



STATE OF NEW JERSEY

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

In the Matter of O.C., Police Officer
(S9999U), City of Elizabeth

CSC Docket No. 2021-1396

List Removal

**ISSUED: DECEMBER 20, 2021
(DASV)**

The City of Elizabeth requests the removal of O.C. from the Police Officer (S9999U), City of Elizabeth, eligible list¹ on the basis of good cause reasons as established by the appointing authority.

By way of background, O.C. appealed his rejection as a Police Officer candidate by the City of Elizabeth and its request to remove his name from the eligible list for Police Officer (S9999U) on the basis of psychological unfitness to perform effectively the duties of the position. The appeal was brought before the Medical Review Panel (Panel), which recommended that O.C. be referred for independent evaluation. The Civil Service Commission (Commission) adopted the Panel’s Report and Recommendation and ordered that O.C. undergo an independent evaluation, which was to include an in-depth cognitive and memory assessment. The independent evaluator concluded that O.C. was psychologically suited for a Police Officer position. After a review of the record in its entirety, the Commission adopted the independent evaluator’s Report and Recommendation and ordered that O.C. be restored to the subject eligible list and granted him a retroactive date of appointment upon successful completion of his working test period absent any disqualification issue ascertained through an updated background check. *See In the Matter of O.C.* (CSC, decided February 26, 2020).

Subsequently, O.C. requested enforcement of the Commission’s decision, asserting that the appointing authority had willfully delayed in complying with the Commission’s decision. He stated that the appointing authority advised him that he would be examined by another psychologist. The appointing authority argued that

¹ The eligible list expired on May 1, 2020.

subjecting O.C. to another psychological evaluation would assist in determining whether the alleged inconsistencies in his employment applications may be due to a psychological impediment. O.C. countered that he was accurate and truthful in answering questions in his applications. He also maintained that the appointing authority's psychologist merely disagreed with the Commission's independent evaluator, and he should not be subjected to yet another psychological evaluation. Upon review of the matter, the Commission agreed and concluded that O.C. should not be subjected to another psychological evaluation as the circumstances did not warrant the examination. In that regard, the Commission indicated that no event had occurred after O.C.'s original certification that would warrant another psychological evaluation. The appointing authority presented information in employment applications that could have readily been obtained and/or was available to it in its initial background check. Therefore, the Commission found that the appointing authority was precluded from administering another psychological evaluation or requesting his removal from the subject eligible list based on background information which was available to it prior to its preemployment psychological evaluation.

In particular, the Commission noted that the appointing authority did not substantiate one of its claims of falsification regarding O.C.'s Elizabeth School District application for a Security Guard position where he was employed. The Commission stated that it was evident that O.C. did not falsely answer a question about a conviction in 2011 as he was never convicted of a 2008 marijuana charge. It was dismissed by conditional discharge in 2010. The Commission also noted that, as for whether O.C. was obligated to advise the school district of his 2008 violation, nonetheless, and his 2013 arrest and charges for driving under the influence (DUI) of alcohol, and whether he did, the background information at that point was lacking. Apart from review of his personnel record with the school district, the appointing authority had not presented official confirmation from the Elizabeth Public Schools. O.C. also did not provide a clear answer. Therefore, in that regard, the Commission declined to make a finding. Nonetheless, while the Commission was cognizant of the fact that the appointing authority could have explored this issue with O.C. prior to subjecting him to a psychological evaluation, it emphasized the seriousness of a possible newly uncovered violation of a public school's policy and/or regulatory and statutory requirements for failure to disclose required information. Thus, it indicated that the appointing authority was not precluded from interviewing O.C. which may lead to uncover such updated information. Upon conclusion of the interview and any necessary investigatory follow-up, absent any disqualification issue, the Commission reiterated that O.C.'s appointment was otherwise mandated, and upon successful completion of his working test period, he was entitled to a retroactive date of appointment to July 12, 2018, the date he would have been appointed if his name had not been originally removed from the Police Officer (S9999U), City of Elizabeth, eligible list. Therefore, the Commission ordered that the appointing authority conduct O.C.'s pre-appointment processing and submit the amended disposition of

his March 14, 2018 certification (OL180232). *See In the Matter of O.C.* (CSC, decided February 3, 2021).

Considering this background, the Division of Agency Services has referred the appointing authority's request to remove O.C. from the Police Officer (S9999U), City of Elizabeth, eligible list for good cause reasons to the Commission for review. The parties have been provided with the opportunity to supplement the record.

The appointing authority, represented by Daniel M. Santarsiero, Esq., requests O.C.'s removal from the subject eligible list as it maintains that it presents good cause reasons based on its findings during the updated background investigation and February 24, 2021 interview of O.C.,² O.C.'s 2011 application certifications, and the statements of the Superintendent of the Elizabeth Board of Education (EBOE). It submits that, during O.C.'s recorded interview,³ he was asked whether he reported his 2013 DUI arrest to his supervisor and the Elizabeth School District. In response, he provided the appointing authority with "unauthorized certifications" from employees as "purported proof" that he made his employer aware of his arrest. The appointing authority notes that the employees had not been serving with the Elizabeth School District at the time of O.C.'s arrest in 2013. Additionally, it states that O.C. replied that he told an EBOE attorney, a security supervisor, and an investigator about his arrest. However, they supposedly failed to report his arrest to the Human Resources Department. The Superintendent of EBOE was contacted and she stated that it was policy to document arrests and retain records in an employee's personal files. It is noted that, in an email dated February 22, 2021, the Superintendent specifically states that "all teaching staff members are required to report their arrest or indictment for any crime or offense in accordance" with policy and regulation. "The school district makes these reporting requirements known to all team members upon initial employment and to all employees on an annual basis."

² As proscribed by the Commission in *In the Matter of O.C.* (CSC, decided February 3, 2021), information that the appointing authority raises in its second request for removal that pertains to issues on information in O.C.'s background or employment applications that could have readily been obtained and/or was available to it in its initial background check will not be addressed and cannot be used as a basis for O.C.'s removal. O.C.'s responses to those issues also need not be reviewed, as well as O.C.'s complaint that the appointing authority refused him a conference prior to his February 24, 2021 interview "to correct misstatements contained in the Elizabeth Police Department's previous submission" in the prior matter.

³ O.C. has requested a copy of his recorded interview. However, the appointing authority has declined to provide it to his counsel, who has made a request for the same through the Commission. O.C. argues that an adverse inference should be imposed on the appointing authority. The appointing authority replies that the recorded interview "be maintained in confidence and marked privileged, not subject to release." Instead, it offers a certified transcript. List removal appeals are based on a review of the written record. The Commission does not find it necessary to order submission of the recorded interview or a certified transcript since sufficient information has been presented for it to render a decision. The Commission is satisfied that O.C. has had the opportunity to challenge the excerpts of the interview that has been placed in the written record. There is also no basis to refer this matter to the Office of Administrative Law, as suggested by O.C.'s counsel in his pursuit of the recorded interview.

It is further noted that the policy that was submitted by the appointing authority in the instant matter pertained to teaching staff and “certificate holders.” Additionally, the Superintendent conveyed that arrest cases are followed up by Human Resources staff, and she confirmed that no arrest or incident report was found in O.C.’s personnel file. Nonetheless, the appointing authority states that in its view, “it is not the issue of whether O.C. had a duty or properly disclosed certain information on his application that is the core concern. Rather, it is O.C.’s own admission concerning his state of mind and intentions when he omits information at times and uses unlawful means to achieve his goals . . . Based upon O.C.’s responses, his conduct and line of thinking simply do not comport with the type of qualities that are required for law enforcement professionals.” Therefore, the appointing authority maintains that O.C. should be removed from the subject eligible list.

In response, O.C., represented by Donald A. DiGioia, Esq., disagrees with the request, and in support, he provides his certification, as well as the certifications of a criminal defense attorney, the current Director of Security of the EBOE, and a Lead Investigator with EBOE. In his certification, O.C. states that he “never attempted to provide false statements in either [his] [EBOE] application of 2011, the Elizabeth Police Department applications of 2016 and 2018, or the interview of February 24, 2021.” He also certifies that he is not a teacher or a teaching staff member nor does he hold certificates. In that regard, in 2011 for his EBOE employment application, O.C. states that he signed an “Affirmation of Signature” which required a “certificate holder” to notify the EBOE of any arrest or indictment for a “crime or offense to the superintendent within 14 calendar days.” The language in the EBOE policy is similar. As certified by the criminal defense attorney, O.C.’s DUI charge was not considered a “crime” or “offense” under the New Jersey Code of Criminal Justice. O.C. indicates that he nevertheless told his supervisor and an EBOE attorney about his arrest in 2013 shortly after it occurred because “it was the right thing to do.” Moreover, he continues to be employed as a Security Guard with the EBOE. The Director of Security and the Lead Investigator of the EBOE recommends O.C. for a Police Officer position as he is an “exemplary employee” and emphasizes that O.C. is not a teaching staff member or a “certificate holder.” Thus, the reporting requirements as contained in the “Affirmation of Signature” does not apply to him. Even if it did, they contend that a DUI charge is not a “crime” or “offense” that would have had to be reported. Moreover, in as much as the appointing authority suggests that the Commission disregard the aforementioned certifications, O.C. emphasizes that the appointing authority did not previously object to submissions by the individuals it questions. In conclusion, O.C. maintains that he did not provide a false statement of any material fact or attempt any deception or fraud in any part of the selection or appointment process. In support of his position, he submits various documents, such his EBOE employment application, and documents pertaining to his driving and arrest history. Therefore, O.C. urges the Commission to deny the appointing authority’s request to remove him from the subject eligible list and mandate his appointment.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)9, allows the Commission to remove an eligible's name from an eligible list for other sufficient reasons. Removal for other sufficient reasons includes, but is not limited to, a consideration that based on a candidate's background and recognizing the nature of the position at issue, a person should not be eligible for appointment. *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)6, allows the Commission to remove an eligible's name from an employment list when he or she has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process. *N.J.A.C.* 4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant shall have the burden of proof, except for medical or psychological disqualification appeals, where the appointing authority shall have the burden of proof.

Initially, it is noted that in the Commission's prior decision, it restored O.C.'s name to the subject eligible list as it found he was psychologically suited for a Police Officer position. It mandated O.C.'s appointment absent any disqualification issues ascertained through an updated background check. In that regard, the Commission recognizes that Police Officers hold highly visible and sensitive positions within the community and the standard for an applicant includes good character and an image of utmost confidence and trust. See *Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). See also *In re Phillips*, 117 *N.J.* 567 (1990). The public expects Police Officers to present a personal background that exhibits respect for the law and rules. As such, when the Commission is presented with new information that a Police Officer candidate does not have the background to meet the high standards to be a law enforcement officer, it has the obligation, and even the ability *sua sponte*, to remove that candidate from an eligible list, even if it previously restored that candidate to the eligible list. The appointing authority has failed to present good cause reasons to remove O.C. based on an alleged non-disclosure of his 2013 DUI arrest to the EBOE. Clearly, the plain language of the subject policy and regulation does not apply to O.C. However, O.C. certifies that he advised EBOE supervisory personnel about his arrest, which the appointing authority has not refuted persuasively. The fact that O.C.'s personnel record does not contain documents does not demonstrate a policy violation. Further, O.C. remained employed as a Security Guard when this issue came to light.⁴ Moreover, the appointing authority notes that the employees had not been serving with the Elizabeth School District at the time of O.C.'s arrest in 2013. While that may be true, the Commission does not find reason to disregard the certifications provided in this matter as the statements are not inconsistent. In other words, the employees do not state they were advised of O.C.'s arrest when it happened.

⁴ No further information has been provided to otherwise find that O.C. has not had continuous employment with the EBOE through the date of this decision.

With respect to the appointing authority's concern regarding O.C.'s "state of mind," "intentions," and "line of thinking," these go to his psychological mindset. O.C. has been found psychologically suited for the position by licensed professionals. Nonetheless, as noted by the Commission in its prior decision, any potential behavioral or work performance issues could be addressed during O.C.'s working test period as a Police Officer. *In the Matter of O.C.* (CSC, decided February 26, 2020). Moreover, the appointing authority's disapproval of O.C.'s responses to interview questions or the manner in which he responded does not rise to a basis on which to remove O.C. from the subject eligible list. The appointing authority has not presented sufficient evidence that O.C. "omits information at times and uses unlawful means to achieve his goals" in its updated background investigation. In that regard, the appointing authority presents issues on information in O.C.'s background and on his employment application that were available to it in its initial background check. In other words, the appointing authority had an opportunity to request the removal of O.C.'s name based on its background investigation prior to subjecting him to a psychological examination in the first instance, but it did not do so. Accordingly, as set forth in the Commission's prior decision, the appointing authority is precluded from utilizing such information to disqualify O.C. in the present matter. *See e.g., In the Matter of Edison Cerezo*, Docket No. A-4533-02T3 (App. Div. October 15, 2004) (Appellate Division affirmed the decision denying appointing authority's request to remove an eligible from the Police Officer eligible list due to unsatisfactory background when eligible was subjected to a psychological examination and eligible could not be bypassed).

Accordingly, under these circumstances, O.C. has met his burden of proof, and the appointing authority's request to remove him from the subject eligible list is therefore denied.

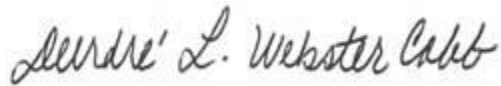
ORDER

Therefore, the City of Elizabeth's request to remove O.C. from the Police Officer (S9999U), City of Elizabeth, eligible list is denied. The appointing authority must amend the March 14, 2018 certification (OL180232) of the Police Officer (S9999U), City of Elizabeth, eligible list to record O.C.'s appointment, contingent only upon the results of a medical examination, within 30 days of the date of issuance of this decision. Absent medical disqualification, O.C.'s appointment is otherwise mandated. The subject eligible list shall be revived for O.C.'s appointment, and upon the successful completion of his working test period, O.C. is granted a retroactive date of appointment to July 12, 2018, for salary step placement and seniority-based purposes. The Commission does not grant any other relief, such as back pay or counsel fees.

If the appointing authority does not adhere to the above-noted timeframe for the proper certification disposition without an approved extension of time, it shall be assessed a fine in the amount of \$100 per day, beginning on the 31st day from the issuance date of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

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 DECEMBER, 2021



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