

CSC Docket No. 2017-2228

**STATE OF NEW JERSEY**  
**FINAL ADMINISTRATIVE ACTION**  
**OF THE**  
**CIVIL SERVICE COMMISSION**

## List Removal Appeal

ISSUED **SEP 22 2017** (BS)

By way of background, the appellant, a non-veteran, appeared on the Fire Fighter (M2542M), Jersey City, eligible list, and his name was certified to the appointing authority on September 30, 2014 (OL141266). In disposing of the certification, the appointing authority requested the removal of his name due to a “medical negative” drug test.<sup>1</sup> In support of its request for removal, the appointing authority submitted a laboratory report indicating that a sample of the appellant’s hair was collected on October 14, 2014 and proved “medically negative” for oxycodone. The appellant appealed this decision to the Civil Service Commission (Commission) arguing that he provided documentation that he was prescribed oxycodone for pain following surgeries to repair an ACL and an arthroscopy in 2009 and 2010. The Commission found that the appellant had fully disclosed all pertinent information pertaining to his oxycodone use prior to submitting to the drug test and was persuaded by the appellant’s assertion that he would discontinue oxycodone use if appointed and that it would not restrict his ability to perform the duties of the position. The Commission noted that the appointing authority’s

<sup>1</sup> A federal law, the Americans With Disabilities Act (ADA), 42 *U.S.C.A.* § 12112(d)(3), expressly requires that a job offer be made before any individual is required to submit to a medical or psychological examination. However, in accordance with 42 *U.S.C.A.* § 12114(d)(1), a test to determine the illegal use of drugs shall not be considered a medical examination.

concern that the appellant was not medically fit to perform the duties of a Fire Fighter could be evaluated in the context of a medical examination after a conditional offer of employment had been made. Therefore, the appellant's name was restored to the subject eligible list for prospective appointment consideration only. *See In the Matter of Matthew Rivera, Fire Fighter (M2542M), Jersey City (CSC, decided December 16, 2015).*

However, four days prior to granting the appellant's appeal on December 16, 2015, the Fire Fighter (M2542M), Jersey City eligible list expired on December 12, 2015, after reaching its maximum statutory four year duration. *See N.J.A.S. 11A:4-6.* The subsequent eligible list, Fire Fighter (M1544T), did not promulgate for use by the appointing authority until March 11, 2016.<sup>2</sup> The M1544T eligible list was certified on March 17, 2016 (OL160306). Although the Commission ordered the restoration of the appellant's name to the prior list on December 16, 2015, for reasons unexplained, there was a delay in reviving that list which resulted in his name not appearing on that certification. However, this oversight was corrected and his name was inserted into the second position of the outstanding OL160306 certification on June 24, 2016 and the appellant was issued a Notice of Certification dated July 5, 2016. Thereafter, his pre-employment process commenced and the appellant submitted to an updated drug screen on August 31, 2016 and again tested positive for oxycodone. It is noted that prior to this drug screen, the appellant again disclosed that he utilized and was prescribed oxycodone. In disposing of the certification on January 20, 2017, the appointing authority requested that the appellant's name be removed from the eligible list on the basis of a positive drug test.

On appeal, the appellant requests enforcement of *Rivera, supra*, and argues that he should have been appointed from a certification issued shortly after the Commission's December 15, 2015 decision restoring his name to the list. In anticipation of his appointment as a Fire Fighter, the appellant states that he resigned from his position at Wells Fargo. Instead, after his appeal was granted, there was a six-month delay in adding his name to the subsequent certification. Thus, as his appointment was not forthcoming and he had given his notice to Wells Fargo, the appellant states that he needed to support himself. As such, he returned to work for the Landscaper where he had previously been employed. The appellant maintains that his return to manual landscaping work required his sporadic use of oxycodone to address pain. Notwithstanding this fact, he maintains that the appointing authority has no proof that his condition would require that he use oxycodone on the job or interfere with his duties as a Fire Fighter. Further, the appellant states he took the medication prescribed by his physician and emphasizes that he "has committed not to take the medication if he is appointed a Fire Fighter." He argues that the issue remains the same as that in the prior case and there is no

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<sup>2</sup> The appellant did not apply for this examination and his name does not appear on the (M1544T) eligible list.



basis for his "apparent removal on medical grounds." Finally, the appellant presents that he had to take oxycodone for a "transient condition" and the medication will no longer be required or used "when he serves in the position." Therefore, since candidates cannot be required to submit to a medical or psychological examination before a conditional offer of employment has been issued, the appellant contends that he should be appointed and receive a retroactive date of appointment for seniority and salary step purposes.

Although provided the opportunity, the appointing authority did not submit any additional information for the Commission to review in this matter.

### CONCLUSION

*N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)3, states that an eligible who is physically unfit to effectively perform the duties of the position may be removed from the eligible list. *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)9, also states that an eligible may be removed from an eligible list for other sufficient reasons as determined by the Civil Service Commission.

Initially, the appellant asserts that since he prevailed in his prior appeal, his appointment was mandated. The Commission disagrees. In accordance with 42 *U.S.C.A.* § 12114(d)(1), a test to determine the illegal use of drugs is not considered a medical examination. Therefore, the fact that the appellant submitted to a drug test in October 2014 does not establish that a conditional offer of employment was made under the ADA. Accordingly, when the Commission granted his prior appeal, it did not award him a retroactive date of appointment for seniority and salary step purposes because his appointment was not mandated. As such, the only remedy he was provided at the time was placement on the eligible list for prospective employment opportunities, which would require that he complete all of the required pre-employment processing, including a drug screen, if his name was again certified.

With regard to his assertion that there was a delay in restoring his name to the eligible list, as noted earlier, certification OL160306 was issued on March 24, 2016 from the M1544T eligible list. As the eligible list the appellant's name was on had expired, the M2542M eligible list should have been revived at the time the appointing authority requested the next certification for Fire Fighter so his name would be listed for appointment consideration before the eligibles on the M1544T list. However, for reasons unexplained, his name was not inserted into the outstanding certification until June 24, 2017. Notwithstanding this delay, when the appointing authority was notified that the appellant's name was inserted on the certification, it scheduled him for the August 31, 2016 drug screen. In this regard, the delay in adding him to the certification does not mandate his appointment as no vested or other rights are accorded by an administrative error. *See Cipriano v.*



*Department of Civil Service*, 151 N.J. Super. 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 N.J. 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 N.J. Super. 538 (App. Div. 1998). That being said, it cannot be ignored that all of the appointments made from the OL160306 certification were effective July 5, 2016, which is the same date of the appellant's individual Notice of Certification.

Turning to the matter of the appointing authority's removal of his name based on the August 31, 2016 drug screen, although the appellant's name was restored to the M2542M eligible list, the Commission's decision in the prior matter was based in part on the appellant's assertions that his then current employment situation no longer resulted in his having to continue using oxycodone. Indeed, in the December 7, 2015 certification he included in his prior appeal, the appellant attested:

From 2009 until *earlier this month*, I was employed by Ivy Landscaping in Brick Township, New Jersey. Doing landscaping work, I was often on my feet 10-15 hours per day, putting great stress on my knees and occasionally required oxycodone to deal with the pain. However, *I am now employed* by Wells Fargo Bank and do not have those issues, and in fact have not had the need to take the oxycodone. (emphasis added).

The appellant argues that after winning his previous appeal in December 2015 and having his name restored to the subject list, and in anticipation of having his name at the top of the list, certified and a conditional offer of employment forthcoming, he resigned from his desk job at Wells Fargo.

It cannot be ignored that the appellant disclosed that he had a valid prescription for oxycodone on his donor information form prior to the August 31, 2016 drug screen. As previously observed, a test to determine the *illegal* use of drugs is not considered a medical examination. Further, as indicated in the prior decision, the appointing authority's concerns that the appellant was not medically fit to perform the duties of a Fire Fighter should/must be evaluated in the context of a medical examination after a conditional offer of employment had been made. Thus, as he disclosed his use of oxycodone prior to the drug screen and the appellant's fitness to perform the duties of a Fire Fighter were never evaluated in the context of a medical evaluation, it was inappropriate to remove the appellant's name from the subject list. The Commission notes that the Class Specification for the title of Fire Fighter is the official job description for such positions within the civil service system. According to the specification, Fire Fighters are entrusted with the safety and maintenance of expensive equipment and vehicles and are responsible for the lives of the public and other officers with whom they work. Some important attributes required of a Fire Fighter include the ability to perform strenuous physical activities such as lifting heavy firefighting equipment, climbing standard and aerial ladders, lifting, and carrying people and equipment for rescue



and salvage. Additional requirements include the ability to work under conditions of heavy physical exertion in extreme heat and dust, in high and confined areas and smoke filled spaces, and in all kinds of weather, and to maintain physical activity for prolonged periods of time. Absent a medical evaluation of an individual's physical condition, evidence of a legal use of oxycodone in a drug screen, which was disclosed by the donor prior to the drug screen, does not necessarily substantiate that he or she cannot physically perform the duties of the position.

The Commission is cognizant that the appellant continued to use oxycodone for pain management following surgeries to repair an ACL and an arthroscopy in 2009 and 2010 and has concerns that an individual who relies on the use of oxycodone for pain management, when placed in an employment situation requiring physical exertion, would have the ability to withstand the physical rigors and performance standards expected of a Fire Fighter. Additionally, the Commission is mindful that considerable time and expense is invested in the education and training of Fire Fighters and to allow an individual who is in any way physically compromised and who may not be able to successfully complete the extensive training to participate runs counter intuitive. However, absent a medical evaluation of the appellant's physical condition, in this case, the confirmation by a drug screen of a disclosed prescription is not sufficient to remove his name from the list.

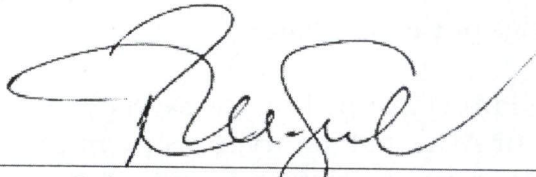
Therefore, the Commission orders that the appellant's name be restored to the subject eligible list, the Fire Fighter M2542M be revived, and that his name be placed on certification OL171040 which is currently outstanding. Absent any disqualification issues ascertained through an updated background check, updated drug screen conducted consistent with this decision, and if he is made a conditional offer of employment passes the required medical and psychological examinations, the Commission orders that the appellant be granted a retroactive date of appointment of July 5, 2016, upon successful completion of the working test period. This date is for salary step placement and seniority-based purposes only. However, the Commission does not grant any other relief, such as back pay or counsel fees.

### **ORDER**

Therefore, it is ordered that this appeal be granted and the M2542M Fire Fighter list be revived to allow for the appellant's name to be placed on the certification OL171040, which is currently outstanding.

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 20TH DAY OF SEPTEMBER, 2017



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