



STATE OF NEW JERSEY

In the Matters of D.G. and D.P.,
Police Officer (M0156D),
Union Township

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

CSC Docket Nos. 2024-1727 and
2024-1728

List Removal Appeals

ISSUED: November 27, 2024 (DASV)

D.G. and D.P., represented by Michael (Miguel) Garcia, Esq.,¹ appeal their rejection as Police Officer candidates by Union Township and its request to remove their names from the eligible list for Police Officer (M0156D) on the basis of psychological unfitness to perform effectively the duties of the position. These matters have been consolidated as they have similar issues.

The relevant facts are as follows:

1. The appellants' names were certified on September 14, 2023 from the Police Officer (M0156D), Union Township, eligible list. In disposing of the certification, the appointing authority requested the removal of the appellants' names as they were found psychologically unsuitable for the position. The certification was disposed on February 1, 2024.
2. In a letter dated February 16, 2024, and postmarked February 17, 2024, D.G. and D.P., through their attorney, filed timely appeals of their removals from the subject eligible list.
3. The parties were then sent a letter, dated March 15, 2024, acknowledging the appeals and advising that submissions were

¹ Mr. Garcia is a partner in the two-attorney law firm of Fernandez Garcia, LLC.

to be filed within 20 days from the date of the letter. Additionally, the parties were advised that if the appellants wished to submit a report and recommendation from a New Jersey licensed psychologist or psychiatrist, they could 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)*. Furthermore, the parties were informed that the date of receipt of the appointing authority's submission did not toll the regulatory time period. Thus, the appellants' reports were due on or before May 17, 2024. The March 15, 2024 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.

4. The pre-appointment psychological report and tests were sent to the appellants' attorney, who acknowledged receipt of the documents on March 26, 2024. The evaluations were conducted by Dr. Robert Kanen, who found the appellants psychologically unsuitable for appointment as Police Officers.
5. On June 24, 2024, the appellants, through their attorney, emailed reports from Dr. Susan A. Furnari, attesting to their psychological suitability for appointment as Police Officers. Dr. Furnari evaluated the appellants on June 23, 2024.
6. The appellants' attorney submitted a certification, dated June 24, 2024, setting forth that he was unable to find a New Jersey licensed psychologist or psychiatrist to conduct the appellants' examinations, due to the passing of one psychiatrist and the retirement, unavailability, and/or conflicts of at least six psychologists and psychiatrists. Additionally, the appellants' attorney stated that in late April and early May 2024, he fell ill. He eventually located and contacted Dr. Furnari to conduct the appellants' evaluation.
7. In letters dated July 10, 2024, staff of the Division of Appeals and Regulatory Affairs informed the appellants' attorney that since the appellants did not submit substantive documentation within the timeframe allowed to refute the findings of their pre-employment psychological examinations or request an extension of the time for good cause reasons, the files in the matters were closed.

In the present case, the appellants' attorney requests that the appeals of D.G. and D.P. be re-opened and the appellants' names be restored to the subject eligible list. He emphasizes that immediately upon filing an appeal he set out to find a New Jersey licensed psychologist and/ or psychiatrist to conduct the appellants' examinations. However, the psychiatrist that he used in a previous case passed away. Further, he began to search for other doctors. The appellants' attorney indicates that the psychologists and/or psychiatrists "required the basic reasons that the candidate had failed the psychological portion of the evaluation. The material had not been made available to counsel." He emphasizes that "21 days after the [Commission] received the appeal, the [Commission] sent the appointing authority a letter approval [sic] the release of the Appellant[s] psychological records" . . . and "33 days after the [Commission] received the appeal, the appointing authority finally sent [him] the Appellant[s] paperwork which included the Appellant[s] psychiatric report." He submits that the "paperwork" was not received until March 26, 2024, and "[a]t this time, almost one half of the time to secure a New Jersey licensed psychologist and/or psychiatrist had expired." The appellant's attorney reiterates that due to retirement, unavailability, and/or conflicts of at least six psychologists and psychiatrists, he was unable to secure a doctor. At this point, he states that "counsel had exercised his complete due diligence." Moreover, the appellants' attorney describes his condition and sickness in late April and early May 2024 and that his return to work "was slow and arduous." Despite his illness, the appellants' attorney certifies that he still searched for a qualified New Jersey licensed psychologist and/or psychiatrist and eventually located Dr. Furnari.

Moreover, the appellants' attorney maintains that the appellants have demonstrated good cause to extend the 90-day time period. He argues that the controlling regulation does not mandate that the extension request must be filed within the 90-day time period or that the appellants would be afforded only a single extension. Further, he submits that "counsel for the candidate[s] suffered a medical issue which caused a significant delay in the procurement of the examining psychiatrist." In the July 10, 2024, letter from staff, he points out that the letter states that in late April and early May 2024, he "fell ill." He maintains that this is an "understatement" and "does not fully appreciate the level of his illness. Nonetheless, despite his illness, he contends that the appellants' psychological reports were filed within 89 days of the appointing authority's submission to him or "only 34 days late – or less time than it took for the appointing authority to provide the candidate[s] with its reports."

Furthermore, the appellants' attorney argues that prejudice has not been demonstrated by extending the 90-day time period. In that regard, he emphasizes that the appointing authority bears the burden of proof in these matters. Moreover, he contends that the instant matters do not have the same considerations as the case cited in the July 10, 2024 letter, *In the Matter of J.D.*, Docket No. A-1271-20 (App. Div. February 23, 2022), and claims that reliance on this unpublished opinion is

“misplaced” and not in compliance with *New Jersey Court Rule* 1:36-3. In the current matters, the appellants’ attorney presents that an “explanatory affidavit” was provided; “[o]ne of the reasons for the main delay was counsel’s sickness;” [c]ounsel exercised due diligence;” and “[t]he rebuttal psychological report was provided within a short time of the Notice of Appeal.” Therefore, he maintains that prejudice to either the appointing authority or a potential candidate cannot be demonstrated. As such, he requests that the matters be considered by the Medical Review Panel.

CONCLUSION

N.J.A.C. 4A:4-6.3(b) provides that the appointing authority shall have the burden of proof in medical or psychological disqualification appeals. Moreover, *N.J.A.C.* 4A:4-6.5(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(a) and 49 *N.J.R.* 2239(a). 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, 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. It is noted that, in accordance with Section 6 of Executive Order 103 issued in response to the COVID-19 pandemic, the Commission approved various emergency adoptions of temporary rule relaxations and modifications to *N.J.A.C.* 4A with respect to timeframes associated with administrative appeals. In particular, *N.J.A.C.* 4A:4-6.5(e) was modified to include the good cause provision found in *N.J.A.C.* 4A:4-6.5(f). *N.J.A.C.* 4A:4-6.5(e) previously stated that “[t]he appellant may submit to the [Commission] a report from a New Jersey licensed physician, psychologist, or psychiatrist of his or her own choosing, which must be submitted within 90 calendar days of the filing of his or her appeal to the Commission.” Effective April 9, 2020, the regulation was modified and stated that “[t]he appellant may submit to the [Commission] a report from a New Jersey licensed physician, psychologist, or psychiatrist of his or her own choosing, which must be submitted within 90 calendar days, which may be extended for good cause, of the filing of his or her appeal to the [Commission].” The temporary modifications have since expired. Nonetheless, *N.J.A.C.* 4A:4-6.5(f) remains in force, providing the Commission with the authority to 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*, notwithstanding that the time period may be extended for good cause. 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 historically received by the Commission, 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.

In the instant matters, upon a thorough review of this matters, the appellants have not shown good cause reasons to extend the timeframe. Initially, as set forth above, the 90-day timeframe to submit an independent psychological or psychiatric report is a regulatory time period and not contingent upon the filing of the appointing authority's submission. Nevertheless, the appointing authority had submitted the pre-appointment psychological report and tests in a timely manner. Notice of the filing of the appeal was dated March 15, 2024, and the appellants' attorney received the documentation on March 26, 2024. Further, while it is customary for this agency to send notice to the parties of a pending psychological disqualification appeal, Civil Service rules require only that the appellant be provided with the opportunity to submit a report from a physician, psychologist or psychiatrist of his or her own choosing. See *N.J.A.C.* 4A:4-6.5(c) and *N.J.A.C.* 4A:4-6.5(e). The appellants had that opportunity. Additionally, while the appellants' attorney may have immediately attempted to find a doctor, the failure to timely secure a psychological evaluator due to the reasons cited herein is not persuasive. Countless appellants have met this time period, and there are certainly more than seven licensed psychologists or psychiatrists in New Jersey. Moreover, an appellant's psychologist and/or psychiatrist may conduct an evaluation independent of the findings of the appointing authority's evaluator. Even considering that a psychologist and/or psychiatrist wanted the psychological reasons for the appellants' rejection, the appellants had more than sufficient time to obtain an evaluation prior to the May 17, 2024 due date as their attorney was provided the appointing authority's documentation on March 26, 2024. Thus, any argument regarding the timing of the appointing authority's submission is not persuasive to grant the appellants' requests to re-open their appeals and accept their independent psychological reports.

Moreover, while it was unfortunate that the appellants' attorney became ill, and the Commission is certainly sympathetic to his plight, this occurred in the later part of the 90-day time period. The appellants' attorney is also not a solo practitioner. He is a partner in a two-attorney law firm. Further, the appellants' attorney argues that the controlling regulation does not mandate that an extension request must be filed within the 90-day time period or that the appellants would be afforded only a single extension. The Commission does not disagree. However, the March 15, 2024 letter to the parties clearly informed them that if an extension of the time periods is needed, the parties must contact the agency in writing. It is evident that a party should ask for an extension prior to the expiration of a due date. In this case, that was not done.

Nonetheless, pursuant to *N.J.A.C.* 4A:4-6.5(f), the Commission may extend the time period for filing the required reports for good cause. Under certain circumstances, good cause could be established if an evaluation occurred prior to the due date, and through no fault of the appellant, the report was issued late and not forwarded to this agency. However, in the instant matters, the appellants' evaluations occurred on June 23, 2024, and the reports were sent to the Commission

on June 24, 2024. Both were after the May 17, 2024² due date. Further, the Commission is mindful of an appellant's responsibility to begin securing a psychological evaluation as soon as the appellant files an appeal, or even before that time in preparation for the appeal, in order to address any contingencies that may arise so that the appellant may meet the 90-day regulatory timeframe and not face dismissal of the appeal. As set forth in more detail above, the Commission does not find good cause to extend the regulatory time period based on the reasons for the delay provided herein.

Lastly, the Commission must balance the reasons for the delay and the effect of accepting a late report, as it is prejudicial to the appointing authority, and potentially a current employee, to allow an appellants' appeal to proceed. In that regard, 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 upon successful completion of the working test period. 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 a recent layoff when three employees who ranked lower than the appellant on the eligible list were not impacted by the layoff). Further, contrary to the argument of the appellants' attorney, reliance on *In the Matter of J.D., supra*, is not "misplaced," since the Commission reviews the particulars of each appeal. The case is cited for the proposition that the Commission may deny the re-opening of an appeal where good cause reasons have not been shown to extend the time period to submit an independent psychological report and where the court noted that prejudice could occur to innocent third parties, since 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, as stated by the Commission. Further, although it is an unpublished Superior Court of New Jersey, Appellate Division, opinion, citation of the case is appropriate,³ and serves as continuing *guidance* to the Commission on cases it has previously decided.

² The appellant's attorney notes that the 90-day time period ended on May 21, 2024. However, the appeals were postmarked on February 17, 2024, and 90 days from that date is May 17, 2024.

³ *New Jersey Court Rule 1:36-3* states that "[n]o unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel."

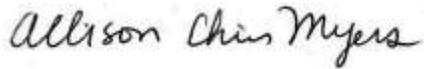
Accordingly, the requests to re-open the appeals, refer the matters to the Medical Review Panel, and restore the appellants to the subject eligible list must be denied.

ORDER

Therefore, it is ordered that these appeals be dismissed.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27TH DAY OF NOVEMBER, 2024



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