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STATE OF NEW JERSEY

In the Matters of Kiahna Walcott, *et. al.*, County Correction Officer (S9999R), Essex County

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

CSC Docket Nos. 2016-3708, 2016-3808 and 2016-3941

List Removal Appeals

ISSUED: APR 07 2017 (JET)

Kiahna Walcott, represented by... appeal their rejection as County Correction Officer candidates 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 failure of a medical examination. Since these appeals concern similar issues, they have been consolidated herein.

The appellants took the open competitive examination for County Correction Officer (S9999R), achieved a passing score, and were ranked on the subsequent eligible list. The appellants' names were certified to the appointing authority on December 1, 2015. In disposing of the certification, the appointing authority requested the removal of the appellants' names from the eligible list on the basis of failure of a medical examination. Specifically, in memorandums dated March 17, 2016, the appointing authority's investigator indicated that Mirambeaux underwent a medical examination on January 26, 2016, Murray-Sims underwent a medical examination on February 2, 2016, and Walcott underwent a medical examination on February 15, 2016. The memorandums also indicated that the examining physicians¹ determined that they were not medically approved to be employed in the subject title. It was noted that the appellants did not pass a physical fitness test.

¹ It is noted that Dr. Robert Mustillo examined Walcott and Mirambeaux, and Dr. Ruth Robels examined Murray-Sims.

On appeal, Walcott asserts that her name should be restored to the eligible list. She does not provide any other arguments or information in support of her appeal. Additionally, Mirambeaux argues, among other things, that he was asked to stop taking the medical examination after he had accidentally stumbled during a step test. He adds that he was not sent to another facility so he could properly complete the medical examination. Further, Murray-Sims argues, among other things, that her niece was involved in a life threatening accident and was living with her until she recovered from her injuries. She states that the situation has improved and she requests to undergo the medical examination again.

In support of her appeal, Murray-Sims provides medical documentation dated February 27, 2017 from her personal physician, Dr. Sabrina Tempesta, D.O., indicating that she is fit to participate in a physical performance test.

Despite being provided with the opportunity, the appointing authority did not provide a response. It is noted that staff from the Division of Appeals and Regulatory Affairs (DARA) reached out to the appointing authority on several occasions and requested information. However, the appointing authority failed to provide any information in response to the requests.

It is noted that, when the appointing authority disposed of the certification, it provided separate memorandums pertaining to the medical examinations conducted for Murray-Sims, Mirambeaux and Walcott at Ironbound Medical Center located at 221 Chestnut Street, Newark. The memorandums indicated that the physicians determined that the appellants were not medically cleared to hold the position of a County Correctional Officer. As such, it was recommended that the appellants' names be removed from the subject list. Moreover, in separate memorandums dated January 26, 2016, February 2, 2016, February 18, 2016, the examining physicians indicated that the appellants were not medically qualified for the subject position due to failure of a physical fitness test.

It is noted that the subject list expired on May 1, 2016. Mirambeaux appeared in the 5th position and ranked 7422 on the list, Murray-Sims appeared in the 93rd position and ranked 8234 on the list. Lower ranked candidates were appointed effective February 22, 2016. Additionally, Walcott appeared in the 188th position and ranked 9325 on the list. Lower ranked candidates were appointed effective March 28, 2016.

CONCLUSION

N.J.A.C. 4A:4-6.1(a)3 provides that a person may be denied examination eligibility or appointment when he or she is physically or psychologically unfit to perform effectively the duties of the title.

N.J.A.C. 4A:4-6.3(b) provides 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.

N.J.A.C. 4A:4-6.5(g)4 provides that, in appropriate cases, appellants may be referred for an independent professional evaluation. *N.J.A.C.* 4A:6.5(a)2 states that the submission shall include a finding that the eligible is not qualified due to medical or psychological reasons for the title. *N.J.A.C.* 4A:4-6.5(d) provides 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 any investigations and all complete medical, psychological and/or psychiatric reports which were the basis for the removal request. *N.J.A.C.* 4A:4-6.5(f) provides that professional reports submitted shall include (1) the professional's signature, type of license (including type of license or educational degree of any person contributing to the report), address, and the date; (2) the length of the examination or interview; (3) a specific diagnosis or statement of behavioral pattern or the specific reasons for a recommendation; (4) a finding as to the qualifications of the appellant for effective performance of the duties of the title; and (5) all tests that have been administered (for example, EKG, EEK, X-ray, M.M.P.I., Rorschach and T.A.T.) and all raw data, protocols, computer printouts and profiles from these tests.

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. *N.J.A.C.* 4A:4-6.5(g)5 provides that costs and penalties may be assessed against a party when the inadequacy of a professional report necessitates an independent professional evaluation, when a party causes unnecessary delay in the review process, or for other substantial violation of these rules.

In this matter, the appellants argue that their names should be restored to the eligible list. The appointing authority required the appellants to undergo a physical evaluation as a part of its background medical evaluation in order to determine their fitness for duty for the position of County Correction Officer. Based on the result of the evaluations, it removed them from the County Correction Officer (S9999R) list. Upon receipt of notice of an eligible filing a medical disqualification appeal, within 20 days, the appointing authority is required to submit to this agency all background information, including any investigations and all completed medical, psychological, and/or psychiatric reports which were the basis for the removal requests.

It is noted that the job specification for County Correction Officer indicates that, as a prerequisite for appointment, appointees may be required to pass a thorough medical examination administered by the appointing authority. Any

medical or physical *condition or defect* which would prevent efficient performance of the duties of the position, cause the appointee to be a hazard to himself/herself or others, or become aggravated as a result of performance of these duties, will be cause for rejection. It also indicates that failure to demonstrate sufficient capacity to perform the duties of the position may be cause for rejection.²

Nonetheless, despite being notified of the appellants' appeals by letters dated April 28, 2016 and May 10, 2016, and in a follow up letter dated January 27, 2017, the appointing authority has not provided this information. It is noted that, in cases where medical evaluations are conducted, **the burden of proof is on the appointing authority (emphasis added)**. Further, *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 an eligible's name may be retained on the list. Although the record reflects memorandums from the examining physicians indicating that the appellants were unfit for duty for failure of a "physical fitness" examination, the appointing authority has not submitted any other substantive information, such as the medical evaluation, to show that the appellants are not fit for duty. As such, the Civil Service Commission finds that the appointing authority has not met its burden of proof in this matter. Therefore, the Commission finds that, absent any substantive disqualification issues showing that the appellants' are medically unfit to effectively perform the duties of a County Correction Officer, there is sufficient basis to restore their names to the subject list.

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

² However, it is noted that a "physical fitness test" is **not** a permissible basis to remove a candidate from a list. In this regard, only an actual physical condition or defect can be used to remove a candidate under *N.J.A.C. 4A:4-6.5(a)3*. However, in this case, since the appointing authority has not provided the information needed to ascertain the exact reasons for its requests to remove the appellants from the list, the Commission need not provide any further comment other than to note that the appointing authority is cautioned to not utilize any type of "physical fitness" test to attempt to remove candidates from future lists.

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).

Thus, in subjecting the appellants to a medical examination, their appointments are mandated subject to any adverse updated background information or psychological documentation that would disqualify them from further consideration. Absent any other such disqualification issues, the list will be revived in order to effectuate their appointments, with an effective date of February 22, 2016 for Mirambeaux and Murray-Sims, and an effective date of March 28, 2016 for Walcott.

One final matter warrants comment. The Commission finds that the appointing authority's failure to submit the appellants' medical evaluations in this matter constitutes an unreasonable delay in this review process pursuant to *N.J.A.C.* 4A:4-6.5(g)5. The Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A.* 11A:10-3; *N.J.A.C.* 4A:10-2.1(a)2. See *In the Matter of Fiscal Analyst (M1351H)*, Newark, Docket No. A-4347-87T3 (App. Div. February 2, 1989). Accordingly, if the appointing authority fails to adhere to the timeframes in this matter without an approved extension of time, or causes further unreasonable delays not in compliance with this decision, it will be assessed a fine after 30 days of \$100 a day, not exceeding the amount of \$10,000.

ORDER

Therefore, it is ordered that these appeals be granted and the appellants' names be restored to the list for County Correction Officer (S9999R), Essex County. It is further ordered that, absent any disqualification issue ascertained through an updated background check and a psychological evaluation, the appellants' appointments are otherwise mandated.

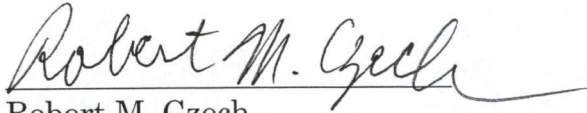
The Commission further orders that, upon successful completion of the background check and the psychological evaluations without receipt of disqualifying information, the County Correction Officer (S9999R), Essex County list be revived and certified to effectuate their appointments, with an effective date of February 22, 2016 for Mirambeaux and Murray-Sims, and an effective date of March 28, 2016 for Walcott.

It is further ordered that the appointing authority comply within 30 days of the issuance of this decision. If at any time, the appointing authority does not adhere to the timeframes noted above without an approved an extension of time

that results in further unreasonable delays, the Commission orders the assessment of a fine after 30 days in the amount of \$100 per day, not exceeding \$10,000.

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 5th DAY OF APRIL, 2017



Robert M. Czech
Chairperson
Civil Service Commission

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

c: Kiahna Walcott
 Joseph Mirambeaux
 Shawn Murray-Sims
 Ciro Spina, Esq.
 Alan Abramowitz
 Kelly Glenn