



STATE OF NEW JERSEY

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

In the Matter of G.E., Police Officer
(S9999U), City of Passaic

List Removal Appeal

CSC Docket No. 2019-1935

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

G.E., represented by Joel M. Miklacki, Esq., appeals the removal of his name from the eligible list for Police Officer (S9999U), City of Passaic, 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 8, 2018 from the Police Officer (S9999U), City of Passaic, 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 his removal, dated January 4, 2019. The notice also advised him that if he wished to appeal, he must do so within 20 days of the date of the notice. *See N.J.A.C. 4A:4-6.5(c)2.*
2. By letter dated January 22, 2019 and sent by New Jersey Lawyer Service (NJLS), the appellant's attorney filed an appeal of the appellant's removal. However, the appeal fee was not submitted, and a Notice of Non-Payment of Appeals Fee was sent on January 25, 2019. Upon receipt of the appellant's appeal fee on February 4, 2019, a letter, dated

February 6, 2019, was sent to the parties 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 22, 2019. The February 6, 2019 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. The appellant did not request any extension.

3. By email and Federal Express on March 11, 2019, the appointing authority, represented by Dominic P. DiYanni, Esq., forwarded the pre-employment psychological report and tests of the appointing authority's evaluator, who did not recommend the appellant for appointment, to the appellant's attorney and to this agency.¹
4. By letter dated July 8, 2019, 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. 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 July 8, 2019 letter was not returned as undeliverable.
5. On July 14, 2020 by NJLS, the appellant's independent psychological report by Dr. Daniel Gollin was sent to this agency. It was stamped as received on July 17, 2020. Dr.

¹ It is noted that the appointing authority had requested an extension on February 25, 2019 to file the pre-employment psychological report and tests. It was granted until March 15, 2019. It is also noted that the appointing authority's evaluator from the Institute for Forensic Psychology directly mailed its evaluation to this agency on March 1, 2019.

Gollin's report was dated August 30, 2019 and indicated that the appellant was evaluated on March 12, 2019. Dr. Gollin determined that the appellant was "psychologically and psychiatrically suitable for police work."

In this matter, the appellant requests that he "not be denied his right to an appeal." His attorney explains that upon receipt of the appointing authority's submission, he immediately sent the information to Dr. Gollin's office on March 13, 2019. Starting at the end of April 2019 to the beginning of 2020, the appellant's attorney called Dr. Gollin's office on a monthly basis requesting the report or a call back from the doctor. Thereafter, he states that "the COVID-19 pandemic virtually closed all businesses for 3 months." He then returned to his office on a limited basis and "renewed" his search for Dr. Gollin's report. The appellant's attorney was able to secure the report from Dr. Gollin on July 11, 2020. The appellant maintains that "[n]o party has been prejudiced by the unforeseen delay as the [eligible] list is still active and Passaic is still hiring law enforcement officers." It is noted that the Police Officer (S9999U) eligible list promulgated on March 29, 2017 and had already expired on May 1, 2020.

It is further noted that agency records reveal that the appellant was also certified from the Police Officer (S9999U) eligible list to the City of Clifton on September 28, 2018. He was removed on the same basis of psychological unfitness to perform effectively the duties of a Police Officer. Notices of removal were sent on May 22, 2019. The Commission did not receive an appeal from the appellant for this certification.

CONCLUSION

Initially, as noted by the Commission, the appellant was subsequently certified (prior to his removal by the City of Passaic) and removed by the City of Clifton from the Police Officer (S9999U) eligible list on the basis of psychological unfitness to perform effectively the duties of a Police Officer. Notices of removal were sent on May 22, 2019, and the appellant did not file an appeal. Accordingly, even if the appellant's instant appeal proceeds, his name cannot be restored to the pool of eligibles (S9999U) for the title area of Police Officer, City of Passaic, as he has been removed on the same basis for cause from the eligible list by the City of Clifton. In that regard, *N.J.A.C.* 4A:4-2.3(c) provides that in announcing open competitive examinations, the Chairperson of the Commission or designee may provide a single application for several announcements and/or title areas (such as police, sheriff, corrections, and bilingual). Moreover, *N.J.A.C.* 4A:4-4.7(g) states that when the Commission has accepted a single application for one or more title areas, pursuant to *N.J.A.C.* 4A:4-2.3(c), an eligible whose name has been removed from the pool of eligibles for one jurisdiction or title area for cause shall be removed from the pool of eligibles for any other jurisdiction or title area. The Commission

notes, however, that it would be impermissible to remove the appellant's name under *N.J.A.C.* 4A:4-2.3(c) and *N.J.A.C.* 4A:4-4.7(g) if he failed a psychological examination in a different title area, such as County Correctional Police Officer or Sheriff's Officer, because psychological testing is specific to each title area. Therefore, since the City of Clifton's removal was for Police Officer, the instant matter is rendered moot.

Nevertheless, even assuming *arguendo* that the appellant filed an appeal of the City of Clifton's removal or was not removed at all, the record in the instant matter does not demonstrate good cause to relax the regulatory time period and accept the appellant's independent psychological report. In that regard, *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 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, there is no indication in the record that the February 6, 2019 notice to the parties regarding the timeframes was not received.² In fact, the appointing authority requested an extension of time to file its submission. The appellant's attorney has acknowledged that he received the pre-employment psychological report and tests. He then forwarded the same to Dr. Gollin on March 13, 2019. Thus, the parties were well aware of the time periods set in this matter and their obligations to pursue and challenge the appeal.

Additionally, 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. Nonetheless, the appellant still had more than one month to submit his psychological evaluation by the April 22, 2019 due date after he received the appointing authority's submission. While the appellant maintains that he contacted Dr. Gollin's office on a monthly basis to secure the report, the appellant's attorney did not begin contacting Dr. Gollin's office until the end of April 2019 for the report, and the report was dated August 30, 2019, approximately four months after the due date. The appellant's March 12, 2019 evaluation also did not occur until approximately two months after he filed his appeal on January 22, 2019. 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.

In the present case, the Commission does not find good cause. 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, 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 written until four months after the due date. It was also not received by this agency until July 17, 2020, well over one year after the due date and when the appellant's attorney was advised by letter, dated July 8, 2019, that the appeal was closed. This letter was not returned as

² 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 within the 90-day time period. *See N.J.A.C. 4A:4-6.5(c)* and *N.J.A.C. 4A:4-6.5(e)*.

undeliverable. While the appellant's attorney may have extended his best effort to secure Dr. Gollin's report, the appellant did not request an extension to submit his report at any time, nor was there a timely objection to the July 8, 2019 letter. In that regard, *N.J.A.C.* 4A:2-1.1(b) 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). *See also, 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).

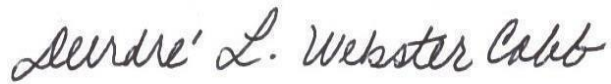
Moreover, contrary to the appellant's argument, it is prejudicial to the appointing authority, and potentially a current employee, to allow the appellant's appeal to proceed. As noted above, the remedy provided to successful appellants in psychological disqualification cases is a mandated appointment 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). Furthermore, the Commission reiterates that the appellant's report was due on April 22, 2019. The widespread impact of the COVID-19 pandemic did not occur in this State until 2020. Nonetheless, even if the Commission considers that the pandemic further delayed the receipt of the report by the Commission, the appellant has failed to show good cause prior to that time for the Commission to re-open his appeal and accept Dr. Gollin's report. Accordingly, the appellant's request to continue with his appeal must be denied.

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 24TH DAY OF NOVEMBER 2020



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