

told to do the darkened maze crawl instead. He states that the monitor told him to crawl through the maze in 40 seconds keeping his right hand on the wall, but that there was no wall and he should keep his hand on the wood. He was told to enter the maze, which was closed behind him, and to move up to the curtain hanging down and not go through the curtain until told to do so.

As to what happened next, the appellant states that he got in the maze and the monitor said, "Ready, set go." He indicates he responded with, "When you say 'go' I go correct?" He states that he heard "Ready, set go" again and he replied "I am going," and began to crawl. He stated that he began crawling on the second command, as he did not want to be disqualified for starting early. He states that he should have started crawling on the first command, but that this delay caused him to fail. He then completed the ladder climb, and gathered his belongings, and then spoke to the Center Supervisor. He states that he told the Center Supervisor that he failed the maze crawl because the directions were unclear and he was given the command to go twice. He then spoke to the other Center Supervisor who indicated he would have to file an appeal, but stated he did not have any forms with him and gave him a document entitled "Appeal Procedures" and told him to send a letter to the address on the document. He then wrote a letter stating he intended to appeal the results and left it with the Center Supervisor.

In a supplement to his appeal, the appellant requests a hearing on this matter. He states that the PPT Fitness Manual indicated that the command for the darkened maze crawl was "ready, go." This differed from how the obstacle course was timed as the timer began when he released a pressure switch at the beginning of the obstacle course. The appellant references the differences in timing methods between the obstacle course and the darkened maze crawl. He reiterates that the monitor gave the command "ready, set go," once he was in the maze, and when he asked for clarification, the monitor merely repeated the command. He blames the monitor for failing to follow instructions and as proof, indicates that she gave him the darkened maze crawl out of order, as he should have taken the ladder climb before the darkened maze crawl. He requests to be allowed to take the darkened maze crawl again, and he requests back pay, costs and counsel fees, as well as any other further relief as is just, equitable and appropriate.

N.J.A.C. 4A:4-2.15(b)2, Rating of examinations, states that, "examinations consisting of more than one part may be rated independently, and candidates who do not receive a passing score on one part of an examination shall be deemed to have failed the entire examination." Thus, it was necessary to pass all three portions of the physical performance examination in order to pass the exam. If a candidate did not complete any one of the three physical performance exercises in under the allotted times, that candidate failed the examination.

N.J.A.C. 4A:2-1.5(b) Remedies, states that, “Back 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 Civil Service Commission or where the Commission finds sufficient cause based on that 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.”

CONCLUSION

At the outset, hearings are granted only in those limited instances where the Civil Service Commission (Commission) determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978). Examination issues are resolved by the Commission by a review of the written record.

Next, the Center Supervisor makes notes of anomalies that occur at the test center, comments that are made, and candidates who fail portions of the PPT. In this case, the assessor noted that the appellant failed the maze with a score of 43.56. The Center Supervisor indicated that the appellant left the test center and returned roughly an hour later. The appellant stated that he was confused by the instructions to go twice and assumed that the clock was started after the first command. The Center Supervisor then spoke to the monitor, who follows a script and said that she read all instructions in full. She stated that she asked the appellant if he was ready, waited for a response, then gave him the command of “ready go” and started the clock.

All candidates had access to the physical performance test, physical fitness manual which provides a description of the darkened maze crawl. This document states, “The candidate enters one end of the maze to the ‘Start’ position (at the first curtain), stops, and waits for the Examiner to give the command, “Ready – Go.” The candidate then proceeds to the far side exit.” On another document available to all candidates, the 2015 Fire Fighter Physical Performance Test (PPT) Process Description, it states, “The candidate will enter the maze and get into a crawling position with his or her hands behind the starting line. When the candidate is in position, the outside cover will be closed, cutting off any light to the interior. At the command “Ready, go,” the candidate will crawl through the maze until reaching the finish line. When the candidate reaches the finish line, the exercise is complete.” The appellant also saw a video with instructions.

In order to ensure that candidates are ready to begin crawling once in the darkened maze, the monitor asks, "Ready?" If the candidate responds, the monitor says, "Ready, go" and starts the stop watch then. The monitors did not state "Ready, set, go," nor did they say "Ready, go" twice. Candidates were expected to begin the crawl when they heard the word "Go." The monitors do not have a conversation with the candidates when they are in the maze. They merely ask them if they are ready and if they hear response that is not "no," they give the command to go. According to the Center Supervisor notes the monitor indicated that she asked him if he was ready, waited for a response that was not in the negative, and then gave him the command of "Ready go" and started the clock.

The appellant contends that he inappropriately received the darkened maze crawl prior to the ladder climb. This argument is simply unpersuasive. On the various materials provided to the candidates, the three portions of the PPT have been described with the various components in differing order. For example, in the video, it states that the portions are the ladder climb, the darkened maze crawl, and the obstacle course, but then it first describes the obstacle course, then the ladder climb, then the darkened maze crawl. There is nothing in these materials that indicates the order of in which these components are given or should be given. For at least the last decade, generally, the order has been obstacle course then the darkened maze crawl, then the ladder climb. But sometimes it is obstacle course and then the ladder climb, then the darkened maze crawl. The appellant's argument is not in his favor, as he is stating that after the obstacle course, he should have taken the ladder climb next, wherein he would have been more fatigued by the time he was in the darkened maze crawl. Of course, the intent of this argument was to highlight the ineptness of the monitor. Nonetheless, at the test center on this particular day, candidates were generally given the darkened maze crawl prior to the ladder climb, and this is the order that the components were given to the appellant.

The record does not support that the appellant is entitled to a retest of this component. The monitor read the instructions in full, then asked the candidate if he is ready, then gave the command, "Ready Go" and started the clock. The appellant was not treated any differently than any other candidate. Even if the appellant was confused at various times during the administration of the examination, the monitor did not start the stopwatch with the inquiry of "Ready," or prior to or while the appellant was talking, but started it upon the word "Go."

Further, the appellant is not entitled to back pay, costs, counsel fees, or any other relief. The guiding principle in determining an award of back and counsel fees is "to insure that, while the appellants do not profit they do not suffer any loss in earnings." See *Mason v. Civil Service Commission*, 51 N.J. 115, 129 (1968), citing *Mastrobattista v. Essex County Park Comm'n*, 46 N.J. 138 (1965). While the matter at hand is an examination issue, the notion that the appellant should be given back

pay or enriched by any monies would result in his actually earning income for non-performance of a job. The appellant is not an employee, and no adverse action against the employee in bad faith or with invidious motivation is evident. Lastly, individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984), *Schroder v. Kiss*, 74 *N.J. Super.* 229 (App. Div. 1962). The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990).

A thorough review of the record indicates that the determination of the Division of Test Development and Analytics was proper and consistent with Civil Service Commission regulations, and that the appellant has not met his burden of proof in this matter.

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
THE 16th DAY OF AUGUST, 2017



Robert M. Czedz, 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: Maurice McLaughlin, Esq.
Richard Lisowski
Michael Johnson