



**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE  
ACTION OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of S.C. and D.B.,  
County Correction Officer (S9999R),  
Essex County

List Removal Appeals

CSC Docket Nos. 2017-2038 and  
2017-2073

**ISSUED: MARCH 29, 2018 (DASV)**

S.C., represented by Nicholas J. Palma, Esq., and D.B. appeal their rejection as County Correction Officers by Essex County and its request to remove their names from the eligible list for County Correction Officer (S9999R), Essex County, on the basis of a failed medical examination. Since these appeals have similar issues, they have been consolidated herein.

By way of background, the appellants appeared on the subject eligible list, which promulgated on May 2, 2014 and expired on March 22, 2017. Their names were certified on April 15, 2016. The certification had a disposition due date of October 17, 2016. In disposing of the certification, the appointing authority requested the appellants' removal due to failed medical examinations. The appointing authority submitted documentation from its physician, Dr. Robert A. Mustillo, indicating that the appellants were "Not medically fit to participate in Defensive Tactics (unarmed defense), Chemical Agent exposure, Firearms Training, Baton Training, Physical Restraint Training, and in the Police Training Commission's Physical Condition Training Program." Specifically, they were found not medically qualified due to a "Physical Fitness Test," which consisted of vertical jumps, push-ups, sit-ups, steps, and kneeling and standing. However, there is no indication that the appellants failed a stress test or other medical examinations, such as visual and pulmonary function tests.<sup>1</sup> It is noted that no appointments were made from the certification.

<sup>1</sup> Although D.B.'s medical documentation indicates that she had an elevated blood sugar level and cholesterol, Dr. Mustillo did not disqualify her for those reasons. Rather, he specifically indicated that D.B. was disqualified because of a failed physical fitness test.

On appeal to the Civil Service Commission (Commission), S.C. challenges the information on the Exercise Stress Test Report, which indicates that the “test was terminated due to dyspnea . . . 1 PVC’s [premature ventricular contraction] noted.” She maintains that she did not experience these conditions and contends that the report has “whited out” information and specifies the incorrect last four digits of her social security number. Moreover, S.C. disputes the Fitness Test Score Sheet and claims that the individual who administered the test was preoccupied with staying at work late, looking at her cell phone, and talking with a co-worker who continuously entered the room during the examination. It is noted that the Exercise Stress Test Report was reviewed by Dr. Mustillo, and it was found that the appellant had a “Normal exercise stress test.” Additionally, S.C. indicates that she modified her lifestyle in preparation for the physical fitness test, which included working out with a personal trainer at the gym and outdoors. Furthermore, S.C. reports that she undergoes a physical examination every two years to maintain her commercial driver’s license. In that regard, S.C. submits a Medical Examiner’s Certificate, dated September 11, 2016, finding her medically qualified to hold such a license.

Regarding D.B., she indicates that she had an emergency cesarean section on February 27, 2016, and was “going back and forth to the hospital” because her daughter was born four months early. Thus, D.B. states that her “body was not physically ready for the physical.” Accordingly, she appeals the removal of her name from the subject eligible list.

It is noted that despite the opportunity, the appointing authority has submitted no further information to support its request to remove the appellants’ names from the subject eligible list.

## CONCLUSION

*N.J.A.C.* 4A:4-6.5(a) provides in relevant part that an appointing authority may request that an eligible’s name be removed from an eligible list due to disqualification for medical reasons which would preclude the eligible from effectively performing the duties of the title. Moreover, *N.J.A.C.* 4A:4-6.5(a)1 indicates that the appointing authority shall furnish to appropriate Commission staff a copy of the certification and a report and recommendation supporting the removal request, prepared and signed by a physician who is licensed in New Jersey. The appointing authority submission shall include a finding that the eligible is not qualified due to medical reasons for the title. *See N.J.A.C.* 4A:4-6.5(a)2. Further, *N.J.A.C.* 4A:4-6.5(d) states in relevant part that upon receipt of a notice of an eligible’s appeal, the appointing authority shall submit to this agency, within 20 days, all background information, including complete medical reports which were the basis for the removal request. In addition, *N.J.A.C.* 4A:4-6.5(d)2 provides that any appointing authority failing to submit the required materials within the

specified time may have its request for removal denied, and the eligible's name may be retained on the eligible list. Lastly, *N.J.A.C.* 4A:4-6.3(b) indicates that in examination and selection appeals, the appellant shall have the burden of proof, except for medical and psychological disqualification appeals, where the appointing authority shall have the burden of proof.

In this case, it is clear that the appellants were administered medical examinations. However, the documentation reveals no condition which would warrant them medically unfit to perform the duties of a County Correction Officer. Rather, the appellants were deemed not qualified due to a "Physical Fitness Test." The Commission has previously found that a candidate's failed physical fitness test does not sustain an appointing authority's burden of proof in medical disqualification appeals. For example, in *In the Matter of Kiahna Walcott, et al.* (CSC, decided April 5, 2017), Essex County removed County Correction Officer candidates from an eligible list for failing to meet the medical requirements of the position. Specifically, it indicated that the candidates failed physical fitness tests. However, upon the eligibles' appeal, the Commission determined that a physical fitness test does not demonstrate an actual physical condition or defect which would remove the appellants from the eligible list. Thus, despite the opportunity to supplement the record, Essex County failed to provide a sufficient basis for its request to remove the candidates from the eligible list for being medically unfit to perform the duties of the position.

Similarly, in the present matter, Essex County has not provided any medical documentation to the Commission showing that either appellant is medically unfit to perform the duties of a County Correction Officer. Therefore, there is an insufficient basis to remove their names from the subject eligible list. Accordingly, the Commission finds that the appointing authority has not met its burden of proof in this matter.

Pursuant to the Americans with Disabilities Act (ADA), 42 *U.S.C.A. sec.* 12112(d)(3), no medical or psychological examination may be conducted prior to rendering a conditional offer of employment. *See also, the Equal Employment Opportunity Commission's ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995). Those guidelines 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. *See also N.J.A.C.* 4A:4-6.5(b) (An appointing authority may only require a medical and/or psychological examination after an offer of employment has been made and prior to appointment). The Commission notes that the ADA's restrictions on psychological and medical

examinations apply regardless of whether an individual has a disability. *See Roe v. Cheyenne Mountain Conference Resort*, 124 F.2d 1221, 1229 (10th Cir. 1997).

Therefore, in subjecting the appellants to a medical examination, their appointments are mandated subject to any adverse updated background information or psychological examination, if necessary, that would disqualify them from further consideration. Additionally, upon successful completion of their working test period, the appellants are entitled to a retroactive appointment date of October 17, 2016, the date that the certification was due to be disposed.<sup>2</sup>

### ORDER

The Commission finds that the appointing authority has not met its burden of proof that S.C. and D.B. are medically unfit to perform effectively the duties of a County Correction Officer and, therefore, the Commission orders that the County Correction Officer (S9999R), Essex County, eligible list, be revived and the appellants' names be restored for retroactive appointment. In that regard, absent any disqualification issues ascertained through an updated background check conducted after a conditional offer of appointment or psychological examination, if necessary, the appellants' appointments are otherwise mandated. *See 42 U.S.C.A. sec. 12112(d)(3) and Equal Employment Opportunity Commission's ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995).

Since the appointing authority has not supported its burden of proof, upon successful completion of their working test period, the Commission orders that appellants be granted a retroactive date of appointment to October 17, 2016. 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, except the relief enumerated above.

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

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<sup>2</sup> *See e.g., N.J.A.C. 4A:4-4.9(a)3* states that “[a]n eligible shall not be appointed and begin work after the expiration date of the eligible list except . . . [w]hen the certification is made just prior to the expiration of the eligible list, in which case **the date of appointment** and the date the eligible begins work shall be **no later than the disposition due date.**” [Emphasis added.]

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 27<sup>TH</sup> DAY OF MARCH, 2018



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