B-5

STATE OF NEW JERSEY

In the Matter of Steven Ruzek, Correction Officer Recruit (S9988R), Department of Corrections CSC Docket No. 2015-1045	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION** List Removal Appeal

ISSUED: APR 2 0 2015 (LDH)

Steven Ruzek, represented by Harvey Fruchter Esq., appeals his rejection as a Correction Officer Recruit candidate by the Department of Corrections (DOC) and its request to remove his name from the eligible list for Correction Officer Recruit (S9988R) on the basis of a positive drug test.

The appointing authority rejected the appellant, a Correction Officer Recruit candidate, due to a positive drug test. In support of its rejection and request for removal, the appointing authority submitted a laboratory report on two of the appellant's urine samples stating that a screening taken on August 5, 2014 was conducted and proved positive for Cannabinoids (Cannabis). The appointing authority's policy on substance abuse specifies that any candidate who tests positive for an illegal controlled substance is automatically disqualified from selection, immediately removed from the current eligible list (S9988R), and their name is forwarded to the Central Drug Registry maintained by the Division of State Police. On October 1, 2014, the appellant was notified of his failed drug test. Subsequently, he appealed to the Civil Service Commission (Commission).

On appeal to the Commission, the appellant argues that his removal from the eligible list was not justified and that his name should not be forwarded to the Central Drug Registry. The appellant argues that his failed drug test was the result of a false positive for cannabis as he has not used any illegal substances or any cannabis containing products. Rather, he states that the positive test was the result of taking multivitamins and ibuprofen since the readings that were found were barely over the acceptable threshold. In support, he submits, *inter alia*,

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negative tests for cannabis taken on October 9, 2014 by LabCorp and Quest Diagnostic, literature on false positive testing and a resume from Dr. Robert Pandina, Director at the Center of Alcohol Studies. Dr. Padina is an expert in drug use who the appellant intends to call should this matter receive a hearing.

Further, the appellant argues that the positive drug test was the result of contamination with another applicant. The appellant alleges that it was the initial contaminated specimen that resulted in the positive drug test. He contends that the method used for the determination of the presence of the drug is outdated and prejudicial. Moreover, the appellant argues that he has the right to confront his accusers and he asserts his Sixth Amendment right to confront and cross-examine the results of the test through testimony. Citing *George v. City of Newark*, 384 *N.J. Super*. 232 (App. Div. 2006), the appellant argues that the delay in notifying him of his positive drug test was unfair as the sample could be degraded over time, which prevented the appellant from confronting the test. Finally, the appellant requests that he be permitted to resubmit his application, submit to a polygraph, or for the appointing authority not to place him on the Central Registry list.

In response, the appointing authority stands with its original decision to remove the appellant from the open-competitive eligible list due to his positive urinalysis for cannabis. The appointing authority reiterates that both of the appellant's urine samples were positive for the illegal drug cannabis. It explains the circumstances surrounding the reason why the appellant took two urine samples. Specifically, it notes that after providing his first sample, the appellant expressed concerned that his first sample may have been contaminated because water from the urinal may have splashed into his test cup. The appellant provided the second sample under the same testing procedures. However, because the first sample was already in transit to the laboratory the second sample was delivered to the laboratory the next morning. Since no names were utilized on the samples, the laboratory tested both samples. The appointing authority maintains that if a sample is denied or rejected for any reason, the laboratory would have sent it a notification letter advising it of the problem with the sample. However, it never received a notification letter from the laboratory about either of the appellant's samples. In support, the appointing authority submits a letter from Thomas Arnot, who took the appellant's samples on August 5, 2014.

In addition, the appointing authority argues that the lab reports done by LabCorp and Quest Diagnostic were taken 65 days after the drug test at issue and therefore are not substantive evidence that the drug tests were invalid as the appellant could have stopped taking the drug prior to those tests. Further, if the positive test was the result of multivitamins and ibuprofen, the presence of cannabis would have been found at the LabCorp and Quest Diagnostic test results as well. In support, it submits literature on cannabis and a law enforcement drug testing manual.

Lastly, the appointing authority contends that the level of cannabis found in the appellant's system was far beyond the threshold levels. In this regard, the florescence polarization immunoassay (FPIA) test's threshold for cannabis was 20 ng/ml. The appellant samples tested positive at 102 ng/ml and 96 ng/ml. Pursuant to the Drug Screening Policy, a positive FPIA test requires the laboratory to perform a second test using gas chromatography/mass spectrophometry (GC/MS). The GC/MS threshold for cannabis was 15 ng/ml. The appellant samples tested positive at 48.4 ng/ml and 50.3 ng/ml. Finally, it argues that the appellant was notified of his positive results 15 days after the appointing authority was notified of his positive results and therefore, the situation is not akin to the situation in *George, supra.*[1] Since in that matter, George was not notified until 10 months after the results of the drug test were known, whereas here, the appellant was notified a mere 15 days after the appointing authority was notified of the positive results.

CONCLUSION

Initially, the appellant requests a hearing in this matter. List removal appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Civil Service Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978). Thus, the appellant's request for a hearing is denied.

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.

In the instant matter, the appointing authority has met its burden of proving that appellant had a positive drug screen and that such matter would prevent him from effectively performing the duties of the position at issue. Though the second sample was not immediately sent to the laboratory, it does not follow that a possible technical deviation from the Attorney General Guidelines warrants the nullification of the results of the drug test. *See In the Matter of Mario Lalama,* 343 *N.J. Super.*

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[1] In *George*, the Court noted that the appellant, a Police Officer, had tested positive for a controlled substance, and that pursuant to the Attorney General's Law Enforcement Drug Testing manual, George requested that the sample be tested by an independent laboratory. However, Newark did not report the determination of the independent laboratory, until 10 months later. The Court found that George had a protected interest in his continued employment, but did not agree with the Merit System Board's (Board) determination to reinstate George, and thus remanded the matter for further proceedings.

560 (App. Div. 2001) (Despite flaws in the chain of custody, a drug test was still valid where the record showed a "reasonable probability" that the integrity of the sample was maintained); *In the Matter of Mahipat Patel* (CSC, decided June 10, 2009); and *In the Matter of Martyn Gourrier* (CSC, decided February 24, 2010). Here, each sample was collected under standard procedures and each sample was found positive for cannabis. In addition, the appointing authority did not receive a notification letter from the laboratory that either of the appellant's samples were contaminated. Thus, the appointing authority has met its burden of proving the appellant had a positive drug test for cannabis.

Moreover, appellant's argument of a false positive test is unpersuasive. Each sample was far beyond the acceptable threshold level for cannabis. In addition, it is irrelevant that the appellant was found to be negative for cannabis 62 days after the test date. Further, the Commission is not persuaded by the appellant's argument that his use of multivitamins and ibuprofen could have resulted in a false positive, especially since the appellant has failed to provide any evidence in support of his argument. Similarly, *George* is inapposite to the issue presented in this matter. In *George,* the issue was whether the Police Officer's due process rights were violated when the City did not properly advise an independent laboratory of the law enforcement threshold level for cannabis. Here, the only issue is whether the appointing authority's positive test is valid. Though the appellant has made some superficial challenges to aspects of the State's lab tests, the Commission gives considerable weight to the fact that both urine samples were positive for cannabis under the FPIA and GC/MS tests.

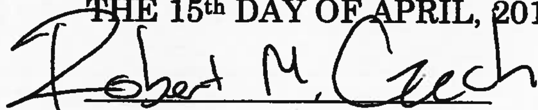
Finally, with regard to the appellant's request that his name be removed from the Central Drug Registry, it is noted that the Commission does not have jurisdiction over the addition or removal of names from the Registry.

ORDER

Therefore, it is ordered that this appeal be denied and the name of Steven Ruzek be removed from the eligible list for Correction Officer Recruit (S9988R), Department of Corrections.

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 15th DAY OF APRIL, 2015



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