



STATE OF NEW JERSEY

In the Matter of Claudio Tundo

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2014-3227

Court Remand

ISSUED: JUL 19 2017

The Superior Court of New Jersey, Appellate Division, has remanded the attached July 11, 2012 final decision of the Civil Service Commission (Commission) to reconsider the appeal of Claudio Tundo.

The background of this matter is thoroughly discussed in the attached decision. *See In the Matter of Claudio Tundo, et al.* (CSC, decided July 11, 2012). Mr. Tundo participated in the Entry Level Law Enforcement Examination (S9999M) and failed to achieve a passing score. Mr. Tundo appealed the matter to the Commission and requested to review the subject test. In denying his appeal, the Commission explained that such a review could not be permitted in order to maintain test security and ensure that the test could be used again. *See N.J.A.C. 4A:4-6.4(e)*.

Thereafter, Mr. Tundo, represented by Ryan M. Lockman, Esq., pursued an appeal with the Appellate Division. In *In the Matter of Claudio Tundo, Entry Level Law Enforcement Examination (S9999M)*, Docket No. A-6313-11T4 (App. Div. November 27, 2013), the court determined that Mr. Tundo should be provided with a limited review of his test materials for the Ability Test component and the opportunity to supplement his appeal with any new information garnered from his review of the test materials. After considering any submissions, the court ordered the Commission to reconsider Tundo's appeal.

On June 25, 2014, Mr. Tundo and his attorney reviewed the Ability Test component materials, including the questions, his answers, and the correct answers

under time restrictions and limited disclosure of the actual test questions, in accordance with the court's directive.

In his supplemental appeal submission, Mr. Tundo indicates that he received a score of 18 out of 48 on the Ability Test component and he did not meet the minimum requirements. He indicates that he was provided with a copy of his answer sheet and challenges its authenticity. He contends that "portions of his answer sheet were not in his handwriting and appeared to be written at different times." He notes that he was informed that candidates' original answer sheets were in the possession of EB Jacobs, LLC (EBJ), the vendor who developed the subject test, and requests to be provided with his original answer sheet. He also emphasizes that he was not permitted to record the keyed responses. As a result, he contends that when reviewing the questions he "had no reference as to what was the correct answer, how it differed from [his] answer, or what precisely was incorrect about [his] chosen answer." He also asserts that he was not permitted to take notes of the correct answer in contravention of the court's order. He argues that during the two hour review period, he was "not able to review the actual questions or answer sheets. Rather, [he had] to rely exclusively on the notes taken during the review periods . . ." Therefore, Mr. Tundo disputes the limited nature of the review and contends that there is no harm in permitting him to view the materials or provide him with more than 45 minutes to review the questions.

During the pendency of arranging a review date for the S9999M examination, in a letter dated May 16, 2014, Mr. Tundo also requested a review of the Entry Level Law Enforcement Examination (S9999R), pursuant to *In the Matter of Claudio Tundo, Entry Level Law Enforcement Examination (S9999M), supra*.¹

On March 26, 2015, Mr. Tundo and his attorney appeared to review his original answer sheet for the S9999M exam² and to review the S9999R exam.³ They were provided with his original answer sheet and the copy of his answer sheet that was provided during his review on June 25, 2014. The original answer sheet was placed under glass, which is part of standard answer sheet review procedures. He was given up to 10 minutes to view each side of the answer sheet along with the copy. Mr. Tundo and his attorney were permitted to take notes regarding the issue of the authenticity of the answer sheet. Upon completion of the review period, the notes were removed but he was permitted to take the notes home to supplement his

¹ It is noted that Mr. Tundo sat for the S9999R examination on November 16, 2013. Mr. Tundo was sent a scoring notice dated May 1, 2014 informing him that he failed the subject test (*i.e.*, "Below Minimum Rating in Written Part 1").

² The former Division of Selection Services obtained Mr. Tundo's original answer sheet from EBJ.

³ The review procedure was outlined in a letter dated August 21, 2014 from the former Division of Selection Services to Mr. Tundo's attorney.

appeal concerning this issue. He was informed that he would have 10 days from the date of review to supplement his appeal. Mr. Tundo and his attorney were also permitted to review the S9999R examination with the same procedures utilized during his review of the S9999M examination on June 25, 2014.

CONCLUSION

At the outset, it is noted that Mr. Tundo did not submit any supplemental information regarding the authenticity of his answer sheet for the S9999M examination. As such, this issue is moot. Furthermore, he did not file an appeal regarding the S9999R examination.

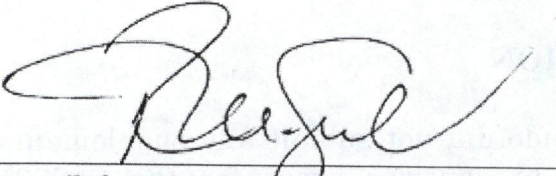
Regarding review of the S9999M exam, Mr. Tundo claims that the amount of time provided for review, his inability to record the keyed responses, and his inability to review the actual questions or answer sheets during the two hour appeal period, were in contravention of the Appellate Division's decision. Initially, the review procedure was outlined in letters dated February 7 and March 14, 2014 from the former Division of Selection Services (now known as the Division of Test Development and Analytics) to Mr. Tundo's attorney. Indeed, based on his objection to the review procedure proposed in the first letter, Mr. Tundo was provided additional time to review his answer sheet and prepare his appeal. There is nothing in the record indicating that Mr. Tundo filed further objections to the procedures prior to the June 25, 2014 review. In this regard, it is noted that the court determined that his review "may be subject to any reasonable limitations (as determined by the Commission) which are necessary to secure the test's integrity, without preventing Tundo's access insofar as is required to ensure that his exam was graded properly." The court found that "at a minimum, this requires that Tundo be allowed to review the Ability Test component materials, including the questions, his answers, the correct answers, a brief summary of any graders' comments, and an explanation of the scoring process." Specifically, the court indicated that "the Commission may limit the time in which examinees are allowed to review the materials; limit the disclosure of the actual test questions or answer key; and/or prohibit the copying of materials, but permit examinees to take notes." Accordingly, Mr. Tundo received a review of the test materials that was in compliance with the remedy ordered by the Appellate Division.

ORDER

Therefore, it is ordered that this appeal be denied.

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 13TH DAY OF JULY, 2017



Robert M. Czedh, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

- c: Ryan M. Lockman, Esq.
- Claudio Tundo
- Todd Wigder, DAG
- Clerk, Appellate Division
- Michael Johnson
- Kelly Glenn

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6313-11T4

IN THE MATTER OF CLAUDIO TUNDO,
ENTRY LEVEL LAW ENFORCEMENT
EXAMINATION (S9999M)

Argued telephonically October 17, 2013 –
Decided November 27, 2013

Before Judges Messano and Rothstadt.

On appeal from the Civil Service Commission,
Docket Nos. 2012-0037.

Ryan Lockman argued the cause for appellant
Claudio Tundo (Mark B. Frost & Associates,
attorneys; Mr. Lockman, on the brief).

Todd A. Wigder, Deputy Attorney General,
argued the cause for respondent Civil
Service Commission (John J. Hoffman, Acting
Attorney General, attorney; Lewis A.
Scheindlin, Assistant Attorney General, of
counsel; Mr. Wigder, on the brief).

PER CURIAM

Claudio Tundo is a former Passaic County Corrections
Officer and West Paterson (n/k/a Woodland Park) Police Officer.
On December 4, 2010, he took the Entry Level Law Enforcement
Examination, administered by the New Jersey Civil Service

Commission ("Commission"). The exam is meant to determine suitable candidates for the Commission's S9999M eligibility list for law enforcement positions in New Jersey. After taking the exam, all passing candidates are placed in an eligible pool, and their names provided to an appointing authority of a specific jurisdiction or agency for use in its hiring process. Accordingly, all non-passing candidates are deemed ineligible, though they have the right to appeal their results and, of course, to take the exam again.

The Commission notified Tundo that he failed the exam, and he appealed its determination and asked to review the questions and his alleged incorrect answers. The Commission denied his request for review, in keeping with its blanket policy of non-disclosure of test materials, due to concerns over test security. It also affirmed his test's results, without a hearing, rendering its decision in a single writing, which collectively addressed the appeals of Tundo and three other examinees.¹

Tundo now challenges the Commission's policy of total non-disclosure as a violation of due process.

¹ The three other examinees have not filed an appeal to this court from the Commission's final determination.

Tundo also argues that the Commission's decision affirming his results should be reversed because he was not informed of a hearing date, or that his matter had been consolidated with claims brought by others similarly situated.

The Commission argues that its policy against disclosure of test materials does not violate due process but is justified by exceptional security concerns. According to the Commission, because test questions are often re-used, there is a real risk that past examinees would share their knowledge of the exam with future test-takers. Moreover, the Commission and the test's developer invested a significant amount of time and money into the development of the exam. As such, granting full access to the test would impair the Commission's ability to contract with private testing firms in the future because of those companies' concerns about the unauthorized release of their work product.

We agree with Tundo that the Commission's blanket refusal to allow him to examine his test results and related materials constituted a violation of his due process rights. As such, the Commission's actions were arbitrary, capricious and unreasonable. See Brady v. Dep't of Pers., 149 N.J. 244, 262 (1997). For that reason we reverse the Commission's determination and direct that it permit Tundo a limited review of his test materials prior to

re-filing his appeal from his alleged failure of the subject examination.

We find no merit to Tundo's other arguments, and we leave to the Commission's discretion as to whether Tundo is entitled to a hearing when the Commission reconsiders his appeal, after he has had an opportunity to conduct a limited review of his test materials.

I.

Our review of the Commission's final decision is limited. In keeping with well-settled principles of appellate review, we defer to State agencies in their expertise and exercise of their legislatively-delegated responsibilities, see In re Carter, 191 N.J. 474, 482-83 (2007) (citing Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)), and have shown such deference in reviewing previous decisions of the Commission, and its predecessor agencies, see, e.g., In re Sheriff's Officer, 226 N.J. Super. 17, 21-22 (App. Div. 1988) (affirming Department of Personnel's decision making certain titles eligible to take a promotional exam for sheriff's officer sergeant position, as part of its "uniquely administrative function," the implementation of which "was neither arbitrary, capricious, or unreasonable"). We must uphold an agency's determination if there is substantial, credible evidence in the record to support

it, Greenwood, supra, 127 N.J. at 513, and we generally do not set aside such action absent "a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record," In re Herrmann, 192 N.J. 19, 27-28 (2007).

Therefore, we must defer to the Commission's expertise in the promulgation and administration of civil service examinations, including its responsibility for adopting measures to ensure the security of its examinations as required by the Civil Service Act (the "Act"). N.J.S.A. 11A:4-1(c) ("The commission shall provide for . . . [t]he security of the examination process and appropriate sanctions for a breach of security"). Accordingly, the Commission has promulgated regulations requiring the retention of examination records and materials, and limiting their availability for public inspection, N.J.A.C. 4A:4-2.16; and governing examinees' access to test materials, and granting the Commission discretion to determine the appropriate level of access "[i]n order to maintain the security of the examination process," N.J.A.C. 4A:4-6.4. This grant of power is in keeping with the Act's general policy of encouraging fairness in the State employee selection system. N.J.S.A. 11A:1-2(c).

In recognition of the Commission's authority over the administration and protection of civil service exams, courts will only interfere with the Commission's actions if there is a clear showing of abuse of discretion. Zicherman v. Dep't of Civil Serv., 40 N.J. 347, 351 (1963). An abusive action is one that is "arbitrary, capricious or unreasonable, or . . . lack[ing in] fair support in the evidence, or . . . violat[ive of] legislative policies expressed or implicit in the civil service act," Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963), or violative of State policy, In re Musick, 143 N.J. 206, 216 (1996). In determining whether the Commission's action is "abusive," the court must recognize its own limited authority and competence with respect to administrative matters, see Greenwood, supra, 127 N.J. at 513 ("Appellate courts must defer to an agency's expertise and superior knowledge of a particular field."), particularly with respect to civil service examinations:

The preparation and administration of civil service examinations is an administrative function delegated most liberally to the authorized examiners of the Department [of Civil Service] by the Legislature. The fulfillment of that function is a matter requiring special expertise, involving as it does the determination of what job knowledge, skills and abilities are necessary or desirable in a candidate for a particular position, and the highly technical problem of devising suitable

examination questions which will demonstrate as accurately as possible whether an applicant possesses those requirements sufficiently to qualify for the position. In view of the above, the courts cannot intervene to nullify a civil service examination unless it is clearly shown that the Department has abused its discretion.

[Zicherman, supra, 40 N.J. at 350-51.]

It would therefore be inappropriate for a court to grant broad judicial review of examination results. Brady, supra, 149 N.J. at 258.

Nevertheless, however broad its powers may be, the Commission's discretion is not limitless. For example, we are not bound by its interpretation of the law, as we are to its determination of facts. Thus, questions of due process with respect to civil service procedures are well within the purview of the Court. Greenwood, supra, 127 N.J. at 513 ("Agencies . . . have no superior ability to resolve purely legal questions, and that a court is not bound by an agency's determination of a legal issue is well established."). Courts have invalidated agency scoring on a showing that the scoring process was arbitrary, see, e.g., Rox v. Dep't of Civil Serv., 141 N.J. Super. 463 (App. Div. 1976); and have reviewed a Commission's decision over alleged discriminatory practices, Kiss v. Dep't of Cmty Affairs, 171 N.J. Super. 193, 195 (App. Div. 1979); and

upheld the limited disclosure of exam materials, in the interest of procedural fairness, Brady, supra, 149 N.J. at 262.

Applying the above standards, we hold that the Commission's policy of total non-disclosure of exam results and scoring in this case violated Tundo's due process rights and therefore constituted an arbitrary, capricious and unreasonable act, as the Commission's concerns over test security did not outweigh Tundo's right to at least a limited disclosure of the requested materials. See Brady v. Dep't of Pers., supra, 149 N.J. at 262 (holding that the Department of Personnel's provision for limited or partial access to exam materials struck a "reasonable balance" between its interest in test security and examinees' interest in review).

The subject examination is the Law Enforcement Aptitude Battery ("LEAB") and was developed by the private vendor EB Jacobs, LLC. ("EB"). The exam consists of three component parts – all multiple choice – to be answered within three hours: (1) the Ability Test, (2) the Work Styles Questionnaire, and (3) the Life Experience Survey. The exam is the product of a "job analysis" meant to identify the knowledge areas, skills, and abilities deemed most important to success within the targeted positions. As part of the analysis, EB gathered information through interviews, surveys, and observations of permanent

employees' activities. The collected information was then used to identify the relevant knowledge, skills, and abilities, and then rate them in terms of importance. Questions on the LEAB therefore relate to those qualities deemed to be the most critical. Further, according to the Commission, "the LEAB ha[s] been validated by EB using appropriate psychometric concepts consistent with the federal EEOC Uniform Guidelines on Employee Selection Procedures." Thus, scores on the LEAB

[R]eflect[] the degree of overlap between the candidate's responses and a profile of individuals who have demonstrated success on the job as law enforcement officers. The higher the score on the LEAB, the closer the match between those results and those of individuals who tend to be successful in this type of job.

Answers to all three component parts are considered in a single, combined score. A very low score on any single component could result in low performance or failure of the entire LEAB examination – even if the candidate received a moderate or high score on the other components.

Tundo's initial "Notification of Ineligibility" simply stated that he had failed due to a "below minimum rating in written part 1."² However, the Commission later disclosed during

² In its July 12, 2012 Final Action, the Commission explained that "below minimum rating in written part 1" is an automated response "for any candidate who fails a written
(continued)

this appeal that Tundo had specifically failed the Ability Test component. In keeping with its policy of total non-disclosure, the Commission did not provide passing points or furnish failing candidates with a breakdown of their component scores.³

The Commission expressed its reasoning for its non-disclosure policy in its July 12, 2012 Final Administrative Action ("Final Action") regarding Tundo's appeal:

Regarding examination review, candidates were not permitted to review the examination or the answer key. . . . Such a review cannot be permitted in order to maintain test security and ensure that the test could be used again. This examination was purchased from a vendor, who also scored the responses. Precluding test review is crucial under the special circumstances of this matter. The vendor has invested significant amounts of time and money in producing this test. If the test questions and answers become known to candidates, it will render the test useless. In view of the large number of appellants, there is a real risk that some of these individuals would share information about the test with other

(continued)

multiple-choice examination." Therefore, it does not refer to any particular portion of the exam.

³ EB is responsible for grading the examinations. To ensure reliability, grade sheets are electronically scanned twice. If the scanner flags a sheet for having a multiple or missing response (typically the result of an erasure or lightly-colored response), the individual sheet is hand-scored by EB Jacobs staff. EB then chooses a sample of answer sheets to hand-score, to better ensure accuracy.

candidates, or would use such information themselves the next time the test is given.

In short, candidates could not review their scores, questions and/or answers, due to concerns over exam security, the re-use of test questions, and in light of the time and money invested in developing the exam.⁴

Similarly, in Brady, supra, the New Jersey Supreme Court reviewed a disclosure policy by the Department of Personnel ("Department") (a predecessor to the Civil Service Commission). Brady, supra, 149 N.J. 244. In that case too, an officer appealed his results from a promotional civil service examination, and requested permission to review his test materials. Id. at 251. But unlike in the instant matter, the policy challenged in Brady did not completely bar the officer's review of his test materials. Ibid. Rather, the officer was granted limited access to his materials. For example, he was given just one hour to review the materials but he could not review the actual test questions, or answer key. Also, he could not copy any of the materials, though he could take notes. Id. at 251. The Department's review policy was also justified by concerns over test security and costs. Id. at 255.

⁴ There are no facts in the record to support the Commission's assertions.

Accordingly, the Brady court weighed the Department's interests of security and costs against the officer's due process rights, and held that the limited disclosure policy struck "a reasonable balance between [the Department's] interest in the confidentiality of the examination process and [the officer's] interest in reviewing the grading of examinations." Id. at 262. The officer was thus "entitled to obtain only such evidence that reasonably may enable an examinee to assess the correctness of his or her answers and to demonstrate that the [Department's] grading of his or her examination constituted an abuse of discretion," Id. at 257; see Martin v. Educ. Testing Serv. Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981) ("[P]laintiff has a substantive right to be tested fairly and accurately, i.e., to see that the examinations are graded properly and that the . . . grading key is correct."). This is in keeping with the principle that due process requires an agency to disclose the evidence which forms the basis for its opinion, thereby allowing an aggrieved party to review, explain and/or rebut such evidence, see High Horizons Dev. Co. v. Dep't of Transport., 120 N.J. 40, 53 (1990) ("One of the core values of judicial review of administrative action is the furtherance of accountability.").

The "flipside" of the Brady court's holding was that policies of total non-disclosure were presumptively invalid:

If the [Department] were, in the name of confidentiality and security, to deny examinees all access to testing materials, such a decision almost surely would be arbitrary, capricious, or unreasonable because it would allow the [Department] to conduct the testing and grading process without any accountability and would foreclose any opportunity on the part of an examinee to demonstrate the unreasonableness or unfairness of his or her examination.

[Brady, supra, 149 N.J. at 262.]

The instant matter presents a near-identical situation to that in Brady, supra, as the Commission's concerns over test security and costs must be properly weighed against Tundo's due process rights. Its policy of total non-disclosure is therefore invalid, because it forecloses any opportunity by Tundo to support his appeal of his exam results.

Still, the limited review to which he is entitled must strike "a reasonable balance" between the Commission's security and cost concerns, and Tundo's interest in reviewing the grading of his exam. Thus, Tundo's review may be subject to any reasonable limitations (as determined by the Commission) which are necessary to secure the test's integrity, without preventing Tundo's access insofar as is required to ensure that his exam was graded properly. At minimum, this requires that Tundo be

allowed to review the Ability Test component materials, including the questions, his answers, the correct answers, a brief summary of any graders' comments, and an explanation of the scoring process. For its part, the Commission may impose certain limitations on that review – e.g., the Commission may limit the time in which examinees are allowed to review the materials; limit the disclosure of the actual test questions or answer key; and/or prohibit the copying of the materials, but permit examinees to take notes. Id. at 251.⁵

II.

Tundo further argues that the Commission's failure to provide him notice of a hearing date, or the consolidation of his matter, also violated his due process rights. After receiving his Notification of Ineligibility dated June 9, 2011, Tundo appealed his results by letter dated June 29, 2011. In the

⁵ Tundo's limited review is restricted to the Ability Test component of the exam, which was designed to test for those cognitive abilities deemed most important to the success of an entry-level law enforcement officer: specifically, written expression, written comprehension, problem sensitivity, deductive reasoning, inductive reasoning, and information ordering. The Ability Test has objectively right or wrong answers. In contrast, the remaining two components – the Work Styles Questionnaire and the Life Experience Survey – require subjective, experience of opinion-based responses, and have no right or wrong answers. There is no meaningful distinction between the Ability Test component challenged herein, and that of the subject exam in Brady, supra, 149 N.J. at 249-50.

letter, Tundo cited his prior experience as a Correction Officer in Passaic County, and as a Police Officer in West Paterson, in addition to his successful performance on prior civil service examinations. Thereafter, the Commission's first and only responsive communication to his appeal was the decision itself - its Final Action dated July 12, 2012.

The Final Action is captioned "In the Matter of Claudio Tundo, et al., Entry Level Law Enforcement Examination (S9999M)," and refers to three other individuals who appealed their scores on the Entry Level Law Enforcement Examination (S9999M). It also noted that the appellants failed the examination and that their appeals were consolidated due to common issues. It then provided general details about the LEAB's format, the scoring process, and the above-discussed non-disclosure policy for test materials. The Commission also addressed issues specific to individual examinees.

Underlying Tundo's arguments is the incorrect presumption that he was entitled to a hearing in the first place. He was not. In fact, there is no language in the Commission's final decision to suggest that a hearing, or any other formal proceeding, was even held. Under the Act, a hearing is not required unless expressly mandated by statute or regulation, or "where the Civil Service Commission finds that a material and controlling dispute of fact

exists that can only be resolved by a hearing." N.J.A.C. 4A:2-1.1(d). If not mandated by the Act, a hearing may still be required when the agency's proposed action is of a quasi-judicial nature, as opposed to an action of a legislative or executive (sometimes called ministerial) nature. Jersey City v. Dep't of Civil Serv., 57 N.J. Super. 13, 45 (App. Div. 1959). Not every exercise of judgment or discretion is an exercise of judicial power; but a hearing is required "[w]here the administrative tribunal is under a duty to consider evidence and apply the law to the facts as found." Handlon v. Belleville, 4 N.J. 99, 105 (1950); see Pa. R.R. Co. v. N.J. State Aviation Comm'n, 2 N.J. 64, 70 (1949) ("The 'hearing' is the hearing of evidence and argument."). All other appeals are reviewed "on a written record." Ibid. For this reason, the Commission addresses appeals from examination results "on the written record or [by] such other proceeding as the [Commission] deems appropriate" in accordance with its regulations. N.J.A.C. 4A:4-6.4(e). As applied to the instant matter, the re-scoring or re-evaluation of exam results does not involve the application of law to facts, and therefore does not require a hearing. Therefore Tundo was not entitled to a hearing or, as it follows, notice of a hearing.

As to the consolidation of Tundo's matter with other examinees' appeals, we note again the Commission's broad discretionary authority over civil service employee selection: the Commission "[s]hall establish and supervise the selection process and employee performance evaluation procedures," and "[s]hall set standards and procedures for review" under the Act. N.J.S.A. 11A:2-11(f), (h). Thus, pursuant to its regulations, the Commission "shall decide any appeal on the written record or such other proceeding as the [Commission] deems appropriate." N.J.A.C. 4A:4-6.4. Accordingly, we again review the Commission's actions – as to the consolidation – for abuse of discretion. See Flanagan v. Dep't of Civil Serv., 29 N.J. 1, 9 (1959) ("In the field of civil service employment, administrative agents who are authorized to make decisions of this type are invested with a broad discretion and the courts will not interfere with their actions unless they are clearly arbitrary and unreasonable.").

In the instant matter, the Commission's Final Action provides, "These appeals have been consolidated due to common issues." But the Commission's Final Action is not in any sense a "consolidation" of claims – as a practical matter, it is impossible to consider the grading of individual examinations as a collective whole. Rather, the examinees' appeals were consolidated in form, not in substance: the Final Action

provides general details about the LEAB, while addressing specific issues pertaining to individual examinees.

Thus, pursuant to its discretionary powers under N.J.A.C. 4A:4-6.4, the Commission simply chose to render its decision on multiple claims in a single writing. In so doing, they did not deprive Tundo of a fair opportunity to present his arguments, as would implicate the required notice under due process. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). Therefore, the Commission's lack of notice for "consolidation" was neither arbitrary, unreasonable, nor capricious.

III.

In sum, the Commission's denial of Tundo's appeal is vacated. The Commission is to provide Tundo with a limited review of the "Ability Test" component materials under circumstances and conditions it deems reasonable and necessary, as well as consistent with our opinion. Tundo may then supplement his appeal with any new information garnered from his review of the test materials. The Commission shall then re-

consider his appeal, after considering Tundo's additional submissions, if any.

Reversed and remanded. We do not retain jurisdiction of this matter.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION

B-101



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE
ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Claudio Tundo,
et al., Entry Level Law Enforcement
Examination (S9999M)

CSC Docket Nos. 2012-37
2011-5063
2011-5197
2011-4940

Examination Appeals

ISSUED: JUL 12 2012

(RE)

Claudio Tundo, represented by Ryan Lockman, Esq., Dashon Holmes, Brian Quigley, and Kiahna Walcott appeal their scores on the Entry Level Law Enforcement Examination (S9999M). It is noted that the appellants failed the examination. These appeals have been consolidated due to common issues.

The subject examination is called the Law Enforcement Aptitude Battery (LEAB), developed by EB Jacobs, LLC, and was administered to the appellants on a variety of dates in November and December 2010. Notices of Examination were sent in June 2011, and the appellants were informed that they had failed the examination. On appeal, the appellants argue that they possess the required knowledge, skills and abilities to perform the duties of various positions. In support of this assertion, they maintain that they have passed prior entry level law enforcement examinations, or that there was an error in scoring. In addition, Mr. Tundo explains that he previously served as a Correction Officer in Passaic County and as a Police Officer in West Paterson. Official records indicate that Mr. Tundo was removed from his position as a Police Officer and was separated from his Correction Officer position in a layoff. Mr. Quigley explains that he has been Police Officer for five years but he does not provide a jurisdiction, and official records do not indicate that he holds a position in a civil service jurisdiction. Mr. Tundo and Ms. Walcott also request reviews of the examination.

CONCLUSION

The record establishes that appellants took the subject examination in November or December 2010 and subsequently were found to have failed the examination. The LEAB consisted of the following three test components: the Ability Test, the Work Styles Questionnaire, and the Life Experience Survey, and candidates were given approximately 3 hours to take all three components of the LEAB and read the test instructions. The Ability Test contained 48 questions, the Work Styles Questionnaire contained a series of 103 short statements to which the candidate agreed or disagreed, and the Life Experience Survey consisted of 68 questions. Although the scores were considered in combination, a very low performance on one of the three test components could result in low performance or failure on the entire LEAB examination even if the candidate performed at a moderate level or higher on the other test components. In addition, scores reflected the degree of overlap between the candidate's responses and a profile of individuals who have demonstrated success on the job as law enforcement officers. The higher the score on the LEAB, the *closer* the match between those results and those of individuals who tend to be successful in this type of job. The lower the score on the LEAB, the *less* the match between those results and those of individuals who tend to be successful in this type of job. Also, candidates were told that if they did not respond to all of the questions on the Work Styles Questionnaire or Life Experience Survey, they might be disqualified. When these questions were left blank, insufficient information may have been available to produce scores.

As to the accuracy of scoring, EB Jacobs scored and processed all of the candidates' test papers. In order to ensure the reliability of the electronic scanning, the vendor scanned all answer sheets twice, and physically reviewed every answer that the scanner flagged as a multiple response or missing response to ensure that the intended answer was read correctly, which addressed issues arising from erasures and lightly colored responses. Furthermore, after scoring was complete, EB Jacobs manually scored a sample of answer sheets to ensure that the scoring was accurate. It is noted that 18,562 candidates passed the examination. All passing candidates have been placed in an eligible pool, and a list of names selected from the eligible pool is provided to an appointing authority for a specific jurisdiction or agency to use for their hiring process for a given title.

As to the Notification of Examination, this note states that the appellants were "below minimum rating in written part 1." This is a standard response for any candidate who fails a written multiple-choice examination. The "written part 1" note refers to a multiple-choice examination or a portion of a multiple-choice examination if an examination has multiple parts, and differentiates it from an essay portion of an examination. This does not imply that the subject examination had multiple parts, but simply notifies the candidate of a failure. These notices do not include passing points, and the vendor does not provide the scores for failing

candidates or a breakdown of component scores. The appellants cannot be placed on the eligible lists due to their test scores. The appellants' standing on prior lists has no bearing on this determination, as scores are based solely on examination performances. It is well settled that, as part of the process of selection and appointment, a candidate must establish eligibility by demonstrating possession of the applicable experience and/or education requirement *and* pass an examination. See *In the Matter of Bindu Shah* (MSB, decided May 19, 2004) (A provisional appointee who was erroneously admitted to examination because she did not meet experience requirements and who subsequently failed examination did not demonstrate reversible error). In *In the Matter of Pinky Bemah* (MSB, decided December 1, 2004), the appellant argued that she satisfactorily performed the duties of her position on a provisional basis for several years and therefore she should be deemed eligible despite not passing the examination. The Board noted that as part of the process of selection and appointment, candidates must pass a competitive examination and that provisional service in a title was not a guarantee of permanent appointment. The same reasoning applies to the appellants, who maintain that they were formerly or are currently in law enforcement titles.

Regarding examination review, candidates were not permitted to review the examination or the answer key, and this information was provided to the candidates on page 4 of the 2010 Law Enforcement Examination Administration Guide. Such a review cannot be permitted in order to maintain test security and ensure that the test could be used again. See *N.J.A.C. 4A:4-6.4(e)*. This examination was purchased from a vendor, who also scored the responses. Precluding test review is crucial under the special circumstances of this matter. The vendor has invested significant amounts of time and money in producing this test. If the test questions and answers become known to candidates, it will render the test useless. In view of the large number of appellants, there is a real risk that some of these individuals would share information about the test with other candidates, or would use such information themselves the next time the test is given. See *In the Matter of Steven T. Dill, et al.*, Docket No A-2674-01T2 (App. Div., September 2, 2004) (The Commission properly denied access to examination materials for teamwork component for Fire Fighter examination.) The appellants have challenged the overall validity of the test: however, even if the appellants had access to the test questions, they would not be able to prove that the test is invalid. The test itself has already been validated through appropriate psychometric concepts, consistent with the EEOC Uniform Guidelines on Employee Selection Procedures. Permitting the appellants access to review the questions and answers would serve no purpose, except to expose the test and render its future use moot. Also, full access to the scoring would impair the Commission's ability to contract with private testing firms to provide this service.

A thorough review of the record indicates that the determinations of the Division of Selection Services were proper and consistent with civil service

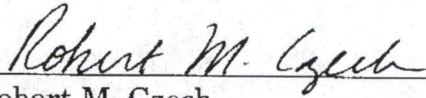
regulations, and that the appellants have not met their burden of proof in these matters.

ORDER

Therefore, it is ordered that these appeals be denied.

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 11th DAY OF JULY, 2012



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Merit System Practices
and Labor Relations
Civil Service Commission
Written Records Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Enclosure

c: Claudio Tundo
Ryan Lockman, Esq.
Dashon Holmes
Brian Quigley
Kiahna Walcott
Dan Hill
Joseph Gambino

