In the Matter of Wayne Hundemann,
Police Sergeant (PM2512F),
Borough of Carteret
DOP Docket No. 2006-552
(Merit System Board, decided May 10, 2006)

Wayne Hundemann, represented by Thomas C. Sciarrabone, Esq., appeals the removal of his name from the eligible list for Police Sergeant (PM2512F), Borough of Carteret, on the basis of an unsatisfactory background report.

The subject eligible list was promulgated on January 27, 2005 and expires on January 26, 2008. The appellant's name appeared on the February 3, 2005, certification of the subject eligible list as the number one ranked veteran. In disposing of the certification, the appointing authority requested the removal of the appellant's name on the basis that he was psychologically unfit to perform the duties of the subject title and had an unsatisfactory employment history. It also requested the removal of his name for other sufficient reasons. Specifically, the appointing authority asserted that the appellant underwent several psychological evaluations which demonstrate that he is unsuited to the supervisory role of Police Sergeant. The appointing authority relied on fitness for duty psychological reports dated December 13, 2000, May 14, 2002, April 11, 2003 and October 20, 2003 to reach its conclusions. It claimed that a Police Sergeant must possess the ability to treat citizens, and others, with uniform courtesy and consideration, without loss of temper or equanimity. In this regard, the appointing authority stated that the appellant did not possess these qualifications. Rather, it stated that the appellant was an irritant to his employer and the general public, demonstrated poor judgment, insensitivity and compulsive traits, and was unable to apply the laws he was charged with enforcing to the realities of life.

With regard to the appellant's reemployment record, the appointing authority, represented by Brian W. Kronick, Esq., asserted that based upon Internal Affairs records, the appellant had over 25 complaints filed against him between April 2002 and July 2003. The appointing authority asserted that these complaints demonstrate the appellant's inability to deal effectively with the public. In this regard, the appointing authority highlighted several instances in which it claimed the appellant's conduct was rude, irrational, abusive, overbearing and tyrannical. Additionally, the appointing authority contended that the appellant's disciplinary history evidenced two counseling sessions, one verbal warning, a two-day suspension, and a 30-day suspension. The suspensions were based on inappropriate conduct when dealing with the public. Moreover, with regard to the appointing authority's claim of other sufficient reason to remove the appellant's name from the subject eligible list, it claimed that the Chief of Police issued a memorandum to the appellant to "refrain from eating dog biscuits during his hours

of employment," which was indicative of his psychological instability and his inability to function in a sane and balanced manner. In support of its claims, the appointing authority submitted copies of the psychological reports, Internal Affairs reports, a Notice of Minor Disciplinary Action form dated December 2, 2002 indicating a two-day suspension, a Final Notice of Disciplinary Action (FNDA) dated September 8, 2003 indicating a 30-day suspension,[1] and a memorandum dated March 11, 2005 from the Chief of Police concerning the dog biscuits.

On appeal, the appellant contends that the Internal Affairs complaints filed against him do not provide grounds for removing him from the list. The appellant argues that the complaints are suspect because they were all made by individuals who were unhappy about receiving a motor vehicle summons and did not like his demeanor or tone of voice. Additionally, he claims that 27 complaints filed against him in 2002 and 2003 is a very small number considering that he wrote between 2000 and 3000 traffic tickets per year and there is no proof that any of the traffic tickets issued were invalid. The appellant also asserts that these Internal Affairs complaints should not be considered as they occurred some time ago. With regard to his suspensions, the appellant asserts that he already served these suspensions, which included a loss of pay, and should not be further punished for these incidents. Further, the appellant contends that the appointing authority's conclusion that he is psychologically unstable because of the dog biscuit issue is improper and contends that such a conclusion can only be reached by a qualified medical professional. Moreover, the appellant argues that the real reason that he is not promoted and his name is being removed from the subject eligible list is because he has given tickets to local politicians, their families, and their supporters. Furthermore, the appellant claims that he has reported possible illegal acts committed by local politicians. In this regard, the appellant argues that his claims are bolstered by the fact that he has not been allowed to leave police headquarters while on duty since he gave a parking ticket to a former mayor and State assemblyman. Finally, the appellant requests a hearing at the Office of Administrative Law (OAL) to determine whether there is sufficient evidence to remove his name from the subject eligible list.

In response, the appointing authority reiterates its position that the appellant's psychological evaluations coupled with his prior employment history, indicate that he is unfit to perform in any role requiring supervisory responsibilities. Additionally, it restates its contention that numerous psychological evaluations have found that the appellant lacks the ability to exercise reasonable judgment in performing his duties as a police officer. In this regard, the appointing authority argues that the large number of Internal Affairs complaints filed against the appellant illustrates the appellant's lack of judgment. Further, the number of Internal Affairs complaints filed against the appellant far exceeds the number of

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[1] In *In the Matter of Wayne Hundemann, Borough of Carteret* (MSB, decided August 10, 2005), the Merit System Board acknowledged a settlement between the appellant and the appointing authority in which the appellant received a 30-day suspension.

complaints filed against other police officers. Again, the appointing authority describes several of the incidents leading to the Internal Affairs complaints. It also reiterates that the Internal Affairs complaints led to two disciplinary actions taken against the appellant, a two-day suspension and a 30-day suspension. Moreover, the appointing authority contends that there is no need to forward this matter to OAL for a hearing as there is sufficient evidence in the record to uphold the removal of the appellant's name from the subject eligible list.

In reply, the appellant argues that the appointing authority is improperly relying on psychological evaluations to remove his name from the eligible list, as the requirements set forth in *N.J.A.C.* 4A:4-6.5 were not complied with. He argues that the appointing authority did not make him an offer of employment and did not subject any of the other candidates to a psychological evaluation. Additionally, the appellant asserts that the psychological evaluations relied upon by the appointing authority do not include a finding that he is not qualified for the title of Police Sergeant due to psychological reasons. Further, the appellant states that the psychological evaluations used by the appointing authority are over a year old and should not be relied upon. Moreover, the appellant argues that per Attorney General Guidelines, it is improper for the appointing authority to rely upon Internal Affairs complaints in which the appellant was exonerated. With regard to the charges that were sustained, the appellant contends that it was improper for the appointing authority to rely upon the facts of the complaint as the only information which should have been placed in his personnel file with regard to these complaints are the administrative charge form and the disposition form. Furthermore, the appellant reiterates his contention that the appointing authority's refusal to promote him is in retaliation for giving tickets to local politicians, their families, and their supporters, and reporting possible illegal acts committed by local politicians. In this regard, the appellant asserts that the appointing authority has effectively admitted to this assertion by not refuting this claim in its response to the Merit System Board (Board).

CONCLUSION

Initially, the appellant requests a hearing on these matters. List removal appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted only in those limited instances where the Board determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). For the reasons discussed below, no material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

Pursuant to the ADA, 42 *U.S.C.A.* sec. 12112(d)(3), no medical or psychological examination may be conducted prior to rendering a conditional offer of employment. *See* the Equal Employment Opportunity Commission's *ADA*

Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations (October 10, 1995). Those guidelines state, in pertinent part, that in order for a conditional offer of employment to be "real," the employer is presumed to have evaluated all information that is known or should have reasonably been known prior to rendering the conditional offer of employment. This requirement is intended to ensure that the candidate's possible hidden disability or prior history of disability is not considered before the employer examines all of the relevant non-medical information. *See also, ADA Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* (July 27, 2000), which state, in pertinent part, that when an employee *applies* for a new job with the same employer, that employee should be treated as an applicant for a new job. Therefore, the employer is "prohibited from . . . requiring a medical [*i.e.*, psychological] examination before making the individual a conditional offer of the new position." *See also N.J.A.C.* 4A:4-6.5(b) (An appointing authority may only require a medical and/or psychological examination after an offer of employment has been made and prior to appointment). The Board notes that the ADA's restrictions on psychological and medical examinations apply regardless of whether an individual has a disability. *See Roe v. Cheyenne Mountain Conference Resort,* 124 *F.2d* 1221, 1229 (10th Cir. 1997). Thus, individuals subjected to a psychological examination, and who pass, must be appointed, absent any disqualification issue. *See N.J.A.C.* 4A:4-4.7 and *N.J.A.C.* 4A:4-6.1.

In the instant matter, the appointing authority did not make a conditional offer of employment to the appellant. Additionally, it did not require any of the candidates to undergo a psychological evaluation for the Police Sergeant position. In this regard, the Board notes that psychological evaluations relied upon by the appointing authority were not specifically conducted to determine the appellant's suitability for the Police Sergeant title. Rather, these evaluations were conducted in response to Internal Affairs complaints filed against the appellant. Further, none of the psychological evaluations expressly indicated that the appellant could not or should not perform the duties of the subject title. Therefore, the psychological evaluations relied upon by the appointing authority cannot be used to remove the appellant's name from the subject eligible list.

However, *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)7, allows the Merit System Board to remove an individual from an eligible list who has a prior employment history which relates adversely to the position sought. In the case at hand, the appellant's disciplinary record evidences a two-day suspension in 2002 and a 30-day suspension in 2003. The appellant argues that he has already served these suspensions and should not be further punished for these incidents. The Board does not agree. The position of Police Sergeant is reserved for employees who exhibit leadership skills, a positive work ethic, and respect for the rules and regulations. In the appellant's case, it is clear that his disciplinary history, which includes a major disciplinary action, reflects serious offenses, which show a lack of

respect for such tenets. *See In the Matter of John Bonafide,* Docket No. A-1658-04T1 (App. Div. February 7, 2006) (Removal from Sheriff's Officer Lieutenant promotional list upheld for Sheriff's Officer Sergeant who received a six-month suspension for misuse of public property three months prior to the certification of his name for appointment); *In the Matter of Howard Doherty, Correction Sergeant, Department of Corrections (PS7099I),* Docket No. A-4959-01T1 (App. Div. April 5, 2004) (Removal from Correction Sergeant promotional list upheld for Senior Correction Officer with 25 minor disciplinary actions, 24 of which were imposed for attendance-related infractions); *In the Matter of Frank R. Jackson, Correction Lieutenant, Department of Corrections (PS6320I)*, Docket No. A-1617-00T2 (App. Div. March 28, 2002) (Removal from Correction Lieutenant promotional list upheld for Correction Sergeant whose disciplinary record included two official reprimands for absenteeism and a 30-day suspension for falsification of a report, despite the recommendation of his immediate supervisor); *In the Matter of Albert S. Waddington, County Correction Sergeant (PC0349T), Camden County*, Docket No. A-568-99T2 (App. Div. December 5, 2000) (Removal from County Correction Sergeant promotional list upheld for County Correction Officer with a lengthy list of counseling reports, poor evaluations, reprimands, minor disciplinary sanctions and two major disciplinary actions over approximately 13 years). Accordingly, the appellant's prior disciplinary history adversely relates to the position sought and is sufficient cause to remove his name from the eligible list. The appellant has not met his burden of proof in this matter and the appointing authority has shown sufficient justification for removing his name from the subject eligible list.

ORDER

Therefore, it is ordered that this appeal be denied.

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