



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE
ACTION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of W.A., Police Officer
(S9999U), City of Newark

List Removal Appeal

CSC Docket No. 2018-3420

ISSUED: JUNE 28, 2019 (DASV)

W.A., represented by John D. Feeley, Esq., appeals the removal of his name from the eligible list for Police Officer (S9999U), City of Newark, on the basis of psychological unfitness to perform effectively the duties of the position.

The relevant facts are as follows:

1. The appellant's name was certified on April 28, 2017 from the Police Officer (S9999U), City of Newark, eligible list. In disposing of the certification, the appointing authority requested the removal of the appellant's name as he was found psychologically unsuitable for the position. The appellant was then sent a notice of removal dated May 17, 2018. It is noted that candidates wishing to appeal must do so within 20 days of the date on the notice. *See N.J.A.C. 4A:4-6.5(c)2*
2. By letter faxed June 4, 2018 and sent by regular mail, the appellant's attorney filed an appeal of the appellant's removal. A letter, dated June 13, 2018, was then sent to the parties acknowledging the appeal and advising that submissions are to be filed within 20 days of the date of the letter. Additionally, the parties were advised that if the appellant wished to submit a report and recommendation from a New Jersey licensed psychologist or psychiatrist, he may do so within 90 calendar days from the filing of the appeal to the

Civil Service Commission (Commission) pursuant to *N.J.A.C. 4A:4-6.5(e)*. Thus, the appellant's report was due on or before September 4, 2018. The June 13, 2018 letter also informed the parties that if a party needed an extension of the time periods, the party must notify this agency in writing with the reason for the extension.

3. On July 23, 2018, the appointing authority, represented France Casseus, Assistant Corporation Counsel, emailed the City of Newark's pre-appointment psychological report and tests to the appellant's attorney and to this agency. The appointing authority also emailed the investigative background report and questionnaire of the appellant on August 14, 2018. The attorney's legal secretary confirmed receipt of the August 14, 2018 email on August 16, 2018.
4. On October 11, 2018, the appellant's independent psychological report by Dr. David Pilchman was faxed to the Commission and was sent by regular mail. Dr. Pilchman's report was dated September 24, 2018 and indicated that the appellant was evaluated on August 8, 2018 and September 21, 2018. Dr. Pilchman determined that the appellant "qualified as a positive candidate for the position of Newark Police Officer."
5. Based on the fact that Dr. Pilchman's report was received on October 31, 2018 and one of his interviews with the appellant occurred on September 21, 2018, after the 90-day time period, the parties were informed by letter dated January 23, 2019 that the appeal would be forwarded to the Commission for a determination as to whether the report would be accepted. The parties were given the opportunity to submit additional information.
6. In correspondence dated January 28, 2019, the appellant's attorney replied, stating that in a letter, dated August 15, 2018, he had requested additional time to submit Mr. Pilchman's report since the appointing authority had emailed him additional information on August 14, 2018. The August 15, 2018 letter indicated that Dr. Pilchman had initially examined the appellant on August 8, 2018 and that his report would not be completed until the end of September. It is noted that this letter was not received by this agency and did not indicate that it was sent by facsimile. In the January 28,

2019 letter the appellant's attorney noted that if staff did not receive the August 15, 2018 letter, he "cannot explain why." The appellant's attorney further stated that he has been "doing this work for approximately twenty years and [has] never missed a filing date" and "this delay has not prejudiced either party."

CONCLUSION

N.J.A.C. 4A:4-6.3(b) states that the appointing authority shall have the burden of proof in medical or psychological disqualification appeals. Moreover, *N.J.A.C.* 4A:4-6.3(d) states that:

Upon receipt of a notice of an eligible's appeal, the appointing authority shall submit to the [Commission], within 20 days, all background information, including any investigations and all complete medical, psychological, and/or psychiatric reports that were the basis for the removal request.

1. The appointing authority shall also furnish to the appellant's attorney or to a New Jersey licensed psychologist or psychiatrist of the appellant's choice upon request all of the information supplied to the [Commission].
2. Any appointing authority failing to submit the required materials within the specified time may have its request for removal denied, and the eligible's name may be retained on the eligible list.

Additionally, in order to further facilitate the timely processing of these types of appeals, the Commission amended *N.J.A.C.* 4A:4-6.5(e), effective June 21, 2017, to require that the appellant, if he or she chooses to do so, to submit a report from a physician or psychologist/psychiatrist to rebut the appointing authority's report within 90 calendar days of filing of the appeal. *See* 49 *N.J.R.* 492. These timeframes were designed to facilitate the opportunity for the parties to establish a contemporaneous record of an eligible's medical or psychological condition at the time of appointment for the Commission to consider. In that regard, it is noted that based on longstanding administrative practice, a psychological assessment for employment in law enforcement is only considered valid for one year. *See In the Matter of Aleisha Cruz* (MSB, decided December 19, 2007), *aff'd on reconsideration* (MSB, decided April 9, 2008).

Nonetheless, *N.J.A.C.* 4A:4-6.5(f) indicates that the Commission may extend the time period for filing the required reports for good cause. However, the 90-day

time period to submit a psychological or psychiatric report is not contingent upon the filing of the appointing authority's submission. *N.J.A.C.* 4A:4-6.5(e) specifically states that the appellant's report must be filed within 90 calendar days *of the filing of his or her appeal*. Furthermore, *N.J.A.C.* 4A:4-6.5(g) indicates that the Commission shall either conduct a written record review of the appeal or submit psychological appeals to the Medical Review Panel for its report and recommendation. In that regard, given the volume of psychological disqualification appeals received by the Commission each year in conjunction with the fact that the Commission utilizes the Medical Review Panel, psychological medical professionals who review each case, the adjudication of psychological appeals is a lengthy process that can take up to two years. Specifically, the process consists of compiling the record which allows the appellant up to 90 days to submit an independent psychological evaluation as noted above; scheduling a meeting with the Medical Review Panel which generally meets once a month to review a maximum of six cases; awaiting the Medical Review Panel's report to be issued; permitting parties to submit exceptions and cross exceptions to the report and recommendation within 10 and five days of receipt, respectively; and issuing the Commission's final determination. If the Commission determines that a candidate was improperly rejected for the position, the remedy provided is a mandated appointment to the position with a retroactive date of appointment for seniority and salary step purposes. Therefore, in order to ensure a fair process to all parties, it is imperative that the timeframes established throughout the process are strictly enforced.

Initially, there is no indication in this matter that the June 13, 2018 notice to the parties regarding the timeframes were not received. Moreover, the appellant's attorney was emailed the appointing authority's pre-appointment psychological report and tests on July 23, 2018. While the submission was beyond the 20-days given to the appointing authority, the 90-day time period to submit a psychological or psychiatric report is not contingent upon the filing of the appointing authority's submission. Even considering the July 23, 2018 date, the appellant still had until September 4, 2018 to rebut the pre-appointment psychological report and tests with his own report. The additional submission emailed to the appellant's attorney on August 14, 2018, which was confirmed received on August 16, 2018, was the investigative background report and questionnaire of the appellant. With that information, the appellant still had approximately three weeks to submit his psychological evaluation. Furthermore, the request for additional time to submit the report, which was dated August 15, 2018, was not received by this agency. Unlike the other letters sent on behalf of the appellant, there is no indication that the August 15, 2018 letter was faxed to the Commission. It is perplexing that if an extension was requested, one would seek confirmation of its approval or denial.

Nevertheless, for the reasons set forth above, the appellant had a sufficient amount of time to submit his report. It is the responsibility of an appellant to pursue his or her appeal and comply with the applicable timelines. The appellant's

first evaluation on August 8, 2018 did not occur until over two months after he filed his appeal on June 4, 2018, and the second evaluation by Dr. Pilchman did not occur until September 21, 2018, after the 90-day time period expired. It is noted that good cause could be established if an evaluation(s) occurred prior to the due date, and through no fault of the appellant, the report was issued late and not forwarded to this agency. Appellants, however, are cautioned that it is their responsibility to begin securing a psychological evaluation as soon as they file an appeal or even before that time in preparation for the appeal and to address any contingencies that may arise so that the appellants may meet the 90-day regulatory timeframe and not face dismissal of their appeal, as only good cause can extend the time period.

Lastly, it is prejudicial to the appointing authority, and potentially a current employee, to allow the appellant's appeal to proceed. As noted above, the remedy provided to successful appellants in psychological disqualification cases is a mandated appointment to the position with a retroactive date of appointment for seniority and salary step purposes. Should a position not be available, the last employee hired must be displaced. *See In the Matter of Stanley Kolbe, Jr.* (CSC, decided May 21, 2014) (Commission enforced prior order granting retroactive appointment to the appellant after a mandated appointment resulting from successfully appealing a failed psychological evaluation and dismissed the appointing authority's claims of fiscal constraints and recent layoff when three employees who ranked lower than the appellant on eligible list were not impacted by the layoff).

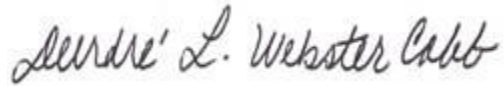
Therefore, under these circumstances, the appellant has failed to show good cause for the Commission to accept Dr. Pilchman's report. *See e.g., In the Matter of L.L.* (CSC, decided March 27, 2019) (Commission found that there was not good cause to relax the provisions of *N.J.A.C. 4A:4-6.5(e)* which requires an appellant to submit a psychological report after 90 calendar days of filing an appeal. The appellant's attorney claimed he never received various letters from this agency. However, the Commission noted that none of the Commission's letters addressed to the appellant's attorney were returned as undeliverable, the appointing authority submitted its psychological report to the appellant's attorney, the request to relax the rules was received well after the case was closed, and the appellant's attorney did not submit an affidavit indicating that he never received the prior letters).

ORDER

Therefore, it is ordered that this appeal be dismissed.

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 26TH DAY OF JUNE, 2019



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