

B-21



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

In the Matter of E.B.T.

Request for Stay

CSC Docket No. 2014-3242

ISSUED: AUG 14 2014 (BS)

The City of Hoboken (City), represented by Bryant Gonzalez, Esq., petitions the Civil Service Commission (Commission) for a stay of the Commission's decision in *In the Matter of E.B.T.* (CSC, decided April 9, 2014) pending the City's appeal to the Appellate Division of the Superior Court of New Jersey. This request for a stay is made pursuant to *N.J.A.C. 4A:2-1.2(f)* and *N.J. Court Rules 2:9-7*.

E.B.T. was originally removed from the eligible list for Fire Fighter (M2537M) for failing the psychological examination. E.B.T. appealed, secured a psychological evaluation on his own, and appeared before the Medical Review Panel (Panel) on January 14, 2014. The Panel reviewed all submitted evaluations and concluded that E.B.T. was mentally fit to perform effectively the duties of a Fire Fighter and recommended that he be restored to the list. It is noted that the appointing authority did not file exceptions regarding the Panel's recommendation. At its April 9, 2014 meeting, the Commission accepted and adopted the recommendation of the Panel and issued an order to the City to appoint E.B.T.

On petition to the Commission for a stay, the City argues that it should not be required to appoint E.B.T. because "[f]rom the background check that (E.B.T.) had an extensive history of drug use, an arrest from assaulting a Police Officer, and several motor vehicle infractions." Additionally, Dr. Betty McLendon, the City's psychological evaluator, concluded that E.B.T. demonstrated a pattern of maladaptive functioning characterized by a history of substance abuse problems, and repeated difficulty assuming responsibilities and adhering to standards. This finding was supported by a review of E.B.T.'s personal history which included

illegal drug use, a criminal record, alcohol abuse problems, and motor vehicle infractions. Dr. McLendon also found that E.B.T. was an individual with limited insight and poor judgment and that he was not psychologically fit to serve as a Fire Fighter. The City indicated that, despite the findings and issues raised Dr. McLendon, the Panel chose to accept E.B.T.'s unverified version of events concerning his arrests as fact in arriving at its recommendation to restore his name to the list. The City received a copy of the Panel's report and recommendation on January 23, 2014 indicating that E.B.T. should be restored to the list and the Commission adopted the report and recommendation of the Panel on April 9, 2014.

The City respectfully requests that the Commission stay its order to appoint E.B.T. pending the outcome of its appeal to the Appellate Division. The City asserts that "significant public policy issues are implicated" in that hiring someone it strongly believes is mentally unfit to serve would be detrimental to public safety. The City respectfully submits that the Commission's order to reinstate E.B.T. resulted from its reliance on the "flawed findings and evaluation" of E.B.T. conducted by the Panel. The City contends that should it be required to implement the Commission's April 9, 2014 order, prior to the disposition of its appeal, it will suffer irreparable harm, "namely placing the lives and property interests of its residents at risk." Conversely, should the City lose its appeal, E.B.T.'s reinstatement and retroactive appointment will not be "destroyed or impaired" by granting a stay as any harm to him can be redressed through monetary relief.

The City argues that the report of the Panel is flawed in that it did not articulate the standards or principles it used to analyze Dr. McLendon's report or address how her conclusions were incorrect. The City asserts that the whole procedure for a psychological appeal to the Commission is somewhat of an anomaly, particularly in instances where the appeal is referred to the Panel, in that the Panel is not authorized to initiate its own fact-finding investigation or conduct an adversarial hearing where the parties are allowed to make statements, present witnesses, offer evidence, or exercise a right of cross examination. The Panel meeting is not a fact-finding proceeding or a meeting to review documents. Even more disturbing to the City is that the Panel does not record or maintain minutes of its proceedings. The City argues that the Panel's failure to explain its recommendation to restore in this case is similar to the error made by the Commission's predecessor, the Merit System Board (Board), in *In the Matter of Anastasia Vey*, 124 N.J. 534 (1991) and 135 N.J. 396 (1994), where the matter was remanded back to the Board by the Court for further findings of fact on the basis that the record did not disclose the Board's basis for equating identified personality traits with the condition of unfitness. The city contends that without any discussion of how E.B.T.'s January 23, 2014 statements regarding his substance abuse, alcohol abuse, arrests, and various motor vehicle infractions could be reconciled with the demands of being a Fire Fighter, the Panel's "wholesale acceptance" of his statements as credible fact was "arbitrary, capricious, and unreasonable." The City

argues that there is no way that the Appellate Division can determine that the Panel's recommendation to restore E.B.T. to the eligible list for Fire Fighter could be reasonably reached on "sufficient" or "substantial" credible evidence presented in the record and, therefore, it is likely the Commission's April 9, 2014 order will be reversed or remanded back to the Commission for further review. Accordingly, the City respectfully requests that its Motion for Stay be granted.

In response, E.B.T., represented by Daniel J. Zirrith, Esq., argues that the Panel issued a detailed, five page report which included a discussion, detailed findings, numerous additional materials reviewed, and explained the findings and conclusions of Dr. McLendon and Dr. Crain. E.B.T. further argues that, significantly, the City failed to file exceptions to the Panel's positive report and recommendation nor did it request reconsideration after the Commission issued its April 9, 2014 Final Administrative Action. Additionally, E.B.T. submits that there is no clear likelihood that the city will prevail on this matter and that the City has failed to support its allegations that employing E.B.T. as a Fire Fighter would present a risk to the community.

E.B.T. argues that a Stay should be granted only in those cases where undisputed evidence is provided, not mere allegations. The City will suffer no harm if the Stay is not granted. E.B.T., on the other hand, would suffer substantial harm if a Stay was granted in that he has already endured a lengthy appeal process and the City is enrolling a class of Firefighters in the Fire Academy effective July 14, 2014. A delay in E.B.T.'s appointment would be of no benefit to the City in that the Commission ordered that he receive retroactive seniority. With regard to *Vey*, it is the City that carries the burden to prove that a candidate is psychologically unfit for a position. In *Vey*, unlike the present matter, the Panel agreed with the City's doctor that the candidate was psychologically unfit and the then-Merit System Board adopted the report and recommendation of the Panel. Further, in *Vey*, the Court found that the appellant had a full and fair opportunity to participate in the process as did the City in the instant matter. However, after the Panel found in favor of E.B.T., the City chose not to do so until after the Commission issued its decision. E.B.T. argues that no basis exists to support the City's request to Stay the Commission's Final Administrative Action. E.B.T.'s removal from the eligibility list was reversed and he is now entitled to appointment pursuant to the Commission's final decision.

CONCLUSION

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

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 Commission will address the issues raised by the City of Hoboken in its request for a stay. First, the City argues that hiring someone it strongly believes is mentally unfit to serve as a Fire Fighter would be detrimental to public safety and, therefore, not in the public interest. Specifically, it should not be required to appoint E.B.T. because "[f]rom the background check that (E.B.T.) had an extensive history of drug use, an arrest from assaulting a Police Officer, and several motor vehicle infractions," the Commission notes that if E.B.T.'s background report was so egregious, the City could have requested the removal of his name from the subject list of eligible prior to extending him a conditional offer of employment. *N.J.A.C. 4A:4-4.7(a)* states in pertinent part that an eligible can be removed from a list who has a criminal record which adversely relates to the employment sought. Again, the City neglected to use this option and instead extended a conditional offer of employment and subjected E.B.T. to a psychological evaluation.

The City further argues that the Panel chose to accept E.B.T.'s unverified version of events concerning his arrests as fact in arriving at its recommendation to restore his name to the list, despite the findings and issues raised by Dr. McLendon to the contrary, and that the Commission arbitrarily adopted the report and recommendation of the Panel in this matter. The City believes that the report of the Panel is flawed in that it did not articulate the standards or principles it used to analyze Dr. McLendon's report or address how her conclusions were incorrect. The Commission disagrees and notes that the Panel is comprised of experts in the fields of psychology and psychiatry who thoroughly review the reports and recommendations, including all of the testing data, submitted by evaluators on behalf of both the appellant and the appointing authority, prior to making its own report and recommendation to the Commission. The Panel meeting serves as a vehicle for the members of the Panel to question the appellant concerning areas of concern which arise from the Panel's own thorough review of both sets of evaluations, the test data, and behavioral record prior to rendering its own report and recommendation concerning the psychological suitability of the appellant. Copies of the Panel's report and recommendation are provided to the parties prior to a final decision being issued, and the parties are afforded an opportunity to file exceptions and cross exceptions to be addressed by the Commission in its Final Administrative Determination. However, in the instant situation, the City failed to file exceptions to the Panel's initial report and recommendation, even though afforded an opportunity to do so.

With regard to the City's argument that the Panel failed to explain its recommendation to restore in this case as being similar to the error made by the Commission's predecessor, the Merit System Board (Board), in *In the Matter of*

Anastasia Vey, supra, the Commission strongly disagrees. Aside from the instant situation being different from that in *Vey* in that E.B.T.'s appeal was granted by the Commission and the City did not sustain its burden of proof, the Panel's report and recommendation to the Commission was not the final agency administrative determination in this matter and, consequently, applying the standard articulated in *Vey* to the Panel's report and recommendation would have been premature. However, as aptly stated by E.B.T. in his exceptions to the Request for Stay, and apparently overlooked by the City, the Panel issued a detailed, five page report which included a discussion, detailed findings, numerous additional materials reviewed, and explained the findings and conclusions of Dr. McLendon and Dr. Crain before explaining its own findings and making the recommendation to restore E.B.T. to the subject eligible list. Further, the Commission then conducts an independent review of the Panel's report and recommendation prior to rendering its own conclusions, which are based firmly on the totality of the record presented to it.

Finally, the Commission notes that the City made a conditional offer of appointment, and that 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. *See also* the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examination* (October 10, 1995). That offer having been made, it is clear that, absent the erroneous psychological disqualification, E.B.T. would have been employed in the position. Once E.B.T.'s appeal was granted, the Commission notes that any subsequent appointments to the title Fire Fighter made by the City were conditional because, unless the Appellate Division completely reverses the Commission's April 8, 2014 order, E.B.T.'s appointment remains otherwise mandated absent any disqualification issue ascertained through an updated background check, meaning any behavioral incidents which may have occurred between the City's original conditional offer of appointment and E.B.T.'s actual effective date of appointment.

Based on the above, it is clear that the City of Hoboken has not shown a clear likelihood of success on the merits in this case. It is well settled that an appellate court will reverse the final decision of an administrative agency only if it is arbitrary, capricious or unreasonable or if it is not supported by substantial credible evidence in the record as a whole, or if it violates legislative policy expressed or fairly to be implied in the statutory scheme administered by the agency. *See Karins v. City of Atlantic City*, 152 N.J. 532, 540 (1998); *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980); *Mayflower Securities v. Bureau of Securities*, 64 N.J. 85, 92-93 (1973); *Campbell v. Civil Service Department*, 39 N.J. 556, 562 (1963). Hoboken has not presented any evidence that the Commission's prior decision meets the enumerated standards for reversal. As stated above, in this case, there is nothing in the record which convinces the Commission that the Panel's assessment of E.B.T. was not based on the totality of the record presented to it, or was otherwise in error.

ORDER

Therefore, it is ordered that this petition for a stay be denied, and that the City of Hoboken immediately comply with the Commission's prior Order.

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 13TH DAY OF AUGUST, 2014**



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Chairperson
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E.B.T.
Todd Wigder, DAG
Clerk, Appellate Division**

ORDER

The Civil Service Commission finds that the appointing authority has not met its burden of proof that [REDACTED] is psychologically unfit to perform effectively the duties of a Fire Fighter and, therefore, the Commission orders that his name be restored to the subject eligible list. Absent any disqualification issue ascertained through an updated background check conducted after a conditional offer of appointment, the appellant's appointment is otherwise mandated. 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. *See also* the Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examination* (October 10, 1995). That offer having been made, it is clear that, absent the erroneous disqualification, the aggrieved individual would have been employed in the position.

Since the appointing authority has not supported its burden of proof, upon the successful completion of his working test period, the Commission orders that appellant be granted a retroactive date of appointment to the date he would have been appointed if his name had not been removed from the subject eligible list. 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, except the relief enumerated above.

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 9TH DAY OF APRIL, 2014**

Robert M. Czech


Robert M. Czech
Chairperson
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Attachment

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