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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of Kevin Potter, Jr. Program Specialist Trainee, Department of Children and Families

CSC Docket No. 2016-1214

Administrative Appeal

ISSUED: APR 21 2017 (SLD)

Kevin Potter, Jr. appeals his non-appointment to the noncompetitive title of Program Specialist Trainee, Department of Children and Families (DCF)

By way of background, the appellant, a veteran, applied to a posting for the non-competitive title of Program Specialist Trainee with DCF on January 14, 2015. However, as he failed to obtain a passing score on the structured interview conducted by DCF, it determined that he was not qualified for the position and did not offer him an appointment.

On appeal, the appellant argues that although veterans preference applies to noncompetitive appointments and he met all conditions for hiring, the DCF refused to appoint him to one of the positions. The appellant asserts that during his interview, a student intern was included on the interview panel; he was questioned about why he wanted to change careers; DCF failed to provide him with any notice of his non-selection; and DCF failed to show cause as to why he was not selected. Consequently, the appellant demands that he be immediately offered a position with DCF, with a retroactive effective date, and all back pay, pension benefits/credits and other benefits commensurate with his retroactive date of hire.

In response, DCF argues that the appellant was not selected because he is not qualified for the position as he failed to obtain a passing score on the structured interview examination. Initially, it notes that subject position was located in the Office of Research, Evaluation and Reporting, which is responsible for providing quantitative and qualitative information necessary to measure and support organizational performances, report on the outcome of service delivery to children

and families and to comply with State and Federal requirements. Therefore, there is a heavy emphasis on data gathering and report preparation through the use of Excel. The selection process was administered as a three-part structured interview. Part one was an evaluation of the candidates' credentials. Part two was an interview in front of three panelists and part three was an exercise to assess the candidates' proficiency with Excel. Out of hundreds of applicants, 12 candidates, including the appellant and one other veteran, who possessed a Bachelor's degree, were selected for part one of the process.

During the credential review process, resumes were evaluated and points awarded in priority order for report preparation, data management and survey design experience. Experience in MS Access and Excel was also evaluated as well as familiarity with software such as Statistical Analysis System. The passing score for the credential process was 50, with the appointee receiving a score of 58.2. However, the appellant only received a score of 17.6. During the interview portion, all candidates were asked the same questions, which included topics such as describing a very detail oriented task, providing an example of research skills, describing a time when a good work ethic was demonstrated and describing the characteristics of their best supervisor. The top interview score was a 64.9. However, the appellant received a score of 36.9, which it asserts was below the passing point. The Excel exercise consisted of a workbook with four tabs (or worksheets), each of which contained simplified examples of work that could be encountered on the job, such as calculations using the equal and plus signs and the "average" function. However, the appellant was unable to properly compute the questions with the "average" function. The appellant also made several copy and paste errors when calculating the percentages and only completed one worksheet out of four. DCF notes that all candidates were provided with the workbook and verbally told that there were four tabs.

With regard to the appellant's concern with the question regarding the change to his career, DCF notes that the individual who asked the question had previously been in the same career and was merely asking a "break the ice" type of question. Concerning the credentials of the graduate intern, DCF states that she recently received her Master's degree in Social Work, and she possesses several years of experience in family crisis services as an incarcerated women's advocate at the Cumberland County Jail and the Maine Correctional Center as well as extensive quantitative and qualitative research experience and database development and maintenance.

In response, the appellant maintains that he did very well in the oral interview as he answered all the questions in a "remarkable manner." He notes that he was complimented numerous times for his past work performance and he has extensive experience using data and working with at-risk children. Thus, he maintains that the score given to him for his interview was not indicative of his

performance. Therefore, he asserts that DCF purposely lowered his oral interview score to bypass a veteran in violation of Civil Service law and rules. Moreover, he maintains that the interview was "inherently discriminatory towards combat veterans" as all of the veterans who possessed the indicated education failed the interview process. With regard to the Excel exercise, he asserts that the test was not monitored or proctored, thereby allowing for the possibility of a candidate receiving an unfair advantage by using a smart phone. Moreover, he maintains that he was not provided with any clear or coherent directions nor was he told about the "four alleged worksheets." The appellant asserts that he was not provided an opportunity to ask any clarifying questions nor was he told to tell staff when he was done with the untimed test. The appellant also asserts that the appointing authority's submission contains "a false statement on an official document" since he disputes that he was verbally told that the test contained four worksheets or tabs.

Additionally, the appellant argues that the testing environment was not conducive or fair to individuals with a documented disability, such as himself. The appellant asserts that since he was not informed about the test prior to the interview, he was unable to request an accommodation pursuant to the Americans with Disabilities Act (ADA). Specifically, he asserts that the testing environment was loud as employees were talking in close proximity to the testing location and should have been conducted in a "proctored environment free of distraction and harassment." He alleges that the candidates completed the exercise on an "unscientific computer were [sic] an answers [sic] could be changed at a later date or erased." Moreover, as the candidates used the same computer, he believes later candidates could have obtained an unfair advantage by checking other candidates work due to the unsupervised nature of the examination. Therefore, the appellant argues that the Civil Service Commission (Commission) must invalidate the Excel portion of the structured interview. The appellant also contends that an individual on the interview panel "may have had a conflict" with him and her scores should be ignored. Specifically, he asserts that the interviewer worked for Cumberland County Correctional Facility as a Women's Advocate and his father was incarcerated numerous times charged with "crimes involving an alleged female victim." Therefore, due to the possibility of bias, the interviewer should have recused herself in order to avoid the appearance of impropriety.

In response, DCF notes that the appellant failed to raise any test issues or concerns or his claimed disability on the date of his structured interview or even in the weeks that followed. Moreover, it notes that he failed to raise these issues in his initial appeal to the Commission. Notwithstanding the fact that the selection process was not administered by the Commission, DCF maintains that similar to the rule governing assembled examinations for competitive titles, these issues are untimely. For example, Civil Service rules provide that issues concerning test administration issues must be raised at the test site so that a remedy can be provided, if warranted. With regard to the appellant's allegations concerning his

disability, DCF notes that although it did not notify candidates in writing for the subject structured interview and their ability to request an accommodation, it does for other non-competitive structured interview, and thus will do so for the subject title in the future.

Moreover, DCF asserts that the Lead Panelist provided standardized instructions, including the fact that there were four worksheets. In addition, the four tabs (worksheets) in the Excel document are clearly visible in a screen shot of the Excel test. Additionally, it notes that although all candidates used the same laptop that did not have access to any shared files or the internet, the candidate's work was removed from the laptop upon completion. Furthermore, all candidates were seated at a table immediately outside of the Lead Panelist's cubicle or in her cubicle. DCF also notes that either the Lead Panelist or the co-worker in the adjoining cubicle were present while the candidates completed the exercise and available for any questions the candidates may have had. With regard to the appellant's complaint concerning the noise, DCF notes that all candidates were exposed to the same environment. Finally, with regard to the appellant's claim that one of the Panelists should have recused herself based upon a possibility that she may have had some past knowledge/conversation of his father, he has presented no evidence of a conflict. Moreover, at the time of the interview, the Panelist had no knowledge of the identity of the appellant's father or his involvement in the criminal justice system.

CONCLUSION

N.J.S.A. 11A:5-8 specifies that:

From among those eligible for appointment in the non-competitive division, preference shall be given to a qualified veteran. Before an appointing authority shall select a nonveteran and not appoint a qualified veteran, the appointing authority shall show cause before the Civil Service Commission why a veteran should not be appointed. In all cases, a disabled veteran shall have preference over all others.

N.J.A.C. 4A:5-2.3 provides that in making appointments in the non-competitive division, preference shall be given among qualified applicants to disabled veterans, then veterans.

While the Commission notes that Civil Service law and rules include a strong preference for veterans and disabled veterans, the establishment of veterans preference does not automatically entitle the veteran to a permanent appointment in a career service position. As noted above, *N.J.S.A.* 11A:5-8 permits an

appointing authority not to appoint a qualified veteran for cause when making noncompetitive appointments. In *In the Matter of Andrew Triandafilou* (MSB, decided June 8, 2005), the Merit System Board (Board) delineated the standard necessary to remove qualified veterans from consideration for noncompetitive appointments. In *Triandafilou*, the Board stated that although *N.J.A.C. 4A:5-2.3* does not specify the standard for the non-appointment of a veteran to a noncompetitive position, the rules regarding use of the preference in promotional examinations delineate what is required of an appointing authority to show cause as to why a veteran should be removed from a list. Thus, in the absence of any other specific regulatory procedure concerning noncompetitive positions, these rules are illustrative of what an appointing authority would need to demonstrate to substantiate not appointing an interested, qualified veteran.

In particular, *N.J.A.C. 4A:5-2.2(c)* provides that a non-veteran shall not be appointed unless the appointing authority shows cause why the veteran should be removed from the promotional list. *N.J.A.C. 4A:4-4.7 et seq.*, in conjunction with *N.J.A.C. 4A:4-6.1 et seq.*, delineates a number of reasons why a person may be denied an appointment and removed from the list. This would include the failure of a veteran applicant to complete required pre-employment processing. See *N.J.A.C. 4A:4-4.7(a)11*, which allows an eligible's name to be removed from an eligible list for other valid reasons. In short, the Board in *Triandafilou* stated that these rules explain what an appointing authority would have to demonstrate in order not to make an appointment of an interested veteran eligible to a noncompetitive title. As such, an eligible who has established veterans preference does not necessarily have to be permanently appointed.

In the instant matter, the appellant argues that DCF refused to honor his veterans preference and appoint him to the noncompetitive position. DCF acknowledges that veterans preference is to be considered prior to making a noncompetitive appointment. However, it maintains that only candidates, who met specific requirements and were recommended and identified for employment after the structured interview process, were determined to be qualified and offered employment. In this regard, DCF indicates that it utilized a structured interview process to determine whether candidates should be offered the subject position. The Commission is satisfied that DCF demonstrated that it utilized a uniform selection process that did not adversely impact the appellant's veteran preference rights and properly determined that he was not qualified for the position. Further, during structured interview, the other veteran indicated that he did not realize the position primarily involved working with data and was found to be not qualified for the position. However, it is noted that the other veteran subsequently applied for and passed the structured interview process for Family Service Specialist Trainee and was permanently appointed to that title.

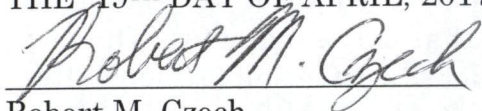
Upon a review of the record, the Commission finds that DCF presented sufficient reasons not to appoint the appellant. Specifically, his experience and interview scores were below average. Moreover, the appellant failed to complete the Excel examination and he had documented errors in the portion he did complete. Although the appellant disputes that DCF has provided a legitimate reason for his non-appointment, other than his disagreement with DCF's statements, he has provided no documentation to dispute the findings of the interview panel, his grade for his experience, and his grade on the Excel examination. Moreover, although the appellant raises concern with the testing conditions for the first time in his response to the DCF's submission on appeal, his failure to raise them at the time of the structured interview precluded the DCF from providing him a possible remedy before the process continued. It must be emphasized that all of his concerns should have been made at the time of his structured interview in order to immediately identify, address and remedy any deficiencies in the manner in which the process was being administered. Accordingly, the appellant has failed to sustain his burden of proof in this matter.

ORDER

Therefore, it is ordered that Kevin Potter's appeals of his non-appointment by the Department of Children and Families 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 19TH DAY OF APRIL, 2017



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