



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jacqueline P. Byk,
Legal Secretary 2 (S0398T),
Department of Law and Public Safety

List Removal Appeal

CSC Docket No. 2016-3613

ISSUED: **NOV 14 2016** (DASV)

Jacqueline P. Byk, represented by Brian Powers, Staff Representative, CWA Local 1033, appeals the Department of Law and Public Safety's request to remove her name from the Legal Secretary 2 (S0398T) eligible list for failing the qualifying typing test.

By way of background, the appellant was appointed provisionally pending open-competitive examination procedures as a Legal Secretary 2 with the Department of Law and Public Safety effective December 29, 2014. On June 5, 2015, the Legal Secretary 2 (S0398T) examination was announced with a closing date of June 26, 2015 and required candidates to pass a typing test. Specifically, the announcement set forth that:

[a] five-minute qualifying typing test (scored on a pass/fail basis) will be scheduled or administered during the interview process. Applicants who have taken a typing test administered by the Civil Service Commission [Commission] or an approved representative of the [Commission] and have been issued a scoring report indicating a passing score, or a proficiency certificate, are not required to be tested again until the proficiency score has expired (five years from date of test). Candidates will be graded on a scale based on the number of errors made. A minimum acceptable typing speed is 40 net words per minute. Net words equal total words per minute minus errors. Keyboards will be provided.

The appellant filed for the subject examination and took the written portion on December 10, 2015 and passed. Her name appeared on the resulting eligible list (S0398T), which promulgated on December 31, 2015 and expires on December 30, 2018. The appellant's name was then certified to the Department of Law and Public Safety on January 4, 2016, in the seventh position. Since the appellant was not exempt from taking the typing portion of the subject examination, she was administered a proficiency test on March 2, 2016. She received a net score of 22 words per minute. However, the appellant complained that a ringing telephone during the five-minute typing test caused a distraction. She was then given another opportunity to be examined. On March 7, 2016, the appellant was administered the second test, but again failed with a net score of 14 words per minute. Consequently, the appointing authority requested the removal of the appellant's name from the subject eligible list and terminated her provisional appointment effective May 27, 2016.

On appeal, the appellant maintains that she has performed well on typing tests in the past "and has a stellar work history." She claims that there have been complaints from other people regarding the test location and states that there could have been an internet connectivity issue or other problem "not observable by the naked eye." Moreover, the appellant indicates that she previously passed a typing test for the Judiciary and requests that the Judiciary test be considered an equivalent test for meeting the requirements of the Legal Secretary 2 position. In support of the appellant's appeal, several Deputy Attorney Generals and other Legal Secretaries, including supervisors, attest to the quality of the appellant's job performance, her professionalism, and the accuracy of the written work she submits. One supervisor states that the appellant "most certainly can type over 40 WPM, if not over 60 WPM."

In response, the appointing authority indicates that the appellant provided it with a copy of a Typing Master Typing Test administered by the Judiciary, in which she scored a net speed of 44 words per minute. However, this test was not equivalent to the TapDance typing test approved by this agency. Thus, the appointing authority states that the appellant was required to take the typing test and given the opportunity to take it twice. It notes that although the appellant complained of the telephone ringing during the first test on March 2, 2016, she did not raise a concern regarding her computer or internet connectivity after failing the test. The appellant also did not allege such a problem during the March 7, 2016 test administration. The appointing authority states that the March 7, 2016 test was held at the same location as the first test, but the telephone was unplugged and a human resource representative was present to proctor the examination. Furthermore, based on the appellant's inquiry, the appointing authority consulted with its information technology management staff regarding the possibility of an internet connectivity issue. However, staff confirmed that the bandwidth was sufficient to support the typing test and no technology issue could have played a

role in the appellant's failure to achieve a passing score. Moreover, the appointing authority emphasizes that other eligibles successfully passed the typing test in the location where the appellant was tested, including two other provisional employees and four appointees. Therefore, because the appellant did not meet all the requirements of the position, the appointing authority maintains that the appellant's removal from the subject eligible list was appropriate.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)4, provides that an eligible's name may be removed from a list for failure to pass examination procedures. *N.J.A.C.* 4A:4-6.3(b) provides that an appellant has the burden of proof to show that an appointing authority's decision to remove the appellant's name from an eligible list was in error.

A candidate typically only has one chance to pass a typing test. In the appellant's case, she was given more than one opportunity to take the examination, and unfortunately, received non-passing scores on both. Furthermore, to allow the appellant to re-take the typing test a third time would provide the appellant with an unfair advantage over the other eligibles who were required to meet the qualifications for the position. Moreover, there is absolutely no evidence that there was a computer problem or internet connectivity issue which would have contributed to the failing score. Further, it is noted that any test administration issues must be filed in writing at the examination site on the test date. See *N.J.A.C.* 4A:4-6.4(c). The Superior Court of New Jersey, Appellate Division, has noted that "the obvious intent of this 'same-day' appeal process is to immediately identify, address and remedy any deficiencies in the manner in which the competitive examination is being administered." See *In the Matter of Kimberlee L. Abate, et al.*, Docket No. A-4760-01T3 (App. Div. August 18, 2003). As indicated by the appointing authority, although the appellant complained of the telephone ringing during the first test on March 2, 2016, she did not raise a concern regarding her computer or internet connectivity after failing that test or during the March 7, 2016 test administration. Finally, to accept a non-approved typing test would create a situation where the appellant was tested based on a different set of criteria, potentially creating psychometrically invalid test results. Therefore, the appointing authority has presented a sufficient basis to remove the appellant from the Legal Secretary 2 (S0398T) eligible list, and the appellant has not met her burden of proof in this matter.

As a final comment, it is noted that, the Commission is without jurisdiction to address the appellant's termination. *N.J.A.C.* 4A:2-2.1 provides that the right to appeal major discipline, which includes the termination of an employee, applies only to permanent employees in the career service or a person serving a working test period. See also *N.J.S.A.* 11A:2-6. Pursuant to *N.J.A.C.* 4A:1-1.3, a permanent

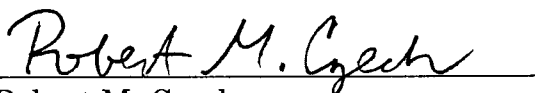
employee means an employee in the career service who has acquired the tenure and rights resulting from regular appointment and successful completion of the working test period. A provisional appointment means employment in the competitive division of the career service pending the appointment of a person from an eligible list. In this case, it is not disputed that the appellant held a provisional appointment as a Legal Secretary 2 and did not have any underlying career service status. Moreover, the appellant has had an opportunity to achieve permanent status by way of competitive testing, but she was not successful in her attempt. It is emphasized that a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. In other words, a provisional employee has no automatic right or expectation of achieving permanent appointment to the position which he or she is occupying. *See O'Malley v. Department of Energy*, 109 N.J. 309 (1987) (Appointing authority was not equitably estopped from removing a provisional employee even when the provisional employee occupied the position longer than the statutory one-year limit). Accordingly, no relief can be afforded to the appellant in that regard.

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 10TH DAY OF NOVEMBER, 2016



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