



STATE OF NEW JERSEY

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

In the Matter of J.D., Police Officer
(S9999U), City of Bayonne

List Removal Appeal

CSC Docket No. 2020-1999

**ISSUED:NOVEMBER 27, 2020
(DASV)**

J.D., represented by Giovanna Giampa, Esq., appeals the removal of his name from the eligible list for Police Officer (S9999U), City of Bayonne, 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 August 5, 2019 from the Police Officer (S9999U), City of Bayonne, eligible list. In disposing of the certification, the appointing authority requested the removal of the appellant's name since he was found psychologically unsuitable for the position. Notices of removal were sent and dated March 26, 2020.
2. Prior to the disposition of the certification, the appellant's attorney filed an appeal of the appellant's removal by facsimile on January 6, 2020. It was also sent by regular mail, postmarked January 24, 2020, with the appeal fee. The appellant certified that on January 3, 2020, the Bayonne Police Department advised him that the Institute for Forensic Psychology (IFP), the psychological evaluator of the appointing authority, did not recommend him "to move forward." IFP

evaluated the appellant on December 27, 2019 and issued its report on January 22, 2020.

3. The appellant's appeal of his removal from the Police Officer (S9999U), City of Bayonne, eligible list due to psychological disqualification was accepted. The parties were sent a letter, dated February 7, 2020, acknowledging the appeal and advising that submissions are to be filed within 20 days from 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)*. 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 appellant's report was due on or before April 6, 2020. The February 7, 2020 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. On April 3, 2020, the appellant's attorney requested an extension of the 90-day time period. She indicated that the appellant sought an independent psychologist in February and was scheduled to meet with the doctor on March 18, 2020. The appellant's psychologist assured that a report could be issued by April 6, 2020. However, due to "the rapidly changing circumstances related to COVID-19," the appellant's psychologist gave the appellant notice on March 12, 2020 that the evaluation was postponed until further notice.¹ The appellant found another psychologist, Dr. Sarah DeMarco, and he was evaluated on March 26, 2020. In a letter dated April 1, 2020, Dr. DeMarco stated that she requested additional records which delayed her ability to complete her evaluation, and due to the COVID-19 pandemic, a delay in receipt of those records was anticipated. Given that the delay was due, in

¹ It is noted that the appellant's attorney requested an initial extension on March 12, 2020, noting the aforementioned delay and that the appellant had not yet received the pre-employment psychological report and tests. However, the appellant's attorney indicated that they were coordinating with another psychologist. Staff advised that should the appellant find that he was unable to submit a report by April 6, 2020, he could submit a request for an extension at that time with an explanation and supporting documentation.

part, to the impact of COVID-19, the extension was granted to May 21, 2020.

5. On May 19, 2020, the appellant's attorney requested another extension, explaining that Dr. DeMarco had requested the appellant's hospital records. The request was made on March 30, 2020, but it was still outstanding due to the delays caused by the COVID-19 pandemic. The appellant was granted a second extension to July 6, 2020 to submit his independent psychological report to the Commission. However, it was not received at that time.
6. By letter dated August 25, 2020, agency staff sent the appellant's attorney a letter, indicating that although the appellant was provided with an opportunity, no substantive documentation had been received within the timeframe allowed to refute the findings of the pre-employment psychological examination. In that regard, staff noted the 90-day time requirement set forth in *N.J.A.C.* 4A:4-6.5(e) in filing an independent psychological report and that the appellant was afforded a full 90-day extension to submit his report. Accordingly, since the appellant had not submitted such a report, there was no basis to disturb the appointing authority's determination. Therefore, the appeal file was closed. The August 25, 2020 letter was not returned as undeliverable.
7. By letter, dated October 12, 2020, and sent via facsimile and regular mail, the appellant filed a "request for reconsideration,"² attaching Dr. DeMarco's report dated October 6, 2020. The report indicated that the appellant was interviewed by Dr. DeMarco on March 26, 2020 and October 1, 2020. Dr. DeMarco determined that "there is no compelling data that rises to a level of clinical significance that would indicate [that the appellant] is not at least minimally psychologically suitable for the position at this time [and]

² The Commission did not render a decision to be reconsidered pursuant to *N.J.A.C.* 4A:2-1.6(a). As noted, the appeal was closed since the appellant did not present substantive documentation to refute the findings of the pre-employment psychological examination. Thus, a request to re-open a matter is governed by *N.J.A.C.* 4A:2-1.1(b), which provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed. *See e.g., In the Matter of Joe Moody, Jr.* (CSC, decided January 15, 2020) (The Commission rejected the appeal of an appellant who did not request that his matter be re-opened until well after 20 days from the receipt of a letter from agency staff that his matter would be closed as untimely).

it is clear that [the appellant] is psychologically suitable to move forward.”

In his request, the appellant recounts the circumstances of the delays in this matter, indicating that his attorney did not receive IFP’s report and tests until March 18, 2020³ and that his initial independent psychologist “understandably” could not evaluate him without reviewing the basis for his removal. Moreover, in addition to the hospital records needed by Dr. DeMarco, the appellant states that Dr. DeMarco also requested a prior 2018 evaluation conducted by IFP for the State Police which was referenced in its January 22, 2020 report. The hospital records were not received by the appellant’s attorney until June 30, 2020. Additionally, IFP did not respond to the appellant’s request until August 3, 2020 by email, advising that it could not release the 2018 report as the report is the property of the referring agency. The appellant indicates that his attorney also made multiple requests for the report from the State Police in August 2020. It is noted that the appellant’s requests for extensions did not reference IFP’s 2018 report. The appellant argues that “COVID-19 create[d] an unprecedented situation in terms of getting medical records.” He emphasizes that he was able to be evaluated by Dr. DeMarco on March 26, 2020 which is “a testament to his willingness to resolve this appeal favorably, and his diligence in getting everything needed of him done within time.” Further, once IFP advised that it could not forward the 2018 records, the appellant met with Dr. DeMarco in order for her to clarify anything that had changed since their March meeting. The appellant maintains that he “should not lose the ability” to be referred to the Medical Review Panel, “especially because he has been involved since March” to obtain his independent psychological report. The appellant submits that he would be “the only one who would be prejudiced in this situation,” emphasizing that the remedy in a successful appeal of this nature is a retroactive date of appointment for seniority and salary step purposes. Therefore, the appellant requests that *N.J.A.C.* 4A:4-6.5(e) be relaxed for good cause and his appeal be re-opened.

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

³ The pre-employment psychological report and tests by IFP were emailed to agency staff on March 31, 2020, and the appellant’s attorney was copied on the email. The appellant’s attorney was also sent an earlier email on March 18, 2020 with the information. Additionally, the Commission received IFP’s information by regular mail postmarked March 17, 2020.

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 states 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]."

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 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.

In the instant matter, the appellant had been granted two extensions to submit his independent psychological report as he provided good cause reasons for the initial extensions. In that regard, he presented that the delays were caused by the COVID-19 pandemic as his initial psychologist suspended his evaluation "upon further notice" due to the crisis and that the crisis also delayed the receipt of hospital records which were needed for his evaluation with Dr. DeMarco. The appellant was afforded a total of 90 calendar days to July 6, 2020 to submit his report, but he did not do so until October 12, 2020 at which time he requested another extension to submit his report for good cause. As further explained below, the Commission does not find good cause to grant a further extension and re-open the appellant's appeal.

Initially, the appellant did not file a timely objection to the August 25, 2020 closure of his appeal. See *N.J.A.C.* 4A:2-1.1(b) and *Moody, supra*. His request to re-open his appeal was not submitted until almost two months later. Additionally, 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. If the COVID-19 crisis did not occur, there would have been ample time nevertheless for the appellant to submit a timely report by the initial due date of April 6, 2020 as the appellant's attorney received the pre-employment psychological report and tests on March 18, 2020. Therefore, any argument

regarding the timing of the appointing authority's submission is not persuasive to grant the appellant's request. It is noted that appellants 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.

It is noted that, 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 matter, although the appellant was initially evaluated on March 26, 2020, the lateness of his report is significant and not reasonable or excusable. See *Appeal of Syby*, 66 N.J. Super. 460 (App. Div. 1961), *Atlantic City v. Civil Service Commission*, 3 N.J. Super. 57, 60 (App. Div. 1949) (describing the circumstances under which delay in asserting rights may be excusable). Among the factors to be considered are the length of delay and the reasons for the delay. *Lavin v. Hackensack Board of Education*, 90 N.J. 145 (1982).

As indicated above, the report was not submitted until more than three months after the extended due date of July 6, 2020. Furthermore, the appellant's attorney received the requested hospital records on June 30, 2020 prior to the due date and a report could have been issued as the appellant was already interviewed. Thus, the appellant's argument with regard to the delay in receipt of hospital records does not provide him with good cause reason for another extension of time. With respect to the 2018 IFP report for the State Police, it must be underscored that the date of receipt of an appointing authority's submission, and especially records regarding another psychological examination for a different title and jurisdiction, does not toll the time for the issuance of an independent psychological or psychiatric report. In other words, an appellant's evaluation may be conducted independently. As evident in this case, Dr. DeMarco was able to evaluate the appellant without IFP's 2018 report. Moreover, it is noted that Dr. DeMarco's October 20, 2020 report is also not timely on the basis that IFP emailed its response declining to provide the 2018 report on August 3, 2020. The appellant's second meeting with Dr. DeMarco did not occur until October 1, 2020.

Moreover, contrary to the appellant's argument, it is prejudicial to the appointing authority, and potentially a current employee, to allow the appellant's appeal to proceed. As correctly noted by the appellant, 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).

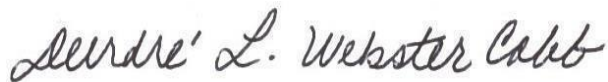
Lastly, the Commission emphasizes that the appellant was afforded a full 90 calendar day extension to submit his independent psychological report, and essentially, he is requesting approximately another 90 days. The Commission is satisfied that the appellant was given sufficient opportunity to pursue his appeal in light of the havoc that has been caused by the COVID-19 pandemic. However, the appellant has failed to show good cause to further extend this time period and accept Dr. DeMarco report. Accordingly, the appellant's request to continue with his appeal must be denied.

ORDER

Therefore, it is ordered that the 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 24TH DAY OF NOVEMBER 2020



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