basis. Preventing a department of corrections from being proactive by not permitting a correction officer with a heroin problem from working at a jail or prison could have serious security and safety consequences for the officer himself, other staff and inmates. Plaintiff essentially asks the court to do just that.

The court deems the concerns raised by defendant to be legitimate and serious. They justify invoking disciplinary proceedings against correction officers who use or possess narcotics while on or off duty.

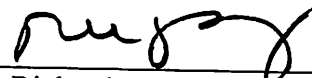
Moreover, the overdose incident is likely not the only conduct of the plaintiff that is problematic, in violation of his oath of office and the Department's Code of Ethics, and subject to disciplinary action. If plaintiff engaged in prior illegal drug acquisition, possession and use, or associated with individuals who also use or supply narcotics, that conduct is appropriate subject matter for disciplinary action. In that regard, the overdose incident may well have been the end result of a course of conduct, not an isolated, singular event. Presumably, to the extent that it exists, the evidence produced during the disciplinary appeal will demonstrate the nature and extent of any such improper conduct or the lack thereof. The Department should not be precluded from introducing otherwise admissible evidence of plaintiff's possession and use of heroin during the overdose incident as part of the evidence of plaintiff's improper conduct during the disciplinary appeal.

In rendering this decision the court does not issue any determination of the strength or weakness of the disciplinary charges brought against plaintiff or the appropriate sanction if the charges are sustained. Those decisions will be rendered by the Administrative Law Judge after hearing all the evidence and the argument of counsel.

### CONCLUSION

Given the higher standard of conduct applicable to corrections officers and the legitimate safety and security concerns raised by the Department of Corrections, the off duty conduct engaged in by plaintiff -- possession and use of heroin -- is highly probative, relevant and seemingly admissible evidence in the pending OAL labor disciplinary appeal.<sup>2</sup>

For these reasons, plaintiff's application to bar the use of the arrest records and police reports and the information contained therein is denied. The stay of the pending OAL labor disciplinary appeal is terminated and that proceeding may resume. Plaintiff's demand for compensatory and punitive damages, interest, attorneys' fees and costs are denied. Plaintiff's Complaint is dismissed with prejudice. This court does not retain jurisdiction.



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Richard J. Geiger, J.S.C.

Dated: August 4, 2014

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<sup>2</sup> OAL labor disciplinary rules are subject to the residuum rule, *N.J.A.C.* 1:1-15.5. Hearsay evidence is admissible in OAL proceedings so long as there is "some legally competent evidence ... to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." The Administrative Law Judge will determine admissibility of the evidence proffered during the trial subject to this court's determination that the use of the evidence in question is not barred by the Act.