

CIVIL SERVICE COMMISSION MINUTES

August 7, 2024

A meeting of the Civil Service Commission was held at 2:30 p.m., in-person in room 402-A at the County Administration Center; 1600 Pacific Hwy.; and via Videoconference/Teleconference.

Present:

Bryan J. Fletcher
A. Melissa Johnson
Will Rodriguez-Kennedy

Absent:

P. Kay Coleman

Comprising a quorum of the Commission

Support Staff Present:

Todd Adams, Executive Officer
Morgan Foley, Commission Legal Advisor.

Approved
Civil Service Commission
November 6, 2024

**SAN DIEGO COUNTY CIVIL SERVICE COMMISSION
MEETING MINUTES
AUGUST 7, 2024**

- 1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation
- 2:30 p.m. OPEN SESSION: Attend in-person at the County Administration Center, 1600 Pacific Highway, 4th Floor, Room 402A, San Diego, California; or
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Notice pursuant to Government Code Section 54954.2.

CLOSED SESSION AGENDA
County Administration Center, Room 458

Members of the public may be present at this location to hear the announcement of the closed session agenda.

- A. Commissioner Rodriguez-Kennedy: CONFERENCE WITH LEGAL COUNSEL - PENDING LITIGATION (GOV. CODE SEC. 54956.9(a)) David Fujimoto, Esq., on behalf of **2022-157**, Toxicologist I, Department of the Medical Examiner, alleging discrimination by the Sheriff's Department.
- B. Commissioner Fletcher: CONFERENCE WITH LEGAL COUNSEL - PENDING LITIGATION (GOV. CODE SEC. 54956.9(a)) **2023-001**, Office Assistant, Health and Human Services Agency, alleging discrimination by the Health and Human Services Agency.

OPEN SESSION AGENDA

ORDER OF BUSINESS

A. **ROLL CALL**

Present: Fletcher, Johnson, Rodriguez-Kennedy

Absent: Coleman

B. **APPROVAL OF MINUTES:** Regular meeting of July 3, 2024.

Motion by Commissioner Johnson to approve the minutes of July 3, 2024; seconded by Commissioner Fletcher. Motion passed.

C. **NON-AGENDA PUBLIC COMMENT:**

None.

D. **AGENDA ITEM DISCUSSION:**

None

E. **FORMATION OF CONSENT AGENDA**

Agenda Item No. 10 was removed. Item Nos. 1, 8 & 9 are automatically pulled for discussion.

Item Nos. 2-7 and 11-12 are available for approval on the Consent Agenda.

Motion by Commissioner Johnson to approve the Consent Agenda; seconded by Commissioner Fletcher. Motion passed.

F. **DISCUSSION ITEMS**

Special Announcement: Before beginning the meeting, Commissioner Rodriguez-Kennedy announced that after July's meeting, Peter B. Smith resigned from the Civil Service Commission. The Commissioners thanked Mr. Smith for his six years of service on this Commission.

AGENDA ITEMS

ELECTION

1. Election of President of the Civil Service Commission for the remainder of 2024.

Commissioner Johnson motioned to nominate Commissioner Fletcher as President for the remainder of Peter Smith's term (2024), who resigned. Commissioner Rodriguez-Kennedy seconded the motion. Motion passed.

CONFIRMATION OF ASSIGNMENT

2. Commissioner Coleman: Rico J. Dominguez, Esq., on behalf of **2024-009P**, Deputy Sheriff, appealing the Citizens' Law Enforcement Review Board's sustained finding. (Previously assigned to former Commissioner Smith.)

Confirmed.

3. Commissioner Johnson: **2024-008**, former Protective Services Worker, alleging discrimination by the Health and Human Services Agency. (Previously assigned to former Commissioner Smith.)

Confirmed.

4. Commissioner Rodriguez-Kennedy: James J. Cunningham, Esq., on behalf of **2024-034P**, Deputy Sheriff, appealing an Order of Suspension and Charges from the Sheriff's Department.

Confirmed.

5. Commissioner Fletcher: Rico J. Dominguez, Esq., on behalf of **2024-035P** and **2024-036P**, Deputy Sheriffs, appealing Orders of Termination and Charges from the Sheriff's Department.

Confirmed.

6. Commissioner Coleman: Rico J. Dominguez, Esq., on behalf of **2024-037P**, **2024-038P**, and **2024-039P**, Deputy Sheriffs, appealing the Citizens' Law Enforcement Review Board's sustained finding.

Confirmed.

7. Commissioner Johnson: Rico J. Dominguez, Esq., on behalf of **2024-040P** and **2024-041P**, Deputy Probation Officers, appealing the Citizens' Law Enforcement Review Board's sustained finding.

Confirmed.

DISCRIMINATION

Findings

8. Commissioner Rodriguez-Kennedy: David Fujimoto, Esq., on behalf of **2022-157**, Toxicologist I, Department of the Medical Examiner, alleging discrimination by the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

A hearing on the discrimination complaint and selection process appeal of 2022-157 ("Employee") regarding his non-selection for the classification of Criminalist I by the Sheriff's Department ("Department") was conducted pursuant to Sections 6.1.8 and 10.6 of the Civil Service Rules on May 16, 17, and 23, 2024. The Civil Service Commission ("CSC" or "Commission") Commissioner Will Rodriguez-Kennedy, to hear the appeal and submit findings, conclusions, and recommendations to the Civil Service Commission.

Employee filed his complaint with the Commission on June 15, 2022, alleging discrimination based on age, marital status, protected activity (retaliation), and other non-job-related factors by the Sheriff's Department relating to his non-selection for the classification of Criminalist I. In accordance with the established rules and procedures of the Commission, the matter was concurrently referred to the Office of Ethics and Compliance ("OEC") for investigation. OEC's investigation found that there was probable cause that non-job-related discrimination occurred in this matter. OEC did not find that discrimination occurred on the basis of age, marital status, or protected activity (retaliation). Pursuant to Civil Service Rule Section 6.1.3 provides in relevant part: "If OEC finds probable cause... the Commission shall conduct a hearing in accordance with the following process". This hearing focused specifically on the OEC finding of probable cause that non-job-related discrimination occurred.

Employee also filed a timely Petition to Appeal Selection Process regarding his non-selection for the Criminalist I classification. In it, Employee alleges the Department's decision was biased, retaliatory, and based on non-job-related factors. The Petition to Appeal Selection Process was held in abeyance pending the outcome of the discrimination investigation. The Commission granted Employee's Petition to Appeal Selection Process (Rule X), and ordered a hearing be held in conjunction with the Rule VI discrimination hearing.

The Employee was a Lab Assistant for the San Diego County Sheriff's Department Crime Lab from April of 2016 until December of 2022. During his tenure the Employee sought promotion to a Criminalist I position in the Crime Lab on more than one recruitment, including an open recruitment during the latter half of 2021, for which he applied and was

interviewed on November 30, 2021 (the "First Interview"), as one of 19 qualified applicants.

The First Interview was conducted by a panel of four (4) individuals: a Supervising Criminalist I, a Supervising Criminalist II, an Assistant Director, and a Departmental Human Resources Officer.

As a result of the First Interview the Employee received an average rating of 45. The Employee's score, when compared to the entire list of qualified applicants, ultimately ranked third and therefore should have been sufficient to qualify the Employee for a second interview with a second panel of raters (the "Second Interview"). The Second Interviews were conducted between December 19, 2021, and January 5, 2022.

In preparing her evaluation of those applicants who should be moved on to the Second Interview, the DHRO erred in failing to include the Employee and two other qualified candidates with acceptable scores, on a list submitted to the Crime Lab Director for her consideration for a Second Interview. The error on the part of the DHRO was not discovered until after the Employee complained that he was not included in the Second Interview process, believing that his exclusion from the list was intentional.

Once discovered, the Department conducted Second Interviews of the Employee and the two other qualified - but excluded - applicants, for one more Criminalist I vacancy. These interviews were conducted approximately four months after the original round of Second Interviews. Following his Second Interview the Employee was not offered the promotion to Criminalist I. The Crime Lab Director participated in the Second Interviews for the three omitted candidates. The Employee was rated the lowest of the three, and was not offered the promotion to Criminalist I

As a part of the First Interview the raters first present a pre-developed list of six questions, with total "points" assigned for the question, based on components to evaluate. Each objective question provides the raters with suggested, but general, responses that if answered sufficiently, would result in a total score for that question. At the end of the First Interview the raters then discuss their scores for each of the six questions for the purposes of determining whether a rater might have missed a response, with the objective being to maximize a candidate's score.

After completing the scored portion of the questions, the raters then discuss other subjective factors, such as communication or presentation skills, body language, and other factors that might affect the impression the candidate has when testifying in court.

Because the Employee is an "internal" candidate, having worked for five and one-half years as a Lab Assistant in the Crime Lab, and because the Assistant Lab Director was the Employee's supervisor for the past 13 months, the other panelists asked her whether the Employee's answers were consistent with his past performance in the Crime Lab. The Assistant Lab Director asked the DHRO if responding to the question was appropriate and, when the DHRO answered in the affirmative, the Assistant Lab Director provided some background information that was not a part of the First Interview that they had just rated.

The information the Assistant Lab Director provided ranged from the possibility that she told them that the Employee's reputation and work history did not match with his answers, to a belief that the Employee's performance seemed to improve at interview times, but falls after the interviews, and finally that the Employee had been involved in two "corrective actions" regarding contamination of specimens (with his DNA), and conversations raised in the Crime Lab that supplies were not being re-stocked and available. None of this information would have been revealed in the Employee's responses to the six standardized questions.

The handling of the 2021 Criminalist I open recruitment in which the Employee participated was inadvertently mishandled by the DHRO when the names of the Employee and two (2) other applicants from their first interviews were not included in the list of those advancing to a second interview. There was no proof of discrimination against any of these three candidates under Rule VI; the error by the DHRO simply failed to include them in the list to pass to a second interview.

The error by the DHRO resulted in a correction to allow the three omitted applicants, including the Employee, to compete for a final opening. At the time of the first round of Second Interviews (the one Employee was inappropriately excluded from) each of the eleven (11) qualified candidates had better than a 50% chance of being offered one of the six (6) openings. The Employee, in his delayed second interview, had

a one in 3 chance (33.3%) of being offered a job for the last opening.

In providing their assessments of the candidates the scoring sheets have a total of 110 points available with a maximum of 10 points being subjective. The candidates in the first interviews had scores in this section ranging from 3 to 10. The Employee received scores of 6 from each of the raters in this subjective analysis.

It is more likely than not that comments made by the Assistant Lab Director to the first interview panel might have influenced them to note the "N" on their rating sheets. Not one of the raters explained why the "N" was on their rating sheets based on the numerical rating they gave the Employee. Even the "bonus" rating was not indicative of recommending that he not move on to the second interview. Others with lower ratings were given a "Y" or "M" on their sheets, and their "bonus" points were comparable to the score assigned to the Employee.

Although the Department points to the two "corrective actions," as reasons for not promoting the Employee (which occurred sometime between October 2, 2019, through October 1, 2020), the testimony received consistently supports that "corrective actions" are not "performance" issues and, therefore, not discipline. As such, there is no evidence that such incidents are job-related. With regard to the "contamination" issue the Employee demonstrated that once he was informed that his DNA was found to contaminate samples on three occasions (likely due to his status as a "shedder" and - perhaps - re-using lab coats, or bringing in personal cell phones), and once corrective action and procedures were imposed, and followed by him and others, the situation was resolved and no additional, and similar, contamination issues have been discovered.

As for the PPE issues, the record reflects that he worked cooperatively and professionally to try to find a solution to the need for a face covering, ultimately agreeing that for him to work effectively as a Lab Assistant he would wear two face coverings. All reports from management are that he acted appropriately through both processes for solutions.

As for corrective actions involving contamination issues the Employee's Employee Performance Appraisal Report for period involved rated the Employee's performance as "Meets

Expectations," in "Compliance with Rules and Regulations," "Cooperation," "Adaptability," and "Performance with Minimum Supervision." His "Overall Rating," for that same period was, likewise, that he meets expectations.

Finally, the evidence that he, on a single occasion, had failed to supply the laboratory with equipment and supplies supports the finding that this situation was adequately addressed by him long before his interviews.

Thus, the Department's responses to the Employee's claim of a Rule VI and Rule X violations relate nearly entirely to these "corrective actions." The testimony clearly supports the Employee's assertion that the corrective actions are not reasons for failing to promote him; they are not reasons for discipline. On the contrary, the evidence supports a finding that they serve to reflect his cooperation and willingness to follow the directives. As such, it is agreed that the Department's efforts to justify his failure to be promoted based on these incidents are pretextual.

Therefore, it can only be concluded, that the comments of the Assistant Lab Director, at the conclusion of the Employee's first interview, were unnecessary and tended to tarnish what has been otherwise described as leading to a "decent score." Although the DHRO allowed the Assistant Lab Director to provide her opinion on the Employee's work history, or ethics, and whether they "align" with his responses, this inserted factors better left unstated. Such a conclusion supports the finding that his denial of promotion was influenced by non-job-related factors, which is a violation of Civil Service Rule VI - Discrimination Complaints.

It is further concluded that comments made by the Assistant Lab Director following the First Interview more likely than not influenced the final decision of Lab Director in a negative manner. Unfortunately, the error on the part of the DHRO triggered the Employee's fate when he wasn't advanced to the second interview as he should have been. It is unknown how he would have performed in a second interview when competing with others, had he been included; perhaps his confidence of progressing would have prevailed over his bitterness in the mistake and his need to advocate his complaint. The Math, however, indicates that the odds were in his favor that he had a greater chance to be selected for the position of Criminalist I in the first round rather than in the second round.

A possible remedy for a Rule VI and Rule X violation would be to place the aggrieved employee into the position that they were denied, as well as an award of back pay. The Department believes that the remedy was mitigated by conducting the Second Interview, where he was not rated the best candidate and was not promoted, and arguing no back pay is justified.

In this situation the Employee no longer works in the Crime Lab and was successfully promoted to Toxicologist I with the County Medical Examiner's office; therefore, placing him in the position of Criminalist I is not an option. In fact, the Employee did not request this remedy.

However, it is clear that he suffered a loss of income that he would have earned as a Criminalist I in the Department, at least until his transfer to the Medical Examiner's office, a period of approximately 6 months, and an award of back pay for that period is just and appropriate.

Based on the findings and conclusions set forth above, I hereby recommend the following:

1. Employee's complaint of Rule VI discrimination be sustained in that his non-selection for the classification of Criminalist I by the Sheriff's Department was made on the basis of non-job-related factors.
2. The Civil Service Commission receive and file the Employee's complaint and OEC's report determining that there was not probable cause that he was discriminated against on the basis of age, marital status, or protected activity (retaliation) pursuant to the process laid out Rule VI, Section 6.1.3.
3. Employee's selection process appeal be granted.
4. Employee be awarded the difference in pay between Laboratory Assistant and Criminalist I for the period of June 17, 2022, to December 16, 2022, plus interest; and
5. That the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motioned by Commissioner Rodriguez-Kennedy for approval of the decision by the Commission; seconded by Commissioner Johnson. Motion passed.

9. Commissioner Fletcher: **2023-001**, Office Assistant, Health and Human Services Agency, alleging discrimination by the Health and Human Services Agency.

FINDINGS AND RECOMMENDATIONS:

The Civil Service Commission appointed Commissioner Bryan J. Fletcher, as its member to be the Investigating Officer in the matter of the complaint submitted by Employee 2023-001, Human Services Specialist, which alleged discrimination based on gender by the Health and Human Services Agency. In accordance with the established rules and procedures of the Commission, the matter was concurrently referred to the Office of Ethics and Compliance ("OEC") for investigation.

The OEC concluded the discrimination investigation and has reported its findings to the Commission. The Investigating Officer has received and reviewed OEC's report and has taken into consideration all documentation submitted in this matter. The Investigating Officer concurs with OEC's report and has concluded that: the evidence does not support a finding of probable cause that a violation of discrimination laws occurred.

It is therefore recommended that the employee 2023-001's Rule VI discrimination complaint be denied; and that the Commission approve and file this report with a finding of no probable cause to believe that the Complainant has been unlawfully discriminated against.

Motioned by Commissioner Fletcher for approval of the decision by the Commission; seconded by Commissioner Johnson. Motion passed.

ABANDONED APPEAL

10. **2024-001**, former Residential Care Worker II, appealing a Final Order of Removal and Charges from the Health and Human Services Agency.

RECOMMENDATION: Deem Appeal Abandoned

Removed from agenda.

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SELECTION PROCESS

Findings

11. **2024-042**, Applicant, appealing the Department of Human Resources' removal of their name from the employment lists for Deputy Sheriff Cadet and Deputy Sheriff Cadet-Detentions/Court Services.

12. **2024-043**, Applicant, appealing the Department of Human Resources' removal of their name from the employment list for Deputy Probation Officer.

Item Nos. 11 & 12. **Ratified**

ADJOURNED: **3:02 p.m.**

ASSISTANCE FOR THE DISABLED: Agendas and records are available in alternative formats upon request. Contact the Civil Service Commission office at (619)531-5751 with questions or to request a disability-related accommodation. Individuals requiring sign language interpreters should contact the Americans with Disabilities Coordinator at (619)531-4908. To the extent reasonably possible, requests for accommodation or assistance should be submitted at least 24 hours in advance of the meeting so that arrangements may be made. An area in the front of the room is designated for individuals requiring the use of wheelchair or other accessible devices.