

*In the Matter of J.P., Fire Fighter (M2377H), Newark*  
CSC Docket No. 2013-573  
**(Civil Service Commission, decided April 17, 2103)**

J.P., represented by Craig Gumpel, Esq., appeals the bypass of his name on the eligible list for Fire Fighter (M2377H), Newark.

The closing date for the subject open-competitive examination was August 31, 2006. The resultant eligible list promulgated on November 2, 2007 and expired on November 1, 2011. In disposing of the July 8, 2011 certification, Newark bypassed the appellant.<sup>1</sup> Specifically, Newark indicated that during the medical examination, it was discovered that the appellant had a medical condition which was not resolved until after the appointment date (October 31, 2011) of the eligibles appointed from the subject certification. In support, it submitted a January 13, 2012 letter from the appellant's physician which indicated that the appellant's medical condition was resolved and he was currently medically cleared to perform all duties.

On appeal, the appellant initially asserts that after he was medically cleared by his personal physician, he met with the Fire Director Fateen A. Ziyad, Personnel Director Kecia Daniels and the Newark Fire Fighters Union President, Chuck West on February 24, 2012 to discuss his status. During this meeting, the appellant was advised that Newark would schedule him for an appointment to be examined by its physician, at the appellant's expense, and that if he passed the medical examination, Newark would "modify" the certification to reflect his appointment at the time of the next Fire Fighter class. The appellant asserts that this agreement was memorialized and signed by him and Ziyad. In support, the appellant submits a March 7, 2012 memorandum from Ziyad to the appellant, signed by Ziyad and the appellant, which states:

The Newark Fire Department has agreed to let you be re-examined by the City Doctor. You must pass this examination in order to be considered eligible for the next class of entry level Fire Fighter. An appointment has been scheduled for you by our Administrative Services Office . . . The City of Newark is asking that you to [sic] be responsible for the cost of this physical examination.

The appellant also submits certified statements from himself and West in which they state that during the February 24, 2012 meeting, Ziyad indicated that he would send the appellant a letter scheduling an appointment for him to be examined by the appointing authority's doctor, at his expense. They further

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<sup>1</sup> Personnel records indicate that Newark did not return the subject certification to this agency until February 27, 2012, and that it was not approved for disposition until April 11, 2012.

indicated that they were told that if the appellant “passed the medical examination, the City would modify the Certification, OL110736, which had recently been disposed of, to reflect [his] appointment” and that his start date would be that of the next Fire Fighter class. The appellant asserts that on March 13, 2012, he was examined by the City’s physician who informed him that he had passed the medical examination and would be submitting a letter to that effect to the Fire Department. The appellant maintains that despite passing the medical examination, and repeated attempts to contact Newark, he was never appointed. Instead, on April 16, 2012, he was informed by this agency that Newark had bypassed him for appointment pursuant to the “Rule of Three.” *See N.J.A.C. 4A:4-4.8(a)3.*

The appellant argues that his bypass was improper since he passed the medical examination, and is therefore entitled to a retroactive appointment date. In this regard, he argues that pursuant to *N.J.A.C. 4A:4-6.5(b)* and the Americans with Disabilities Act (ADA), 42 *U.S.C.A. 12101 et seq.*, a *bona fide* job offer must be made before an individual is required to submit to a medical examination. *See also*, the Equal Employment Opportunity Commission’s *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995). The appellant argues that the appointing authority’s failure to appoint him, despite his passing the medical examination, violates *N.J.A.C. 4A:4-6.5(b)* and the ADA and therefore, his appointment, with a retroactive appointment date, is mandated.

Additionally, the appellant argues that he should be awarded back pay and counsel fees due to the appointing authority’s willful and knowing violation of the ADA as well as its unreasonable and continued delays in this matter. In this regard, he argues that *N.J.A.C. 4A:2-1.5* allows for the payment of back pay and counsel fees in all appeals where, as here, “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 the particular case.” Moreover, he asserts that counsel fees may also be granted pursuant to the ADA, which allows an administrative agency to provide counsel fees to the prevailing party. *See 42 U.S.C.A. §12205.* The appellant asserts that the appointing authority knew or should have known that, once he was sent for and passed the medical examination, his appointment was mandated, and therefore, its failure to appoint him has further harmed him.

In response, the appointing authority, represented by Michael Oppici, Assistant Corporation Counsel, argues that the appellant is not entitled to an appointment since he was properly bypassed on the July 8, 2011 certification, and there were no further certifications from the M2377H eligible list since it expired November 1, 2011. The appointing authority argues that, at the time of the appointments from the certification, the appellant was not medically cleared, and as such, his bypass was appropriate. In this regard, it notes that the eligibles

appointed completed the Fire Academy on December 20, 2011, yet the appellant's personal physician did not medically clear him until January 13, 2012. Therefore, his bypass on the subject certification was appropriate. The appointing authority also argues that since the appellant was unfit at the time of the appointments, all of his other arguments are without merit and should be dismissed.

Additionally, the appointing authority argues that despite the appellant's argument to the contrary, Ziyad did not have the authority to give the appellant a *bona fide* offer of employment, since Ziyad is not the "appointing authority." In this regard, it maintains that Daniels, as the appointing authority, had neither agreed to nor was she aware that the appellant underwent a second medical examination. In support, it submits a certification from Daniels in which she states that she "did not agree with any of the representations" made at the February 24, 2012 meeting. Consequently, any such offer by Ziyad is not enforceable and the appellant is not entitled to an appointment.

Furthermore, the appointing authority maintains that the appellant's request for back pay and counsel fees should also be denied since there has been no showing of bad faith or invidious motivation on its part in not appointing the appellant. Rather, as previously noted, the appellant was not medically cleared to enter the Fire Academy with the eligibles appointed from the subject certification.

In response, the appellant reiterates his arguments. Additionally, he disputes the appointing authority's assertion that Ziyad did not have the authority to extend an offer of employment to him. The appellant maintains that Ziyad, as the Fire Director, has the authority to hire, fire, discipline and resolve contractual disputes, and he is the one who initiates all disciplinary actions for Fire Fighters. In this regard, he asserts that pursuant to the Faulkner Act, Newark is comprised of the Municipal Council, Office of the Mayor, Office of the City Clerk and 10 departments, headed by directors. The powers of the Department Head, delineated in the Administrative Code of the City, includes the authority to "appoint officers and employees" within the department. The appellant also argues that even if Ziyad did not have actual authority to extend an offer of employment, he had the apparent authority to do so, since he was in charge of the pre-employment hiring process, including medical examinations by the appointing authority's doctor. It is clear that any reasonable person would have concluded that Ziyad's statement that the appellant would be appointed if he passed the second medical examination was a *bona fide* offer of employment. Moreover, the appellant notes that although Daniels indicated in her certification that she did not agree with Ziyad's statements at the February 24, 2012 meeting, she did not voice those disagreements, and thus gave tacit approval for Ziyad's offer of employment. Furthermore, he notes that he sent three letters to Ziyad, Daniels and Newark's Law Department, confirming the terms under which the appellant would be appointed, and not once did Daniels object to or otherwise indicate that she did not agree with the representations made

by Ziyad. Additionally, the appointing authority admitted that the certification was not disposed of until April 11, 2012, well after the appellant passed the medical examination, and therefore, it could have effectuated his appointment at that time. Consequently, the appointing authority's attempts to violate his rights are clear evidence of its bad faith and therefore, he is also entitled to back pay and counsel fees.

Personnel records do not indicate that the appellant applied for the more recent examination for Fire Fighter (M2554M), which had a closing date of March 31, 2010. On May 1, 2012, a certification (OL120609) was issued to the appointing authority from the Fire Fighter (M2554M) eligible list. Newark appointed 31 eligibles, effective July 23, 2012, from this certification. On March 1, 2013 a certification (OL130280) was issued to the appointing authority from the Fire Fighter (M2554M) eligible list. That certification has a disposition due date of September 1, 2013.

## CONCLUSION

*N.J.A.C.* 4A:4-6.3(b) provides that, except for disqualification for medical or psychological reasons, the appellant shall have the burden of proof.

There is no question that at the time of the initial appointments from the subject certification on October 31, 2011, the appellant could have been bypassed pursuant to *N.J.A.C.* 4A:4-4.8(a)3, since he had been deemed to be medically unfit. *However*, once the appellant took and passed the second medical examination, at the request of Ziyad, he could no longer be bypassed for appointment. In subjecting the appellant to medical and psychological examinations, and absent any disqualification issue, his appointment is mandated. In this regard, 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.

Although the appointing authority claims that the offer of employment by Ziyad is unenforceable since Ziyad is not the "appointing authority," the Commission does not agree. In this regard, the record indicates that although Daniels claims on appeal that she did not agree with Ziyad's representations to the

appellant, she did not voice those objections to the appellant despite several opportunities to do so. Consequently, she cannot now claim that the appellant was not provided with a *bona fide* offer of employment. She was present when the offer was made, and if, as the appointing authority, she objected to Ziyad's statements, she had the opportunity to object and withdraw the offer. However, she did not do so. It is unreasonable to expect an eligible to have known that Ziyad's offer was not "real" since Daniels did not "agree" when Daniels was silent. Moreover, there is no indication in the record that Ziyad did not schedule all of the other eligibles' medical examinations or even the appellant's first medical examination, all of which would have necessitated Ziyad being able to make *bona fide* offers of employment to those individuals. Accordingly, it is appropriate to revive the M2377H eligible list to allow the addition of the appellant's name to the March 1, 2013 certification (OL130280), so that he may be appointed. Upon his successful completion of his working test period, the appellant's record should reflect a retroactive appointment date of July 23, 2012, the next appointment date after he passed the medical examination, for salary step placement and seniority-based purposes only.

With regard to the appellant's request for counsel fees and back pay, *N.J.A.C. 4A:2-1.5(b)* provides that in all appeals other than disciplinary and good faith layoff appeals, back pay and/or counsel fees may be granted as a remedy where an appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the 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. *See e.g., In the Matter of Anthony Hearn*, 417 *N.J. Super.* 289 (App. Div. 2010). *See also, In the Matter of Kathryn E. Clark*, Docket No. A-5548-93T2 (App. Div. April 28, 1995), *cert. denied*, 142 *N.J.* 457 (1995).

In evaluating the underlying merits of the appellant's case, the Commission finds that other sufficient cause is not evident in this case. The record does not evidence that the failure to appoint the appellant was done in bad faith or with invidious motivation. Rather, it is clear that the appointing authority had legitimate concerns about the appellant's medical fitness and it presented reasonable, yet unpersuasive, arguments for its actions. Therefore, based on the specific merits of this case, sufficient cause has not been established for an award of back pay or counsel fees.

## **ORDER**

Therefore, it is ordered that the appellant's appeal be granted in part and the M2377H eligible list be revived and the appellant's name be added to the March 1, 2013 certification (OL130280), so that he may be appointed. Upon his successful completion of his working test period, the appellant's record should reflect a retroactive appointment date of July 23, 2012, for salary step placement and

seniority-based purposes only. The Commission awards no other remedies such as back pay and counsel fees.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.