

In the Matter of County Correction Officer Certification OL042077,
Gloucester Count
DOP Docket No. 2005-3484
(Commissioner of Personnel, decided April 1, 2005)

Gloucester County, represented by Ila Bhatnagar, Esq., petitions the Commissioner of Personnel for an order requiring the Division of Human Resource Information Services (HRIS) to dispose of Certification OL042077 as presented by Gloucester County and to order HRIS to immediately issue a new certification in order to enable it to hire applicants for the title of County Correction Officer.

The record establishes that HRIS issued Certification OL042077 to Gloucester County on November 19, 2004. In returning the certification to HRIS for disposition on January 13, 2005, Gloucester County requested the removal of certain individuals from the list. In particular, it requested the removal of one individual for failing a urinalysis examination, and it requested the removal of another individual for failing a psychological examination. HRIS advised Gloucester County that the certification could not be disposed of without Gloucester County providing HRIS with documentation that would support its removal requests. Specifically, HRIS required certain medical documentation which would establish that one of the individuals failed a urinalysis examination and the other individual failed a psychological examination.

In reply, Gloucester County advised HRIS that it had provided HRIS with a suitable description as to the reason for each request and had provided the appropriate codes for administrative purposes. Gloucester County also advised HRIS that due to the privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA), Gloucester County was not permitted to share this medical information with HRIS or it would be in violation of federal rules and regulations. Additionally, on February 23, 2005, Gloucester County advised HRIS that it was in immediate need of a new certification in order to be able to hire County Correction Officers and have them begin training at the Camden County Correctional Academy in early April 2005. In support of its request for a new certification, Gloucester County asserted that it had five immediate vacancies and was incurring substantial overtime expenses due to its lack of County Correction Officer employees. It explained to HRIS that it intended to reduce this cost by hiring and training new employees. Further, Gloucester County indicated to HRIS that the training Academy is only offered once every six months and so it needed the employees to be hired in time to be afforded this training.

In support of its request for interim relief, Gloucester County argues that there is a clear likelihood of success on the merits. Specifically, it contends that the information HRIS is requesting is "protected health information" (PHI) that, in its

capacity as a “covered entity” under HIPAA, it cannot disclose or use the PHI unless the individual who is the subject of the information authorizes its use in writing. Gloucester County also argues that HRIS is incorrect in its reliance upon *N.J.A.C.* 4A:4-4.7 on “Removal of Names” and *N.J.A.C.* 4A:4-6.5 on “Medical and/or Psychological Disqualification Appeals” to argue that Gloucester County is required to submit the PHI. Gloucester County maintains that HIPAA makes no exceptions for the unauthorized disclosure of health information because of State regulation. Further, Gloucester County contends that HRIS has not requested the information in the course of a judicial or administrative proceeding, or for law enforcement purposes, which are the established exceptions permitting the disclosure of PHI. Moreover, Gloucester County sets forth that HRIS’ misplaced reliance on *N.J.A.C.* 4A:4-4.7 and *N.J.A.C.* 4A:4-6.5 is causing it immediate and irreparable harm in the form of substantial overtime payments.

Gloucester County also asserts that HRIS’ actions are based on pure speculation. Gloucester County contends that neither of the two individuals have appealed their removal from the eligible list and that the time for them to do so has already elapsed.¹ Additionally, Gloucester County argues that HRIS suffers no harm by immediately providing a new certification to the County and dealing with the issues surrounding the outstanding certification separately. Therefore, Gloucester County maintains that there is an absence of substantial injury to other parties. Finally, Gloucester County maintains that the public interest is hurt by the actions of HRIS in causing it to expend taxpayers’ money on overtime, when such overtime could be alleviated by the hiring of more employees in the title of County Correction Officer.

It is noted that upon request of staff of the Division of Merit System Practices and Labor Relations, Department of Personnel (DOP), Gloucester County provided copies of releases signed by the two individuals permitting disclosure of information obtained via the substance abuse or chemical dependency screening (urinalysis examination). The form specifically releases Gloucester County from any and all claims or liability arising out of the disclosure of the test results. It also specifically authorizes the release of the test information and/or information to designated representatives of the Personnel Department² and/or other appropriate authorities at Gloucester County.

CONCLUSION

¹ It is noted that as the certification has not been yet been accepted and disposed of by HRIS, no decision has been made as to whether any eligible should be removed from the eligible list. Therefore, contrary to Gloucester County’s assertion, at the present time it is unknown whether any eligible will be removed from the list. Accordingly, the appeal rights of any such eligible have not ripened. *See N.J.A.C.* 4A:4-4.7(c) and (d).

² This refers to the Personnel Department of Gloucester County, not the New Jersey Department of Personnel.

The following factors are provided by *N.J.A.C.* 4A:2-1.2(c) in evaluating a petition for interim relief:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Initially, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits.

The threshold issue here is whether HIPAA privacy rules and regulations prevent Gloucester County from providing HRIS with the necessary medical documentation to support its removal requests. Contrary to Gloucester County's arguments and assertions, it is not clear that these regulations apply. First, it is questionable whether Gloucester County is a "covered entity" under the circumstances presented. A covered entity under HIPAA means a health plan; a healthcare clearinghouse or a health care provider who transmits any health information in an electronic form in connection with a covered transaction. *See* 45 *C.F.R.* §160.103. In this regard, employers may receive medical information about their employees unrelated to their employer-sponsored health benefits. When such information is received by the employer *in its role as employer* (not a health care provider), the information is not protected by the privacy rule. As a result, the employer's disclosure of this information is not a violation of the privacy rule. *See* 45 *C.F.R.* §160.103; *See also*, 45 *C.F.R.* §164.501 and 45 *C.F.R.* §164.512.

Second, pre-employment physicals or screenings are not considered PHI since they are merely an evaluation to provide information on the physical or mental status of an individual. They are not provided for the purposes of diagnoses or for treatment, nor are they provided for the benefit of the individual undergoing the testing. They are solely for the benefit of the prospective employer and are part of the test for employment, and therefore are not covered under HIPAA. *See* 45 *C.F.R.* §160.103; *See also*, 45 *C.F.R.* §164.501 and 45 *C.F.R.* §164.512. Instructive in this regard are the comments made regarding the definition of PHI contained in the Federal Register. It states:

The Department [of Health and Human Services] adopts as final the proposed language excluding employment records maintained by a covered entity in its capacity as an employer from the definition of "protected health information." The Department agrees with commenters that the regulation should be explicit that it does not apply to a covered entity's employer functions and that the most

effective means of accomplishing this is through the definition of “protected health information.”

. . .

[T]he Department clarifies that a covered entity must remain cognizant of its dual roles as an employer and as a health care provider, health plan, or health care clearinghouse. Individually identifiable health information created, received, or maintained by a covered entity in its health care capacity is protected health information. **It does not matter if the individual is a member of the covered entity’s workforce or not.** Thus, the medical record of a hospital employee who is receiving treatment at the hospital is protected health information and is covered by the Rule, just as the medical record of any other patient of that hospital is protected health information and covered by the Rule. The hospital may use that information only as permitted by the Privacy Rule, and in most cases will need the employee’s authorization to access or use the medical information for employment purposes. **When the individual gives his or her medical information to the covered entity as the employer, such as when submitting a doctor’s statement to document sick leave, or when the covered entity as employer obtains the employee’s written authorization for disclosure of protected health information, such as an authorization to disclose the results of a fitness for duty examination, that medical information becomes part of the employment record, and, as such, is no longer protected health information.** The covered entity as employer, however, may be subject to other laws and regulations applicable to the use or disclosure of information in an employee’s employment record (emphasis added). 67 Fed. Reg. 53192 (2002).

Assuming, *arguendo*, for the purposes of this matter, that the information generated during a job candidate’s pre-employment physical is PHI, it would be necessary for the health care provider to have authorization from the individual being examined/tested to provide the resultant data to the employer. Moreover, since there is nothing in the HIPAA rules which prevents an employer from conditioning employment on an individual providing an authorization for the disclosure of such information, it would appear from the Candidate Consent form submitted by Gloucester County for Substance Abuse or Chemical Dependency Screening that Gloucester County has the consent of the individuals to have the test results released to designated representatives of the Personnel Department and/or other appropriate authorities at the County of Gloucester. Accordingly, it was incumbent upon Gloucester County to design and implement an authorization form

that would enable it to provide the necessary information to HRIS since only the Department of Personnel has the authority to approve or disapprove the suggested disposition of a certification returned to it from an appointing authority. *See N.J.A.C. 4A:4-4.7(c)*. Moreover, it is noted that Gloucester County has not indicated that it made any effort to obtain an authorization from the individuals whom it sought to remove, or that the individuals refused to sign an authorization.

Finally, even with such a release, it is arguable that the certification process, from issuance through disposition and appeals, may be considered, *in toto*, to constitute an “administrative proceeding.” HIPAA privacy regulations provide an exception permitting the disclosure of PHI in administrative proceedings. *See* 45 C.F.R. §164.512(e). The present matter fits the intent of this exception in that *N.J.A.C. 4A:4-4.7* provides the process for appointing authorities to follow when returning certifications to HRIS for disposition when they are seeking removal of individuals due to, *inter alia*, disqualification on medical or psychological grounds. *See also N.J.A.C. 4A:4-6.5*. This administrative process begins when an appointing authority requests the removal of an eligible’s name from a list and furnishes the report and recommendation indicating that an eligible is not medically or psychological qualified for the position signed by a licensed physician, psychologist or psychiatrist. *See N.J.A.C. 4A:4-4.7(b)* and *N.J.A.C. 4A:4-6.5(a)*. It continues when, after receipt of such information, HRIS determines whether the information provided is sufficient, and if so, notifies the eligible of his or her removal from the list, and the right to appeal to the Merit System Board. *See N.J.A.C. 4A:4-4.7(c)* and *N.J.A.C. 4A:4-6.5(c)*. The administrative process then continues, if an eligible appeals, with the process ultimately resulting in a final administrative determination by the Merit System Board. *See N.J.A.C. 4A:4-4.7(d)*; *N.J.A.C. 4A:4-6.3(a)2* and *N.J.A.C. 4A:4-6.5(c)*. Therefore, since the above-described process falls under the exception detailed in HIPAA for administrative proceedings, Gloucester County must disclose the information even if it is a covered entity.³

With regard to the second prong of the test, Gloucester County does not set forth the irreparable harm it will suffer if this interim relief is not granted. What Gloucester County repeatedly states in its papers is that it has been paying overtime because it does not have enough Correction Officers. This is simply not adequate, as court have consistently held that economic damages do not rise to the level of irreparable harm. *Crowe v. DeGioia*, 90 N.J. 126 (1982).

³ Interestingly, even if this interpretation is incorrect, since Gloucester County has challenged this matter through the appeal procedures outlined in Title 4A, in other words, through an administrative proceeding, it is now absolutely required to supply such information under the exception noted in HIPAA. In this regard, as the head of the Department of Personnel, the Commissioner of Personnel has the ultimate authority to determine the sufficiency of an appointing authority’s initial request to removal an eligible from a list under *N.J.A.C. 4A:4-4.7*.

Moreover, Gloucester County is well aware of the process to be followed for disposition of a certification. For at least 15 years, this process has required an appointing authority to provide HRIS with sufficiently detailed documentation to support its basis for requesting the removal of an individual from an eligible list.⁴ Were the DOP to just accept an appointing authority's assertion that an individual failed a psychological examination or a urinalysis examination, it would damage the public's confidence in the DOP to impartially uphold Merit System law. The public's loss of confidence in the DOP's ability to impartially discharge its constitutional duties constitutes a harm that is of far greater magnitude than that of Gloucester County having to incur overtime costs until it is able to effectuate the hiring of additional County Correction Officers.

Similarly, Gloucester County has completely failed to show an absence of substantial injury to other parties, which is the third prong of the test for interim relief. Gloucester County argues that the harm is only to itself. In fact, there is the very real possibility of harm to a number of individuals if this interim relief is granted. First, there are individuals whose names appear on the current certification whose rights may be adversely affected. This is because the list (S9999D) upon which the current certification is based expired on December 23, 2004. The individuals on the current certification who are not on the new eligible list might be denied the opportunity to exercise their rights under Merit System law. Second, the two individuals who Gloucester County wishes to remove from the list will also be denied their rights as well. This right of appeal is granted to the individuals according to *N.J.A.C.* 4A:2-1.1 and *N.J.A.C.* 4A:4-6.5. To permit individuals to be hired from a second certification without the initial certification being disposed of, which would trigger the appeal process for individuals removed or bypassed for the first certification, denies those individuals their due process rights. Moreover, it allows an appointing authority the potential to manipulate the appointment process by comparing individuals from two separate lists for the same vacancies. In this regard, it is the longstanding practice of HRIS that until an outstanding certification is properly disposed of, it cannot issue another certification to an appointing authority for the same title. In this regard, *N.J.A.C.* 4A:4-4.7(e) allows for the supplementation of an outstanding certification with additional names where such supplementation is necessary. Accordingly, such supplementation would normally be the appropriate mechanism for any additional vacancies. However, in cases where there is an outstanding certification from a list that has expired, as here, and the appointing authority, based on new vacancies, has the need for additional names, such names must come from a certification of a subsequent list. See *William J. Brennan v. Department of Personnel*, Docket No. A-3104-00T1 (App. Div., June 18, 2002). However, if HRIS were to release a certification from a new list without the first certification being disposed of, the

⁴ In the present matter, *N.J.A.C.* 4A:4-6.5(a)1 and *N.J.A.C.* 4A:4-6.5(d) provide that an appointing authority must furnish HRIS with appropriate medical documentation to support its request to remove an individual from a list due to medical and/or psychological disqualification.

eligibles on the first certification could be disadvantaged. For example, an appointing authority may then compare eligibles on different lists for potentially the same vacancies. It would then have the ability to make its decisions regarding any of the appointments using the names on both certifications. In this regard, the appointing authority may find what it deems to be better candidates on the second certification and seek to bypass or remove individuals from the first certification who would have otherwise been appointed had the second certification not been issued. It also creates uncertainty and potential harm to the individuals who receive positions they might ultimately have to vacate if the removed individuals are successful on appeal. Thus, it is clear that Gloucester County has not satisfied the third prong of the test.

The fourth and last prong of the test requires an examination of the public interest involved. Here, the public has an expectation that appointment to Merit System positions will be made in accordance with Merit System law and rules. Therefore, in order to foster the public's trust in government, the rules and regulations of the Merit System must be scrupulously observed and upheld. The DOP recognizes that Gloucester County argues that it must expend taxpayer money for overtime and that it has an obligation to be fiscally prudent. However, if HRIS is permitted to issue a new certification without disposal of the previous one, the harm to the public trust as well as to individuals on the certification is far greater than the economic burden to Gloucester County. Accordingly, I find that the petitioner has failed to demonstrate that it is entitled to interim relief in this matter.

ORDER

Therefore, I have ordered that the petitioner's request for interim relief be denied.