



**STATE OF NEW JERSEY**

**DECISION  
OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of K.W., City of Asbury  
Park

Request for Interim Relief

CSC Docket No. 2020-2657

**ISSUED: OCTOBER 2, 2020 (ABR)**

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K.W., a Police Sergeant with the City of Asbury Park, represented by Ben Weathers, Esq., appeals a May 19, 2020 order to submit to a psychological evaluation.

By way of background, after the petitioner commented that he “want[ed] to slit [his] own wrist,” in an April 22, 2019 email to one of the appointing authority’s internal investigators, the appointing authority placed him on paid administrative leave, effective May 17, 2019, and sent him for a psychiatric fitness for duty evaluation with Betty C. McLendon, Psy.D. on May 31, 2019. Dr. McLendon thereafter prepared her report and an addendum in which she found that the petitioner was unfit to serve as a supervisor and unfit for duty to serve as a Police Officer with the appointing authority. In this regard, she indicated that the petitioner did not present as trustworthy in his judgment and insights, and that he did not demonstrate sufficient emotional stability and decision-making skills for his position. Dr. McLendon did not believe that the petitioner was at risk of harming himself, but she indicated that his statement about slitting his wrist demonstrated poor judgment and conduct unbecoming his position, as she found that he used that statement as a means of standing out to gain control and a sense of power. Furthermore, Dr. McLendon concluded that the statement also reflected a pattern of disruption and distraction to the work environment at a level which further demonstrated his unsuitability for his position as a Police Sergeant.

On July 2, 2019, the petitioner was served with a Preliminary Notice of Disciplinary Action (PNDA) charging him with inability to perform duties and other

sufficient cause. Specifically, the appointing authority alleged that the petitioner was unfit for duty.

On July 25, 2019, the petitioner obtained an independent psychological fitness for duty examination from Nicole J. Rafanello, Ph.D. Dr. Rafanello noted that Dr. McLendon utilized the Millon Clinical Multiaxial Inventory (MCMI), 3<sup>rd</sup> edition in her evaluation of the petitioner rather than the updated 4<sup>th</sup> edition of that inventory. Moreover, Dr. Rafanello stated that the 3<sup>rd</sup> edition of the MCMI could only properly measure an individual's personality if it was used in conjunction with other measures, rather than as a standalone test. Dr. Rafanello further observed that Dr. McLendon did not ask the petitioner about the "slit [his] wrists" comment. Dr. Rafanello administered the following tests: General Ability Measure for Adults (GAMA), Test of Premorbid Functioning, Personality Assessment Inventory (PAI), Minnesota Multiphasic Personality Inventory – Second Edition Restructured Form (MMPI-2-RF), State Trait Anger Inventory (STAXI-II), Substance Abuse Subtle Screening Inventory – Fourth Edition (SASSI-4), Alcohol Use Disorders Identification Test (AUDIT), and the Structured Clinical Interview for DSM-5 Personality Disorders (SCID-5-PD). Based upon these tests, Dr. Rafanello concluded that the petitioner did not have a personality disorder and was fit for duty.

On March 20, 2020, the appointing authority advised the petitioner that, per a determination by its Joint Insurance Fund, he would need to undergo a third fitness for duty evaluation due to the passage of time since his prior evaluation. On May 19, 2020, the appointing authority notified the petitioner it scheduled him for that evaluation on May 27, 2020 and May 28, 2020. The appointing authority told the petitioner that if he failed to participate in the examination, it would be considered insubordination and he would be subject to disciplinary action.

Subsequently, by letter dated May 26, 2020, the petitioner filed the instant request with the Civil Service Commission (Commission). The petitioner asserts that the appointing authority's decision to mandate an additional fitness for duty examination is unlawful and that the Commission should prevent the appointing authority from subjecting him to another evaluation or disciplinary action for declining to participate in another evaluation. In this regard, he asserts that he is entitled to the protections under Title 40A of the New Jersey Statutes, Title 4A of the New Jersey Administrative Code, and the Attorney General's Guidelines on Internal Affairs Policy (Attorney General's Guidelines). He avers that requiring him to submit to a third fitness for duty examination violates the prohibition against compelling civil servants to testify against themselves under *N.J.A.C.* 4A:2-2.6(c) and the requirement in 42 U.S.C. § 12112(d)(4)(A) that a medical examination be "job related and consistent with business necessity." Moreover, the petitioner maintains that the appointing authority's basis for requiring him to undergo an additional fitness for duty evaluation is to insulate its Joint Insurance Fund from financial liability and to gain an advantage against him in his pending disciplinary hearing and interrelated

civil litigation in the Superior Court of New Jersey. He avers that the foregoing reasons do not meet the requirement under the Attorney General's Guidelines that a fitness for duty evaluation be mandated only when there is "reasonable concern" about the subject officer's fitness for duty. Accordingly, he maintains that if the appointing authority's order were to stand, it would irreparably harm him by essentially forcing him to become a witness in his own disciplinary hearing. In addition, he asserts that case law establishes that a violation of the rights of a civil servant, in and of itself, constitutes an irreparable harm and that in the instant matter, the appointing authority has clearly violated his rights under State law, Civil Service rules, the Attorney General's Guidelines and the Americans with Disabilities Act. He further states that he will be irreparably harmed if the order stands and he does not comply, as he would be subject to further administrative charges for insubordination. He asserts that the appointing authority would not suffer any hardship by granting his request. Rather, he submits that both he and the appointing authority would benefit from forcing the appointing authority to move this matter forward with a departmental hearing. Finally, he contends that the public interest would be best served by ensuring that his rights as a civil servant are protected by granting his request, as subjecting him to another fitness for duty evaluation would potentially set a precedent for subjecting police officers and other civil officers to undergo countless psychological evaluations.

In response, the appointing authority, represented by Dominick Bratti, Esq., argues that a third fitness for duty evaluation is legal and necessary to resolve the discrepancy between Dr. McLendon's and Dr. Rafanello's opinions and determine whether the petitioner is fit for duty with or without a reasonable accommodation. The appointing authority avers that the petitioner is unlikely to succeed on the merits, as requiring such an examination is consistent with applicable law and with its obligation to ensure the safety of the public, police officers and other employees. It also states that its decision to require a third examination is consistent with the guidance it received from the Monmouth County Prosecutor's Office (MCPO) in light of the two prior conflicting opinions, and the public health and safety considerations at issue in this matter. It avers that the petitioner's reluctance to undergo the examination is sufficient to raise reasonable questions about his ability to serve and it maintains that there is no procedural or legal justification for the Commission to grant the petitioner's requests, particularly as he did not exhaust his administrative remedies before seeking relief. Moreover, the appointing authority maintains that the petitioner has not demonstrated irreparable harm, as administrative remedies could be employed to return the parties to the *status quo ante* if it is later determined that the third examination was flawed or improper. Conversely, it proffers that there is a significant risk to public health and safety to public health in returning an officer to duty whose fitness is in question. Finally, the appointing authority states it has offered to have a mutually-agreed-upon physician conduct the new examination and it submits that it will withdraw the July 2, 2019 PNDA if this new evaluation shows

that the petitioner can perform the essential functions of his position with or without a reasonable accommodation.

In reply, the petitioner states that the full remark he made in the April 22, 2019 email was “I want to slit my own wrist when I hear supervisors with more than twenty years on the job saying in front of rookies, ‘it’s a waste of money to use Narcans to save these addicts, we are not the ones to stick the needle in their arm, why should we have to save them?’” The petitioner maintains that this was an isolated comment that did not provide a sufficient basis to warrant even the initial psychological evaluation by Dr. McLendon. He submits that even if there was a sufficient basis for that initial evaluation, nothing has occurred in the past year that would satisfy the standard for subjecting him to another examination. In this regard, the petitioner notes that Dr. McLendon stated that she “did not find credible clinical findings to indicate that he is at risk to harm himself.” Furthermore, he maintains that being forced to submit to questioning by another medical professional selected by the appointing authority is tantamount to the appointing authority’s internal investigators asking the questions themselves. Given these considerations, he contends that he has no obligation to submit to further questioning in another psychological examination and that he is entitled to a hearing on the charges at issue in the July 2, 2019 PNDA at the present time. Moreover, the petitioner avers if the appointing authority is allowed to make him submit to another fitness for duty evaluation, it could set up a never-ending cycle of dueling psychological evaluations, with the appointing authority’s evaluator finding that he is unfit for duty and his evaluator finding that he is fit for duty. He contends that allowing the appointing authority to order him to undergo countless fitness for duty evaluations without a reasonable basis would not be in the public interest, as it could lead to the respondent subjecting other police officers and civil servants to the same treatment. Finally, the petitioner contends that the MCPO’s guidance has no bearing on this matter, as it is a personnel action for which the appointing authority is ultimately responsible.

## CONCLUSION

*N.J.A.C.* 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions 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.

In reviewing this matter, the issue to be determined is whether the appointing authority presented a valid basis to subject the petitioner to an additional fitness for duty evaluation.

Here, the petitioner was initially separated from duty with pay on May 17, 2019, and ordered to undergo a fitness for duty evaluation with Dr. McLendon, who found that he was unable to perform the functions of his position. The appointing authority asserts that it mandated such an evaluation because the petitioner stated that he “want[ed] to slit [his] own wrists” in an email to one of its internal investigators. In light of the petitioner’s position, the reference to self-harm presented a cause for concern. It must be emphasized that requiring an employee to demonstrate his physical and/or mental fitness for duty, particularly when employed in such a sensitive public safety position, does not necessarily constitute disciplinary action. See *City of Newark v. Bellezza*, 159 N.J. Super. 123 (App. Div. 1978) (“Obviously an inquiry into the physical condition of an employee concerning his ability to perform his duty is not a disciplinary action as commonly understood”). Where, as here, an employer has legitimate concerns regarding a public safety employee’s psychological fitness for duty, the employer is entitled, perhaps required, to act in the best interests of the public it serves. Thus, the Commission finds that the petitioner was appropriately referred for a psychiatric evaluation at his employer’s discretion and that such a requirement does not violate the mandate that an employee shall not be required to testify in a hearing before the appointing authority, as set forth in *N.J.A.C.* 4A:2-2.6(c).

Following the petitioner’s first psychiatric evaluation, Dr. McLendon issued a detailed report in which she concluded that the petitioner’s statement that he wanted to slit his own wrists did not exhibit a risk of self-harm but did demonstrate that he was unfit for duty. In this regard, she stated that the statement exemplified poor judgment, highlighted a disruptive pattern of behavior and constituted conduct unbecoming his position. Thereafter, the petitioner obtained an independent psychological fitness for duty examination from Dr. Rafanello, who conducted a series of tests and the petitioner did not have a personality disorder and was fit for duty. However, on March 20, 2020, the appointing authority advised the petitioner that they were requiring him to undergo another fitness for duty evaluation due to the passage of time since the prior evaluations. Although the petitioner argues that the appointing authority’s decision to request a new fitness for duty examination was unlawful, for the reasons addressed above the Commission does not agree. Moreover, due to the conflicting reports of Dr. McLendon and Dr. Rafanello and the passage of time, it is not unreasonable for the appointing authority to request a new fitness for duty examination, particularly given that it has indicated that it would refer the petitioner to a psychiatrist or psychologist agreed upon by the parties. Where, as here, there are conflicting reports, the Commission has ordered that a third fitness for duty examination be conducted. See e.g., *In the Matter of Kenneth Rankin* (MSB, decided September 8, 2004). Moreover, the Commission observes that the selection of a psychiatrist or psychologist agreed upon by both parties for this evaluation is more likely to yield a consensus regarding the petitioner’s current fitness for duty.<sup>1</sup>

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<sup>1</sup> The Commission further notes that further evaluation is appropriate, given that the appointing authority has stated that it will withdraw the July 2, 2019 PNDA if this new evaluation shows that

Therefore, the Commission finds that the appointing authority's order requiring the petitioner to undergo a new fitness for duty examination was appropriate and that the petitioner has not shown a clear likelihood of success on the merits. *See N.J.S.A. 11A:2-6(f)*. The Commission recommends that the selection of the psychiatrist or psychologist shall be by agreement of both parties as suggested by the appointing authority. In the event that the petitioner continues to refuse to participate in the evaluation ordered herein, the appointing authority may wish to pursue disciplinary action.

Additionally, the petitioner has not shown that there is a danger of immediate or irreparable harm if his request is not granted. While the Commission is cognizant that the petitioner will remain on leave, pending the outcome of this additional fitness for duty evaluation, the petitioner does not appear to be suffering financial harm, as the record indicates that he was placed on a paid leave of absence. Moreover, as noted above, the appointing authority has indicated that it will withdraw the PNDA it served in this matter and restore the petitioner to duty if he is found to be fit for duty in this new evaluation. Furthermore, if the petitioner is found to be unfit for duty, he would still retain his ability to challenge such a finding in any subsequent disciplinary action.

Finally, the public interest would not be served by allowing the petitioner to be returned to duty when there are serious questions about his fitness for duty. Based on that consideration, it would be potentially harmful for the appointing authority, as well as the public at large, to return the petitioner to duty if he is not, in fact, psychologically fit to do so. Although the petitioner expresses concern that subjecting him to a third psychological fitness for duty evaluation could set up a never-ending cycle of dueling psychological evaluations, the Commission believes such a risk is mitigated by the recommendation that the psychologist or psychiatrist be selected for this new evaluation based upon an agreement of both parties and the appointing authority's assurance that it will withdraw the PNDA at issue if it is found that the petitioner can be returned to duty with or without a reasonable accommodation. Moreover, as noted above, the decision to require an additional psychological evaluation to resolve conflicting opinions is consistent with prior Commission decisions in similar circumstances. Accordingly, the petitioner's request for interim relief is denied.

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the petitioner can perform the essential functions of his position with or without a reasonable accommodation.

**ORDER**

Therefore, it is ordered that the petitioner's request for interim relief be denied.

It is also ordered that the appointing authority schedule the petitioner for further psychological evaluation within 30 days of the date upon which the parties reach an agreement regarding the selection of a psychiatrist or psychologist for the examination.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2020

*Dolores Gorczyca*

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