



B-1

**STATE OF NEW JERSEY**

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

In the Matter of S.F., Police Officer  
(S9999M), Gloucester Township

CSC Docket No. 2014-383

Medical Examiners Panel Appeal

**ISSUED: APR 20 2015 (DASV)**

S.F., represented by Jacqueline M. Vigilante, Esq., appeals the request by Gloucester Township to remove his name from the Police Officer (S9999M) eligible list for medical unfitness to perform effectively the duties of the position.

By way of background, the appellant appeared on the Police Officer (S9999M), Gloucester Township, eligible list, and his name was certified on August 14, 2012. In disposing of the certification, the appointing authority requested the appellant's removal on the basis of medical unfitness due to a history of aqueductal stenosis which requires a ventriculoperitoneal shunt.<sup>1</sup> It is noted that eligibles ranked above and closely below the appellant were appointed on January 22, 2013. It is further noted that Gloucester Township had previously appointed the appellant to the unclassified title of Special Law Enforcement Officer effective April 10, 2006. The appointing authority notes that the appellant served in a Class One Special Law Enforcement Officer position which does not require the carrying or the use of

<sup>1</sup> Aqueductal stenosis is the narrowing of the small passage between the third and fourth ventricles in the middle of the brain. It is one of the most common causes of hydrocephalus, a condition which causes excessive accumulation of fluid in the brain. It is most often treated by surgically inserting a shunt system, which consists of the shunt (flexible plastic tube), a catheter (drainage tube), and a valve, whereby the excessive brain fluid is diverted to other sites of the body and can be absorbed. Source: "Hydrocephalus Fact Sheet," National Institute of Neurological Disorders and Stroke, National Institutes of Health. Publication date May 2013. NIH Publication No. 08-385.

a firearm and whose duties are limited to routine traffic detail, spectator control, and related duties.

On appeal to the Civil Service Commission (Commission), the appellant indicates that after completing the interview process on January 9, 2014, the Gloucester Township Chief of Police advised him that he was to be appointed as a Police Officer subject to a background check and passing the medical and psychological examinations. However, immediately thereafter, the appellant was told that he was rejected from employment due to medical reasons. The appellant asserts that he never received a post-offer medical examination, but rather, the appointing authority relied on a prior medical examination conducted by Dr. Timothy Pinsky. It is noted that, on January 2, 2013, Dr. Pinsky, an authorized physician of the appointing authority, performed a fitness for duty examination on the appellant in order for him to return to Gloucester Township as a Special Law Enforcement Officer. The appellant had accepted a position as a Correction Officer Apprentice with the Department of Corrections on July 16, 2012, but this temporary position was terminated effective August 28, 2012. The appellant argues that reliance on the pre-offer medical examination is in violation of the Law Against Discrimination, *N.J.S.A. 10:5-1, et seq.*, the Americans with Disabilities Act (ADA), 42 *U.S.C.A. § 12101, et seq.*, and Civil Service law and rules. Therefore, the appellant contends that his removal from the subject eligible list was unlawful and must be rescinded.

In response, the appointing authority, represented by David A. Rapuano, Esq., acknowledges that it has been aware that the appellant suffers from hydrocephalus. It explains that the appellant took several leaves of absences from 2006 to 2011 to tend to his medical condition. The appellant resumed his duties as a Special Law Enforcement Officer after these leaves and continued until 2012, when he accepted the Correction Officer Apprentice position.<sup>2</sup> On or about October 4, 2012, the appointing authority indicates that the appellant contacted the Police Lieutenant in charge of the Special Law Enforcement Officers, advising that due to medical reasons, he "dropped out" of the Correctional Staff Training Academy and he wanted to come back to work. However, on October 11, 2012, the appellant advised the Police Lieutenant that he could not return to work because his personal doctor rescinded his clearance and he was scheduled for surgery on October 25, 2012. In the meantime, the August 14, 2012 certification for Police Officer had been issued, and the appellant interviewed for the position on November 13, 2012.

The appointing authority states that on November 26, 2012, the appellant delivered a note from his doctor, clearing him for duty with no activity restrictions.

---

<sup>2</sup> It is noted that the appellant's record in the County and Municipal Personnel System (CAMPS) does not indicate any leaves of absence or the termination of the appellant's unclassified appointment as a Special Law Enforcement Officer. The appointing authority is directed to amend the record accordingly.

The appointing authority indicates that it appropriately requested that the appellant undergo a fitness for duty examination by its physician. The examination was scheduled with Dr. Pinsky on January 2, 2013. On January 9, 2013, the appellant attending a "hiring interview," at which time he was offered a position as a full-time Police Officer. Furthermore, the appointing authority explains, that "[b]y coincidence," after the appellant had been offered the position, Dr. Pinsky contacted the Human Resources Director and advised that the appellant was not fit for duty as a Police Officer. Dr. Pinsky then issued his report on January 24, 2013. The appointing authority contends that it is unclear as to why Dr. Pinsky offered his opinion as to the appellant's fitness for duty as a Police Officer rather than a Special Law Enforcement Officer. It submits that the appellant may have informed Dr. Pinsky of his pending application for a Police Officer position. Nonetheless, the appointing authority maintains that it had no choice but to rescind the offer made to the appellant. It argues that the fact that the examination was performed prior to the appellant's offer of employment is "immaterial in this case." The appointing authority emphasizes that the appellant had been offered employment. In other words, his medical information was not used to deny him a job offer. Further, the appointing authority notes that to send the appellant for another examination "would have been both pointless and wasteful."

In reply, the appellant asserts that he had already been recommended to return to work as a Special Law Enforcement Officer by December 5, 2012. In that regard, he submits a memo, dated December 5, 2012, from the Police Lieutenant to the Chief of Police requesting that the appellant and other Special Law Enforcement Officers be reappointed in 2013. Moreover, the appellant maintains that Dr. Pinsky's examination was for the sole purpose of determining his qualifications for a Police Officer position and was used to disqualify him. He thus reiterates that the examination was an unlawful pre-offer medical examination and he was subjected to discrimination. The appellant further contends that his personal physician had examined him in October 2012 and cleared him to return to work. In addition, the appellant asserts that the appointing authority mischaracterizes his enrollment at the Correctional Staff Training Academy. He indicates that all recruits were required to wear protective head gear to participate in mixed martial arts training. In the process, the appellant obtained medical clearance from his treating physician, Dr. David Andrews. Further, he states that he took a medical leave of absence to undergo a shunt revision, which was unrelated to the training. When he sought to return to the Academy, he was advised that he would have to restart the training with another class. Thus, the appellant decided to return to work as a Special Law Enforcement Officer and seek a full-time position as a Police Officer, since he had been certified. For his remedy, the appellant seeks restoration and an appointment from the subject eligible list with back pay and counsel fees.

It is noted that the appeal was brought before the Medical Examiners Panel (Panel) on October 8, 2014, which rendered the attached report and recommendation on October 13, 2014. The appellant and a representative of Gloucester Township were present at the meeting.

*N.J.A.C. 4A:4-6.5* provides for the Commission to utilize the expertise of the Panel to make a report and recommendation on medical disqualification issues. The Panel is composed of medical professionals, all of whom are faculty and practitioners of Rutgers New Jersey Medical School.

In this case, the Panel's Chairman, Lawrence D. Budnick, M.D., MPH, Director of Occupational Medicine Service and Associate Professor of Medicine, Rutgers New Jersey Medical School, requested a medical specialist to perform a chart review and to make findings and recommendations regarding the appellant's medical fitness for the job in question.

The report by the Panel discusses all submitted evaluations of the appellant. Based on the evaluation of this submitted information and the medical consultant's review, the Panel found that the appellant is physically capable of undergoing the training involved to be a Police Officer and he is capable of performing the essential functions of the position. However, due to concerns "about the possibility of the risk of direct threat to himself due to potential trauma on the job," the Panel recommended that the appellant "use protective head gear to minimize the effects of possible head trauma when in the field."

In its exceptions, the appointing authority contends that the Panel's report and recommendations are "internally inconsistent and self-contradictory." There is no medical basis for the recommendation that the appellant wear protective head gear. Even if there were a need to wear such equipment, the appointing authority argues that it would make the appellant unqualified as a Police Officer, since wearing protective head gear would not be a reasonable accommodation. In that regard, it maintains that Police Officers must be prepared at all times. The physical hazards of the job are not confined to a particular activity or time. Thus, the appointing authority argues that if the appellant must wear a protective head gear so as not to constitute a direct threat to himself, then it would be impossible for him to do so at all times. Furthermore, the appointing authority questions what type of protective head gear is recommended and whether the head gear is suitable with gas masks and ballistic helmets. It emphasizes that the appellant would be faced with "significantly enhanced risk of being challenged," since his wearing of the protective head gear may signal weakness. Thus, the appointing authority concludes that if the Panel cleared the appellant for service as a Police Officer without the need to wear a protective head gear, then he should be permitted to serve as a Police Officer. Otherwise, the appellant should not be restored to the subject eligible list.

In his exceptions, while the appellant does not take issue with the finding that he does not have a current impairment and is able to perform the essential functions of a Police Officer, he clarifies that he has never had a trauma-related shunt revision or injury. Thus, the suggestion in the report that he may have had suffered such an injury while playing hockey when he was 18 years old is incorrect. Furthermore, he submits that the Panel failed to consider that all recruits were required to wear protective head gear during "*unrestricted*" mixed martial arts training. The Panel also did not take into consideration Dr. Andrews' November 12, 2012 report that the appellant may return to work with no activity restrictions and his January 20, 2014 report that the appellant's aqueductal stenosis does not preclude him from any Police Officer duties. Therefore, the appellant states that the Panel's findings are "incomplete and inaccurate" and "resulted in a gratuitous and unnecessary recommendation" unsupported by the medical evidence as to the wearing of a head gear "which has clouded the question before the Commission." He contends that his neurosurgeon should have the final decision as to whether it is necessary for him to wear protective head gear.

Moreover, in his cross exceptions, the appellant notes that there is no dispute that the pre-offer medical examination conducted by Dr. Pinsky was unlawful. Thus, no further inquiry is necessary to determine that the appellant's medical disqualification was improper. In addition, the appellant contends that to the extent that he is required to wear protective head gear, such a requirement does not place an undue hardship on the appointment authority.

The appointing authority responds that "the Township has always and continues to contest . . . that the Township engaged in any unlawful pre-employment medical exam."

### CONCLUSION

Having considered the record and the Panel's report and recommendation issued thereon and having made an independent evaluation of the same, the Commission accepts and adopts the findings and conclusions as contained in the Panel's report and recommendation that the appellant is medically fit to undergo the training involved to be a Police Officer and perform effectively the duties of the position. Further, while the Panel *recommended* that the appellant use protective head gear, the Panel did not require it as a condition of his ability to be employed as a Police Officer. The Commission notes that should the appellant later request an accommodation under the ADA to wear protective head gear (and is denied), the Commission is without jurisdiction to review such a request. The ADA is a federal statute designed to eliminate discrimination against individuals with disabilities. Nowhere in the ADA or in relevant case law is jurisdiction over ADA claims extended to State agencies. However, the Commission may review ADA issues collaterally, when they are implicated in an appeal properly before the Commission,

such as in a disciplinary action or in a State employee's discrimination appeal. See *Matter of Allen*, 262 N.J. Super. 438, 444 (App. Div. 1993); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000); *In the Matter of John Soden* (MSB, decided September 10, 2002); and *In the Matter of Michael Tidswell* (MSB, decided August 9, 2006). Likewise, the Commission does not have primary jurisdiction over disputes under the Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*

Therefore, the appellant shall be restored to the subject eligible list without the requirement of a protective head gear upon employment and appointed with a retroactive date of appointment absent any disqualification issues ascertained through an updated background check. Further, if a psychological examination has not yet been administered, the appellant must undergo and successfully pass that examination prior to appointment. The Commission does not grant any other relief, such as back pay or counsel fees. In that regard, N.J.A.C. 4A:2-1.5(b) provides in pertinent part that:

[b]ack pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. See N.J.A.C. 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the [Commission] or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

The instant matter is not a disciplinary or layoff appeal, nor is this a situation where the appointing authority has failed or delayed to carry out a Commission order. Rather, the appointing authority offered the appellant employment, but it erroneously relied on Dr. Pinsky's report to remove him from the subject eligible list. The foregoing does not demonstrate that the appointing authority abused its discretion, acted in bad faith, or had an invidious reason to request the appellant's removal. Therefore, under these circumstances, there is no basis to grant the appellant's request for back pay and counsel fees. See *e.g.*, *In the Matter of A.B., County Corrections Officer, Essex County*, Docket No. A-1232-13T1 (App. Div. March 27, 2015) (The Appellate Division affirmed the decision of the Commission, which granted the appellant's psychological disqualification appeal and ordered retroactive seniority but did not award back pay or counsel fees, noting that, in non-disciplinary appeals, the rules place strict limits on the circumstances where back pay and counsel fees can be awarded).

Moreover, with regard to the appellant's contention that he was subjected to an unlawful pre-offer medical examination, the Commission notes that the ADA at 42 U.S.C.A. sec. 12112(d)(3) expressly requires that a job offer be made before any



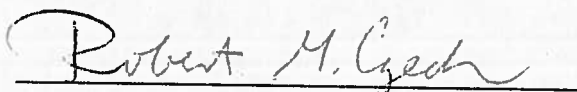
individual is required to submit to a medical or psychological examination. Additionally, the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995) state, in pertinent part, that in order for a conditional 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. Pinsky's report, notwithstanding that it was on the same day. Moreover, although Dr. Pinsky's report was issued with respect to the appellant's application for Police Officer as opposed to the appellant's return as a Special Law Enforcement Officer, the appellant's remedy in this matter has rendered the argument moot. It is reiterated that absent any disqualification issues ascertained through an updated background check and a psychological examination, the appellant's appointment is mandated.

### ORDER

The Commission finds that the appointing authority has not met its burden of proof that S.F. is medically unfit to perform effectively the duties of a Police Officer, and therefore, orders that his name be restored to the subject eligible list. Absent any disqualification issues ascertained through an updated background check and a psychological examination, if applicable, the appellant's appointment is mandated. Upon successful completion of a working test period, the Commission orders that the appellant be granted a retroactive date of appointment to January 22, 2013, the date he would have been appointed if his 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  
THE 15<sup>TH</sup> DAY OF APRIL, 2015



Robert M. Czech  
Chairperson  
Civil Service Commission

**Inquiries  
and  
Correspondence**

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

**Attachments**

**c: S.F.  
Jacqueline M. Vigilante, Esq.  
David R. Mayer  
David A. Rapuano, Esq.  
Kenneth Connolly**