



STATE OF NEW JERSEY

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

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

CSC Docket No. 2022-1576

Request for Stay

ISSUED: MARCH 25, 2022 (DASV)

The City of Elizabeth, represented by Daniel M. Santarsiero, Esq., requests a stay of the Civil Service Commission (Commission) decision in *In the Matter of O.C.* (CSC, decided December 15, 2021),¹ pending its appeal to the Superior Court of New Jersey, Appellate Division.

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. The appeal was brought before the Medical Review Panel (Panel), which recommended that O.C. be referred for independent psychological evaluation. The Commission adopted the Panel’s Report and Recommendation and ordered that O.C. undergo an independent evaluation which concluded that O.C. was psychologically suited for a Police Officer position. The Commission adopted the independent evaluator’s recommendation and ordered that O.C. be restored to the subject eligible list. The Commission also granted O.C. a retroactive date of appointment upon successful completion of his working test period absent any disqualification issues 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. Upon review of the matter, the Commission

¹ The written decision was issued on December 20, 2021.

concluded that O.C. should not be subjected to another psychological evaluation as the circumstances did not warrant the examination. 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. *See In the Matter of O.C.* (CSC, decided February 3, 2021).

Thereafter, the appointing authority concluded its updated background check and requested the removal of O.C. based on good cause reasons. Given the circumstances of the request, the Division of Agency Services referred the matter to the Commission for its determination. The Commission found that the appointing authority failed to present good cause reasons to remove O.C. from the subject eligible list based on an alleged nondisclosure of a 2013 DUI arrest to the Elizabeth Board of Education (EBOE) where he is employed as a Security Guard. The Commission determined that the plain language of a policy cited by the appointing authority and the accompanying regulation did not apply to O.C. as he was not part of the teaching staff or a “certificate holder.” Nevertheless, O.C. had certified that he advised EBOE supervisory personnel about his arrest, which the appointing authority had not refuted persuasively. Moreover, the Commission noted that the fact that O.C.’s personnel record did not contain documents did not demonstrate a policy violation. Further, O.C. remained employed as a Security Guard when this issue came to light. With respect to the appointing authority’s concern regarding O.C.’s “state of mind,” “intentions,” and “line of thinking,” the Commission indicated that these concerns go to his psychological mindset and O.C. had already been found psychologically suited for the position by licensed professionals. Moreover, the appointing authority’s disapproval of O.C.’s responses to interview questions or the manner in which he responded did not rise to a basis on which to remove O.C. from the subject eligible list. The Commission further stated that the appointing authority had 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 presented issues on information in O.C.’s background and on his employment application that were available to it in its initial background check. Accordingly, the Commission determined that O.C. had met his burden of proof, and the appointing authority’s request to remove him from the subject eligible list for good cause reasons was denied. *See In the Matter of O.C.* (CSC, decided December 15, 2021).²

In the instant matter, the appointing authority indicates that it has appealed the Commission’s December 15, 2021 decision to the Appellate Division and requests a stay of the decision pursuant to *N.J.A.C.* 4A:2-1.2 and *N.J. Court Rules* 2:9-7. It maintains that a stay is required to “protect the status-quo.” The appointing

² The appointing authority was ordered to 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 the decision.

authority argues that the Commission only focused on its request to remove O.C. from the subject eligible list based on the non-disclosure of his DUI arrest to the EBOE. However, the appointing authority contends that the Commission failed to consider O.C.'s statements made during his interview where he described the circumstances of his arrest for possession of marijuana and that "distribution of a narcotic was used for purposes of inebriating a woman to assist in obtaining sex." It states that the "Commission's decision is devoid of any reference" in that regard. The appointing authority contends that such a statement "is the functional equivalent of communicating the *mens rea* of a criminal offense" and clearly inconsistent with the type of behavior that should be exhibited by a law enforcement officer. Therefore, the appointing authority indicates that it has "a realistic chance of success on the merits of" its appeal to the Appellate Division.

It is noted that the psychological reports issued on behalf of the appointing authority and O.C., as well as the Report and Recommendation of the Panel and the independent evaluator, indicate that the appellant stated that he was 18 years old and brought the marijuana to work to "impress a girl." At the Panel meeting, O.C. conveyed that his female co-worker "utilized the substance, therefore he purchased it, bragged about it at work so that she would hear about it and choose to be around him." In the updated list removal request, the appointing authority presented that the appellant stated that he was going to give the marijuana to the female co-worker so "hopefully he 'got lucky.'"

Moreover, the appointing authority claims that it would suffer irreparable harm if the stay is not granted since it would be "compelled to send an unqualified candidate to the [P]olice [A]cademy . . . [and] through the working test period" and "risk harm to the general public." On the contrary, it submits that "no significant injury would be sustained by O.C.," as he will be allowed to proceed to the medical examination and attend the Police Academy at a later date. Furthermore, the appointing authority asserts that it is in the public interest to stay O.C.'s appointment. It reiterates that the appointment "would expose the general public to potential harm from having an unqualified officer employed." In support of its petition, the appointing authority submits its attorney's certification, which attests to the foregoing information, and includes the Commission's prior decision, its Notice of Appeal to the Appellate Division, and its request to remove O.C. from the subject eligible list for good cause reasons.

In response, O.C., represented by Donald A. DiGioia, Esq., argues that "there is no legitimate basis for the appointing authority to be entitled to a stay." In that regard, he maintains that the appointing authority has failed to satisfy the four criteria set forth in *N.J.A.C. 4A:2-1.2(c)* in considering a petition for stay. O.C. emphasizes that the appointing authority "is wrongfully attempting to revisit issues" which were decided by the Commission in its prior decisions and that the Commission said would not be readdressed. Citing to the Commission's December 15, 2021 decision, O.C. highlights the following:

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.

Furthermore, O.C. emphasizes that the Commission considered the appointing authority's arguments with respect to his "state of mind," "intentions," and "line of thinking." Thus, O.C. contends that the appointing authority has not shown that it would have a "clear likelihood" of success on the merits of its appeal. Rather, he notes that the appointing authority articulated a lesser standard of having "a realistic chance of success." Moreover, O.C. states that there is no irreparable harm or injury if the appointing authority's stay request is not granted. On the contrary, he has suffered harm by the appointing authority's repeated refusals to abide by the Commission's prior decisions as he has not commenced employment, received a salary of a Police Officer, or been able to contribute to a pension, despite that he was awarded a retroactive date of appointment to July 12, 2018, for salary step placement and seniority-based purposes. Lastly, O.C. maintains that he is psychologically suited to become a Police Officer and was truthful in his application to the Elizabeth Police Department and to the EBOE. Therefore, he urges the Commission to deny the appointing authority's stay request. In support of his position, O.C. submits his counsel's certification which outlines the Commission's prior decision.

In reply, the appointing authority indicates that it has received a Notice of Deficiency, dated January 13, 2022, regarding the March 14, 2018 certification (OL180232) to record O.C.'s appointment. However, it states that this notice "is tethered to" the previous Commission decision and "is naturally included" in its request for stay. The appointing authority maintains that it has satisfied the factors for granting a stay and reiterates that the Commission failed to consider statements made by O.C. during his interview, which were part of the reasons for its request to remove him based on good cause. It also reiterates that there was nothing in O.C.'s personnel file suggesting that O.C. reported his DUI arrest to the EBOE and the certifications that O.C. presented from employees were not contemporaneous to his arrest. In conclusion, the appointing authority states that the Commission "did not follow the applicable law in rendering its decision by failing to apply factors for removal from the list on grounds of statements made by O.C. during the interview and attempts at deception in the application and interview process based upon evidence." Thus, it submits that the Commission's decision should be reversed, and that absent a stay of the decision permits O.C., an unqualified candidate, to proceed to the Police Academy and into the working test period, which would expose the public to potential harm.

O.C. responds with a supplemental certification from his attorney, who states that, despite the Commission's order that the appointing authority schedule O.C. for a medical examination within 30 days, it failed to do so and ignored his emails in that regard. O.C. notes that the appointing authority "knew full well by January 4, 2022, the date upon which the application for a stay was filed," that the next Police Academy class was rescheduled from January 4, 2022 to January 21, 2022, and no stay request was in place. Therefore, he requests that sanctions be made against the appointing authority as it has "blatantly ignored the mandate of the [Commission]."

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration 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.

Also, *N.J.A.C.* 4A:2-1.2(f) allows a party, after receiving a final administrative decision by the Commission and upon filing an appeal to the Appellate Division, to petition the Commission for a stay pending the decision of the Appellate Division. *See also N.J. Court Rules* 2:9-7.

Initially, 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 Co. v. Bureau of Securities*, 64 *N.J.* 85, 93 (1973); *Campbell v. Civil Service Department*, 39 *N.J.* 556, 562 (1963). In the instant matter, the appointing authority has failed to demonstrate that the Commission's denial of its request to remove O.C. from the subject eligible list meets the foregoing standard for reversal. The Commission thoroughly evaluated the appointing authority's request to remove O.C. from the subject eligible list and did not find a sufficient basis to do so. While the appointing authority asserts that the Commission failed to address all of the reasons for its latest list removal request, the Commission disagrees. It addressed O.C.'s alleged non-disclosure of his 2013 DUI arrest to the EBOE and the appointing authority's claims that its interview of him uncovered removable offenses. As set forth by O.C. in this matter, the Commission had indicated that the appointing authority was precluded from removing O.C. on issues that were revealed during his initial background investigation which includes the marijuana incident. The appointing authority was fully aware of that incident, but yet it had given him a conditional offer of employment. The offer was contingent upon passing a

psychological examination, and O.C. was eventually deemed to have done so on appeal.

Nevertheless, the appointing authority's arguments to remove O.C. based on the circumstances surrounding the marijuana incident are unfounded. The appointing authority appears to mischaracterize O.C.'s words and actions to justify the result it desires. In that regard, there is no evidence in the record of sexual impropriety or charges against O.C. which would reflect what the appointing authority is suggesting. Furthermore, licensed psychologists and a psychiatrist found O.C. to be psychologically suited for the position. The appointing authority had an opportunity to bypass or remove O.C. during the first investigation of his background, which uncovered the marijuana incident, but as set forth above, it nonetheless extended him a conditional offer of employment. Therefore, since the appointing authority has not shown that the Commission's decision to deny its request to remove O.C. from the subject eligible lists was arbitrary, capricious, unreasonable, or contrary to law or legislative policy, it has not demonstrated a clear likelihood of success on the merits of its appeal to the Appellate Division.

The appointing authority also has not shown a danger of immediate or irreparable harm if its stay request is not granted. The Commission is mindful that O.C. has undergone prior psychological evaluations, including an independent evaluation, which found him psychologically suited for the position of Police Officer. Moreover, O.C. is still subject to a medical examination and must successfully pass a working test period for Police Officer. Any performance issues can be addressed during his working test period. Moreover, the Commission finds that it is O.C. who is suffering substantial injury for not proceeding through the employment process when the Commission has ordered his reinstatement to the subject eligible list and has denied the appointing authority's request for removal. It is in the public interest to require compliance with orders issued by an administrative agency. The public interest is not served when a final administrative decision is not implemented in a timely fashion. Therefore, the appointing authority has not demonstrated a sufficient basis for a stay in this matter.

As a final comment, O.C. requests that sanctions be issued against the appointing authority. However, although O.C.'s actual appointment has been prolonged, the Commission does not find a basis at this time to impose fines as the appointing authority requested a stay of the Commission's December 15, 2021 decision within 30 days of its issuance. Now that the stay request has been denied, the appointing authority should be mindful that any further delay in implementing the Commission's prior order, which is reiterated herein, may subject it to fines and penalties pursuant to *N.J.A.C. 4A:10-2.1(a)2*.

ORDER

Therefore, it is ordered that the request for a stay be denied. It is further ordered that the appointing authority 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 23RD DAY OF MARCH, 2022

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