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STATE OF NEW JERSEY

In the Matter of Jessica Puglise, County Correction Officer (S9999R), Morris County Sheriff's Office

CSC Docket No. 2015-1611

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

List Removal Appeal

ISSUED SEP 17 2015 (SLK)

Jessica Puglise, represented by Anthony J. Fusco, Jr., Esq., appeals the removal of her name from the eligible list for County Correction Officer (S9999R), Morris County Sheriff's Office, on the basis of two diluted drug tests.

By way of background, the appellant appeared on the County Correction Officer (S9999R), Morris County Sheriff's Office, eligible list which promulgated on May 2, 2014 and expires on May 1, 2016. Certification OL140529 was issued on May 2, 2014 and contained the names of 200 eligibles, including the appellant as the 71st listed eligible. In disposing of the certification, the appointing authority requested the removal of her name due to two diluted drug tests. In support of its request for removal, the appointing authority submitted two laboratory reports from Dr. William Gluckman in Morris Plains:[1] one dated September 26, 2014, indicating that a sample of the appellant's urine was collected on September 23, 2014 and the result was negative, but diluted; and a second one, dated October 2, 2014, indicating that a sample of the appellant's urine was collected on September 30, 2014 and the result was also negative, but diluted.

In support of her appeal, the appellant states that she was informed that she was removed from the eligible list for failing to meet the required medical standards without being provided any specific information. She submits letters from several doctors who indicate that the appellant is medically and physically fit to perform the duties of the subject position.

[1] The collection sites for both urine samples were Faster Urgent Care in Morris Plains and the laboratory for both samples was Alere Toxicology Services, Inc. in Gretna, Louisiana.

In response, the appointing authority, represented by Robert J. Greenbaum, Esq., indicates that the appellant was denied employment because she had two drug tests that came back as diluted and submits her medical records in support of its decision.

In reply, the appellant argues that there were several issues with the testing procedures. First, she notes that she was drug tested on three occasions even though the Policy only provided for one test unless that test was positive. In this regard, she notes she provided a sample on September 17, 2014 at the Morris County Sheriff's Department – Bureau of Corrections, which was sent to the State Toxicology Laboratory in Newark and the results, dated October 31, 2014, were negative. She presents that she was then required to submit two additional drug tests at Faster Urgent Care and that Dr. Gluckman reported the results for both tests as negative, but diluted. The appellant maintains that the initial drug test that was collected by the appointing authority was performed in a manner consistent with its policies and State Attorney General Guidelines and she asserts that the Federal Regulations that Faster Urgent Care utilized do not apply to New Jersey Law Enforcement Candidates. The appellant also certifies that on the morning of September 23, 2014, she was training in preparation for entry into the academy and therefore consumed a considerable amount of water. She was then informed that the results from her drug test with Faster Urgent Care on that afternoon came back as negative, but diluted, and therefore she needed to be tested again. The appellant certifies that, on September 30, 2014, she hardly consumed any liquids prior to the second test at Faster Urgent Care. However, the staff advised that she did not produce enough of a sample and therefore instructed her to drink three to four glasses of water within a specific time frame. As such, she claims that the nurse thereafter advised that her urine was clear due to the large amounts of water she drank.

The appellant provides that, on October 30, 2014, Dr. Gluckman[2] advised the appointing authority that "In my medical opinion this employee is unable to perform the attached job description;" however, he failed to submit a medical report justifying his position and he failed to sign or select the appropriate step 6 result box of the Non-Federal Four-Part Drug Testing Custody and Control for both urine samples. The appellant states that in both cases, the form indicates that there was a split specimen and according to the appointing authority's counsel "the lab only keeps negative samples for 5 days so these are not available for testing at an outside lab. Only positive results are kept for a year." Specifically, she reiterates that the Custody and Control Forms for both samples lack a Medical Review Officer (MRO) signature and/or finding in step 6 of the form. The appellant notes that although the appointing authority maintained that the collection agency followed the United States Department of Transportation regulations which require the lab

[2] It is noted that on September 23, 2014, Sonia Schaefer, RN, APN reported to the appointing authority that the appellant was fit for duty.

to retain the specimen and/or split sample for one year in case a request to test the sample by an independent lab has been made, it failed to do so. It explained that the lab only kept split samples when the results were positive. The appellant also argues that the Federal Regulations require that the appointing authority treat all employees the same and provide notice in advance, yet she was never advised that a "negative dilute" result would cause her name to be removed from the eligible list.

Finally, she presents that, on March 27, 2015, she had an independent urinalysis collected by her doctor and the results came back negative. The appellant maintains that her background is suitable for the subject title. In support of this claim, she submits her college transcript, diploma, and a certificate as proof that she is a good student and college graduate and several letters of recommendation from prior employers including a character reference from the Passaic County Sheriff's Office, Patrol Records supervisor, Internship Coordinator.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)3, states that an eligible who is physically unfit to effectively perform the duties of the position may be removed from the eligible list. *N.J.A.C.* 4A:4-6.3(b) in conjunction with *N.J.A.C.* 4A:4-4.7(d) provides that the appellant has the burden of proof to show by a preponderance of the evidence that the appointing authority's decision to remove the appellant's name from the eligible list was in error.

Initially, a "negative and dilute" drug screen result generally provides a valid basis on which to remove an individual's name from a public safety eligible list. In *In the Matter of Carlos Olivencia* (CSC, decided January 25, 2012), the Commission denied the appellant's appeal of the removal of his name from the eligible list finding that a "negative and dilute" drug screen result is not a valid test since the dilution could have affected the detection of drugs in the appellant's system. *See* Standridge, John B. MD, Adams, Stephen M. MD, and Zotos, Alexander P. MD, "Urine Drug Screening: A Valuable Office Procedure," *American Family Physician*, March 1, 2010. This is the case regardless of the basis for the diluted result. However, the factual circumstances presented in the current matter do not support applying the holding in *Olivencia, supra,* without further examination.

In this regard, in the instant matter, the appellant initially submitted to a drug test where the appointing authority collected her sample and that sample was evaluated by the State Toxicology Lab in Newark. This initial drug test was consistent with the *Morris County Sheriff's Office Bureau of Corrections Policy and Procedures, Standard Operating Procedures, Drug Testing* (SOPs), with reference to the New Jersey Attorney General Guidelines, effective March 10, 1987 and last revised on September 2, 2011, which states that the Bureau of Corrections shall

only use the State Toxicology Lab for purposes of analyzing urine. The report for that test was negative.

Thereafter, the appellant was required to take a second drug test at Faster Urgent Care without any explanation as to why it was necessary to retest her or why it was collected by an outside facility that did not use the State Toxicology Lab. Further, the appellant explained that on the morning of her September 23, 2014 drug test at Faster Urgent Care, she was exercising in order to train for the academy and drank a lot of water which resulted in a "negative diluted" result. Therefore, the appellant stated that she hardly consumed any liquids prior to being retested by Faster Urgent Care on September 30, 2014. However, the appellant claims that the staff from Faster Urgent Care told her that she did not produce enough of a sample for the third drug test. Consequently, she followed their instructions and drank three to four glasses of water which resulted in her receiving a "negative diluted" report again. The appointing authority has not provided any response to dispute the appellant's claim that the "negative diluted" result was caused by Faster Urgent Care's instructions. Additionally, as part of Faster Urgent Care's procedures, it took a "split specimen" from the appellant. The Bureau of Corrections' SOPs require that the second specimen shall be maintained for a period of 60 days to enable a tested individual to have an independent lab evaluate the results in case that individual wants to dispute them. The appointing authority has indicated that, "[t]he lab only keeps negative samples for 5 days so these are not available for testing at an outside lab. Only positive results are kept for a year." Additionally, the appointing authority has not provided any "Chain of Custody" information regarding the drug test taken at Faster Urgent Care which is required by the Bureau of Corrections' SOPs.

Based on the conflicting results of the drug test that was conducted in accordance with the Bureau of Corrections' SOPs and the ones conducted at Faster Urgent Care, the Commission cannot find sufficient basis to permit the removal of the appellant from the subject list due to her providing two essentially invalid tests. However, it has trepidation about restoring the appellant's name to the list without some further assurance that her drug test results are consistent with those required for a law enforcement officer. Accordingly, the Commission orders that the appointing authority schedule the appellant for a drug test that follows the Bureau of Corrections' SOPs. Should the appellant's drug test report from the State Toxicology Lab be "positive" or "negative and diluted," she shall be removed from the subject eligible list. However, should the result be "negative," she shall receive an appointment subject to successful completion of an updated background check and psychological examination. Moreover, the Commission notes that the Americans with Disabilities Act (ADA) at 42 *U.S.C.A.* sec. 12112(d)(3) expressly requires that a job offer be made before any individual is required to submit to a medical or psychological examination. Additionally, the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability*

Related Questions and Medical Examinations (October 10, 1995) state, in pertinent part, that in order for a conditional offer of employment to be "real," the employer is presumed to have evaluated all information that is known or should have reasonably been known prior to rendering the conditional offer of employment. This requirement is intended to ensure that the candidate's possible hidden disability or prior history of disability is not considered before the employer examines all of the relevant non-medical information. In the present case, the record is clear that the appellant had already been offered employment prior to any consideration of Dr. Gluckman's report. It is reiterated that absent any disqualification issues ascertained through another drug test and an updated background check and a psychological examination, the appellant's appointment is mandated.

ORDER

Therefore, the Commission orders the appointing authority to schedule the appellant for another drug test, within 30 days of the issue date of this decision, following the Bureau of Corrections' SOPs. Should the appellant's drug test report from the State Toxicology Lab be "positive" or "negative and diluted," she shall be removed from the subject eligible list. However, should the result be "negative," the appellant shall be subject to an updated background check and psychological examination. Absent any disqualification issues ascertained through the updated background check and psychological examination, the appellant's appointment shall be mandated. Upon successful completion of a working test period, the Commission orders that the appellant be granted a retroactive date of appointment to October 27, 2014, the date she would have been appointed if her name had not been removed from the subject eligible list. This date is for salary step placement and seniority-based purposes only. However, the Commission does not grant any other relief, such as back pay or counsel fees.

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 16th DAY OF SEPTEMBER, 2015

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