



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of J.F.G., Correctional
Police Officer (S9999U), Department
of Corrections

CSC Docket No. 2020-1524

List Bypass Appeal
Hearing Granted

ISSUED: AUGUST 26, 2020 (DASV)

J.F.G., represented by Jeffrey S. Ziegelheim, Esq., appeals the bypass of his name on the Correctional Police Officer (S9999U), Department of Corrections (DOC) eligible list.

By way of background, the appellant, a nonveteran, took the examination for Correctional Police Officer (S9999U), DOC, and appeared on the resulting eligible list, which promulgated on March 29, 2017 and expired on May 1, 2020. The appellant’s name was then certified. In disposing of the certification, the appointing authority bypassed the appellant for appointment for alleged “questionable and deceptive” actions during his medical examination. In that regard, on May 23, 2019, the appellant was undergoing his medical examination for the subject position. He was requested to submit a urine sample. It was asserted that the appellant presented a container “filled with a watery solution” to the hospital staff. Based on this information, the appointing authority withdrew its offer of employment and bypassed the appellant.

On appeal to the Civil Service Commission (Commission), the appellant explains that prior to his medical examination, he received an email from DOC instructing him to fast from midnight until the examination and that he could only drink water until his blood work. On the day of his examination, he submitted a urine sample. He contends that the doctor “did not seem concerned” and requested another sample. The appellant also states that medical staff advised him to have a snack without drinking any more liquids. He then provided anther urine sample

but was “forced” to throw it away by a Correctional Police Officer who led him to a private back room with other officers, “demanded” all his paperwork, and told him that he was being disqualified based on his first urine sample. The Correctional Police Officer informed the appellant to contact the Custody Recruitment Unit, which he did. By email dated May 25, 2019, as requested by the appointing authority, the appellant explained what happened. In the email, the appellant said that he was advised to give a urine sample as soon as he arrived. He asked an officer if he could get some water in his car because the water fountain was not working. The appellant was permitted to do so and “drank 6 bottles of water to make sure [he] could give a urine sample.” He also noted that he “work[s] on [his] feet all day and drank a lot of water to suppress [his] hunger.” Additionally, the appellant indicated that the doctor told him his first urine sample was “too diluted for an accurate reading,” and the officer told him to throw away the second sample and escorted him out of the office. In his email, the appellant also claimed that he “was mishandled” and “was treated with a lack of dignity and respect.” The appointing authority then rescheduled the appellant for another medical examination on June 17, 2019. The appellant states that he went to this examination and “passed all required tests.” He submits the medical documentation, which indicates that his cholesterol test was “Abnormal,” but his urine test was “Normal.” It was recommended that the appellant see his personal physician regarding the abnormal result.

In response, the appointing authority maintains that it exercised its discretionary authority to bypass the appellant, a nonveteran, pursuant to the “Rule of Three,” *N.J.A.C. 4A:4-4.8(a)3*. It reiterates that the appellant presented a watery solution as his urine sample during “Phase 4 medical examination for clearance for the training academy.” In support of its position, the appointing authority submits the appellant’s Application for Employment, his appeal package, his May 25, 2019 email, and a witness statement from a DOC employee dated May 24, 2019. The appointing authority underscores that the appellant’s initial statement contained in his email is different than what the appellant states on appeal. It also emphasizes that, although the appellant asserts that the doctor was not concerned, the appellant was asked to provide a second urine sample. Additionally, the witness reported that the appellant provided his urine sample and was asked if it was water to which he replied, “No, it is urine. I am just very hydrated.” The urine sample was given to one of the doctors who tested it and the “test proved that the amount of air in the liquid was compatible with the amount of air in water NOT urine.” The witness also commented that “[t]he new sample [the appellant] provided looked like urine[,] [a] drastic change from the clear liquid he provide[d] less than 45 minutes before.” Moreover, the appointing authority states that it has the “duty to carefully screen candidates,” and if “a candidate exhibits questionable behavior and/or integrity during pre-employment processing, then the Department, at its discretion, may preclude that individual from moving forward in the hiring process.” In this case, the appointing authority found that the circumstances of the matter

“were extremely concerning, unusual and bizarre.” Thus, the appointing authority maintains that the appellant is not a suitable candidate and he has not met his burden of proof that its decision to bypass him was improper.

In reply, the appellant recounts what occurred on the day of his medical examination and notes that by the time he was ordered to appear for the test, he already passed the psychological examination and the urine test for the presence of controlled dangerous substances and steroids. He reiterates that he fasted prior to the examination on May 23, 2019 and drank a large amount of water to satisfy his hunger. Furthermore, the appellant indicates that the urine samples of candidates, including himself, were collected under the observation of a Correctional Police Officer. He argues that the appointing authority is attempting to remove him for cause, which it has not substantiated, although it states that he was bypassed on the subject eligible list. Moreover, the appellant asserts that no documentation has been presented that the rejected sample was tested by way of a creatine analysis to determine if the sample contained urine. He contends that the “only actions that were questionable or deceptive” were the actions of the Correctional Police Officer who was “interfering” with the second requested urine sample. Additionally, the appellant argues that the appointing authority is barred from bypassing him for appointment under the principles of Estoppel and Waiver. In ordering the appellant to return and provide another sample, the appointing authority has waived its claims, and the concerns regarding the initial sample “disappear.” Lastly, the appellant submits that the appointing authority has not proved that he exhibited “bizarre behavior.” Therefore, the appellant maintains that the appointing authority should not be permitted to bypass him for appointment.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-6, and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on an open-competitive list, provided that disabled veterans and then veterans shall be appointed in their order of ranking. The “Rule of Three” allows an appointing authority to use discretion in making appointments. Moreover, list bypass appeals are generally treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted only in those limited instances where the 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). Further, the appellant has the burden of proof in list bypass appeals. *See N.J.A.C.* 4A:2-1.4(c).

Initially, the appellant in the present case is not a veteran and could have been bypassed under *N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-6, and *N.J.A.C.* 4A:4-4.8(a)3i. However, he was subjected to medical and psychological examinations. Thus, the inquiry turns to whether there is a disqualifying factor that was not previously identified before the medical and psychological examinations were

administered which causes the rejection of the appellant. In that regard, pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C.A. §12112(d)(3), no medical or psychological examination may be conducted prior to rendering a conditional offer of employment. *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). An appointing authority is barred from reevaluating any information that was known prior to extending the conditional offer of employment. *See 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 e.g., In the Matter of Edison Cerezo*, Docket No. A-4533-02T3 (App. Div. October 15, 2004) (Appellate Division affirmed the decision denying appointing authority’s request to remove an eligible from the Police Officer eligible list due to unsatisfactory background when eligible was subjected to a psychological examination and eligible could not be bypassed). *See also In the Matter of County Correction Lieutenant (PC2647F), Sussex County Sheriff's Office* (MSB, decided March 8, 2006) (Eligible cannot be bypassed under the “Rule of Three” in a promotional situation when he was subjected to a psychological examination after the interview process and no disqualifying issue was found). *Compare, In the Matter of Matthew Mizak, Fire Fighter (M1584T), Woodbridge Township Fire District #1* (CSC, decided April 15, 2020) (Bypass of a Fire Fighter candidate was upheld as disqualifying factor was identified after the psychological examination and the appointing authority did not request removal of candidate from the eligible list but rather bypassed him).

In the appellant’s case, there is not a claim in his background that causes him to be rejected for the subject position. He was also not disqualified due to medical or psychological reasons. It was not until after the psychological examination and during the administration of the medical examination that an issue arose. The appointing authority submits that the appellant’s actions were “deceptive” as he allegedly provided a diluted urine sample. A DOC witness indicated that a “test proved that the amount of air in the liquid was compatible with the amount of air in water NOT urine.” In that regard, *N.J.A.C. 4A:4-6.1(a)6* allows the removal of an eligible’s name from an employment list when he or she has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process. However, the appointing authority does not submit this test or provide a certified statement from the witness or medical professional. The appellant also asserts that he was hydrated, drinking six bottles of water prior to providing the urine sample. He willingly provided

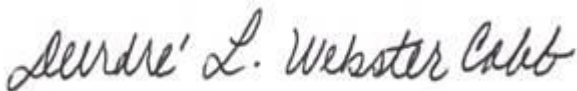
another urine sample during the May 23, 2019 medical examination. Nonetheless, the appellant does not submit a certification attesting to the truth of his statements. Given these circumstances, the case presents a dispute of fact that cannot be determined on the written record. The appellant's credibility, as well as the appointing authority's witness, is at issue. Therefore, it is best that this matter be referred to the Office of Administrative Law where an Administrative Law Judge (ALJ) can review documentary evidence, take testimony, and determine the credibility of witnesses. It is noted that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). To reverse the appellant's bypass on such a serious charge without the benefit of testimony would not be in the public's interest. The Commission is ever mindful of the high standards that are placed upon public safety personnel. Correctional Police Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community and the standard for an applicant includes good character and an image of utmost confidence and trust. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990).

Accordingly, this appeal raises a need for a factual record necessary to determine whether there is a legitimate basis for reversing the appellant's bypass and appointing him from the Correctional Police Officer (S9999U), DOC, eligible list or whether there is sufficient cause for removal.

ORDER

Therefore, it is ordered that this matter be transmitted to the Office of Administrative Law for a hearing. In so doing, the appointments of lower ranked eligibles are designated conditional pending the outcome of this proceeding.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF AUGUST 2020



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher 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: J.F.G.
Jeffrey S. Ziegelheim, Esq.
Veronica Tingle
Division of Agency Services
Division of Appeals and Regulatory Affairs w/file