

CSC  
B-6



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Gabriel Lopez,  
Correction Officer Recruit (S9988R),  
Department of Corrections

List Removal Appeal

CSC Docket No. 2015-2903

ISSUED: DEC 17 2015 (HS)

Gabriel Lopez, represented by Nicholas J. Palma, Esq., appeals the attached decision of the Division of Classification and Personnel Management<sup>1</sup> (CPM), which found that the appointing authority had presented a sufficient basis to remove the appellant's name from the Correction Officer Recruit (S9988R), Department of Corrections eligible list on the basis of an unsatisfactory criminal record.

The appellant took the open competitive examination for Correction Officer Recruit (S9988R), achieved a passing score and was ranked as a non-veteran on the subsequent eligible list. The eligible list promulgated on May 23, 2013 and expired on July 3, 2015.<sup>2</sup> The appellant's name was certified to the appointing authority on May 23, 2013. In disposing of the certification, the appointing authority requested the removal of the appellant's name due to an unsatisfactory criminal record and falsification of his application. Specifically, the appointing authority asserted that the appellant was charged with shoplifting less than \$200 in violation of *N.J.S.A. 2C:20-11c(4)* in 2009, for which the appellant received a three-month deferred disposition from a juvenile referee, and the charge was dismissed after the conditions were met. Additionally, the appellant was charged with receiving stolen property in violation of *N.J.S.A. 2C:20-7a* in 2011, and the charge was later dismissed. The appointing authority also asserted that the appellant failed to disclose the 2009 shoplifting charge on his application. The appellant appealed to

<sup>1</sup> Now the Division of Agency Services.

<sup>2</sup> In *In the Matter of Correction Officer Recruit (S9988R)* (CSC, decided June 3, 2015), the Civil Service Commission revived and extended the eligible list until a new list became available.

CPM. On appeal to CPM, the appellant argued, among other things, that he was already employed in a position supervising federal inmates and that, to obtain that employment, he successfully underwent a federal background check.<sup>3</sup> For that reason, the appellant did not believe that he had to divulge the information regarding his juvenile shoplifting arrest on his application. The appellant stated that he was not intentionally hiding anything. The appellant also stressed that the charge was ultimately dismissed via an adjournment in contemplation of dismissal, which involved less procedure than Pre-Trial Intervention (PTI) for adults and in which the only criterion was the avoidance of another arrest for a pre-determined period of time. However, CPM found that the appointing authority had sufficiently documented and supported its request to remove the appellant's name from the subject eligible list.

On appeal to the Civil Service Commission (Commission), the appellant initially argues that his appeal, postmarked April 30, 2015, is timely. Although CPM's determination is dated July 30, 2014, the appellant claims that he only received the determination in late April 2015 after making inquiries to this agency. In support, he provides a copy of an envelope, postmarked April 25, 2015, in which the July 30, 2014 determination letter appears to have been mailed from this agency. The appellant also requests a hearing in this matter, and he submits the arguments he made to CPM.

In response, the appointing authority argues that it appropriately removed the appellant's name from the eligible list on the basis of an unsatisfactory criminal record. The appointing authority states that it considers how close in time to the application date the criminal incidents occurred. In the instant matter, it maintains that the appellant was charged with shoplifting less than \$200 in violation of *N.J.S.A. 2C:20-11c(4)* based on an incident that occurred on December 6, 2008, and the charge was dismissed on December 10, 2009. The appellant was also charged with receiving stolen property in violation of *N.J.S.A. 2C:20-7a* based on an incident that occurred on April 25, 2011, and the charge was dismissed on July 15, 2011. He applied for the subject examination by the closing date of January 14, 2013. Citing *N.J.S.A. 2A:4A-60(a)(12)*, the appointing authority argues that as a recognized law enforcement agency, it is permitted to review and use juvenile records to assess a candidate's suitability for employment. It contends that a juvenile or adult criminal record, whether sealed or expunged, will still provide a disability to a candidate seeking any type of position as a law enforcement officer. It also argues that under its own criteria for removal from the hiring process, a candidate who has participated in a juvenile diversion program is automatically disqualified from consideration. In the appellant's case, the appointing authority avers that his juvenile violation of the law clearly relates to the employment sought

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<sup>3</sup> According to the appellant's application, he had been employed in this position since December 2011. It is noted that on his application, the appellant also listed employment as a loader at a distribution center (October 2010 to June 2012).

and thus, he is not a suitable candidate. The appointing authority adds that the 2008 incident was not isolated in that the appellant was involved in another incident in 2011 for which he was charged with receiving stolen property.<sup>4</sup> It further argues that the application clearly informed candidates of all of the reasons a potential candidate could be removed from the preemployment process.

The appointing authority also maintains that the appellant falsified his application by failing to disclose the 2009 charge of shoplifting less than \$200. In this regard, it argues that the "Arrest History" section of the preemployment application asked questions related to any type of adverse interaction with law enforcement regardless of the outcome and it clearly indicated that juvenile information must also be disclosed. Applicants were instructed to include all charges including those that are discharged under any diversion program or dismissed. The application also defined "Offense" to include "all misdemeanors, felonies, disorderly persons offenses of any criminal statute listed under New Jersey's Criminal Code (*N.J.S.A. 2C*)," including juvenile violations. More specifically, the appointing authority maintains that in response to question 46, "Have you ever been arrested, indicted, charged with or convicted of a criminal or disorderly persons offense in this state or any other jurisdiction?" the appellant answered "Yes" and disclosed the 2011 incident but did not disclose the 2009 charge of shoplifting less than \$200. The appointing authority adds that the appellant did not disclose the charge in the chart on page 18 of the application and again only listed the 2011 incident. In support, the appointing authority submits a copy of the appellant's application and documentation from the Family Automated Case Tracking System (FACTS). It is noted that in response to question 52 on the application, "Have you ever been summoned, subpoenaed or required to testify before any municipal, state, or federal agency or other investigational body for a criminal matter?" the appellant answered "Yes" and explained that he had been "summoned to appear at Newark Municipal Court for the theft under \$200 charge (2C:20-07a) which was dismissed." The FACTS documentation indicates that the appellant, as a juvenile, was charged with shoplifting less than \$200 in 2009 and that the charge was also dismissed that year.

### CONCLUSION

*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.

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<sup>4</sup> It is noted that the appellant was an adult at the time of this incident. It is also noted that the appellant provided an explanation of this incident in his application, as follows. The appellant's neighbor offered to let the appellant ride what the appellant thought was the neighbor's motorcycle. Police pulled the appellant over while he was riding the motorcycle. The appellant later learned that the motorcycle was reported stolen. The appellant explained to the arresting officer that he was not the owner of the motorcycle and that his neighbor had given him the keys.

Although CPM's determination is dated July 30, 2014, the appellant claims not to have received the determination until late April 2015. In this regard, the appellant provides a copy of an envelope, postmarked April 25, 2015, in which the determination appears to have been mailed from this agency. The appellant's appeal to the Commission is postmarked April 30, 2015. Additionally, the appointing authority does not dispute the timeliness of the appellant's appeal. Under these circumstances, the Commission will accept the appellant's appeal as timely filed and proceed to address the merits.

The appellant requests a hearing in this matter. List removal appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission 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 explained 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).

Although the appointing authority indicated that the appellant was removed consistent with its own criteria for removal from the hiring process, the Commission emphasizes that it must decide each list removal appeal on the basis of the record presented and is not bound by the criteria utilized by the appointing authority. *See, e.g., In the Matter of Debra Dygon* (MSB, decided May 23, 2000).

*N.J.A.C. 4A:4-4.7(a)1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)6*, allows the Commission to remove an eligible's name from an employment list when he has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process.

*N.J.S.A. 11A:4-11* and *N.J.A.C. 4A:4-4.7(a)4* provide that an eligible's name may be removed from an eligible list when an eligible has a criminal record which includes a conviction for a crime which adversely relates to the employment sought. The following factors may be considered in such determination:

- a. Nature and seriousness of the crime;
- b. Circumstances under which the crime occurred;
- c. Date of the crime and age of the eligible when the crime was committed;
- d. Whether the crime was an isolated event; and
- e. Evidence of rehabilitation.

The presentation to an appointing authority of a pardon or expungement shall prohibit an appointing authority from rejecting an eligible based on such criminal conviction, except for law enforcement, correction officer, juvenile detention officer, firefighter or judiciary titles and other titles as the Chairperson of the Commission

or designee may determine. It is noted that the Appellate Division of the Superior Court remanded the matter of a candidate's removal from a Police Officer eligible list to consider whether the candidate's arrest adversely related to the employment sought based on the criteria enumerated in *N.J.S.A. 11A:4-11*. See *Tharpe v. City of Newark Police Department*, 261 *N.J. Super.* 401 (App. Div. 1992).

Further, it is well established that municipal police departments may maintain records pertaining to juvenile arrests, provided that they are available only to other law enforcement and related agencies, because such records are necessary to the proper and effective functioning of a police department. *Dugan v. Police Department, City of Camden*, 112 *N.J. Super.* 482 (App. Div. 1970), *cert. denied*, 58 *N.J.* 436 (1971). *N.J.S.A. 2A:4A-48* provides that a conviction for juvenile delinquency does not give rise to any disability or legal disadvantage that a conviction of a "crime" engenders. However, the Commission can consider the circumstances surrounding an eligible's arrests, the fact that the eligible was involved in such activities and whether they reflect upon the eligible's character and the eligible's ability to perform the duties of the position at issue. See *In the Matter of Tracey Shimonis*, Docket No. A-3963-01T3 (App. Div. October 9, 2003). Thus, the appellant's juvenile arrest records were properly disclosed to the appointing authority, a law enforcement agency, when requested for purposes of making a hiring decision.

Additionally, participation in the PTI Program is neither a conviction nor an acquittal. See *N.J.S.A. 2C:43-13(d)*. See also *Grill and Walsh v. City of Newark Police Department*, Docket No. A-6224-98T3 (App. Div. January 30, 2001); *In the Matter of Christopher J. Ritoch* (MSB, decided July 27, 1993). *N.J.S.A. 2C:43-13(d)* provides that upon completion of supervisory treatment, and with the consent of the prosecutor, the complaint, indictment or accusation against the participant may be dismissed with prejudice. In *Grill, supra*, the Appellate Division indicated that the PTI Program provides a channel to resolve a criminal charge without the risk of conviction; however, it has not been construed to constitute a favorable termination. Furthermore, while an arrest is not an admission of guilt, it may warrant removal of an eligible's name where the arrest adversely relates to the employment sought. Thus, an eligible's arrest and entry into a juvenile diversionary program, which is similar to the PTI Program, could still be properly considered in removing the eligible's name from an eligible list. Compare *In the Matter of Harold Cohrs* (MSB, decided May 5, 2004) (Removal of an eligible's name reversed due to length of time that had elapsed since his completion of his PTI).

*N.J.A.C. 4A:4-4.7(a)1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)9*, allows the Commission to remove an eligible's name from an eligible list for other sufficient reasons. Removal for other sufficient reasons includes, but is not limited to, a consideration that based on a candidate's background and recognizing the nature of the position at issue, a person should not be eligible for appointment. *N.J.A.C.*

4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his name from an eligible list was in error.

In this matter, a review of the record indicates that the appointing authority reasonably requested the removal of the appellant's name from the subject eligible list based on his history of charges. While the appellant's employment application indicated some evidence of rehabilitation, including employment, this case does not present a matter of an isolated incident. In 2008, the appellant was involved in an incident that resulted in a charge of shoplifting less than \$200. In 2011, the appellant was involved in a separate incident that resulted in a charge of receiving stolen property, the appellant's second charge related to theft. The second incident occurred less than two years before the closing date for the subject examination, and so the appellant's history of charges was not so remote in time as to render the appointing authority's request unjustified. Moreover, the appellant was an adult at the time of the second incident. The Commission further notes that a Correction Officer Recruit is a law enforcement employee who must help keep order in the State prisons and promote adherence to the law. Correction Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community, and the standard for an applicant includes good character and the image of utmost confidence and trust. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966). *See also In re Phillips*, 117 *N.J.* 567 (1990). The public expects prison guards to present a personal background that exhibits respect for the law and rules.

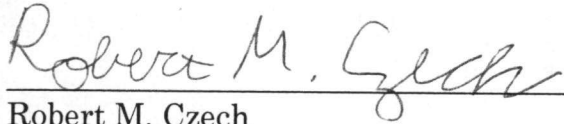
Accordingly, the appellant's criminal record provides a sufficient basis to remove his name from the eligible list. It is, therefore, unnecessary to determine whether his name could be removed on the basis of falsification of the application.

### 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.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 16<sup>TH</sup> DAY OF DECEMBER, 2015



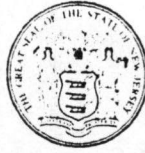
Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

Henry Maurer  
Director  
Division of Appeals and Regulatory Affairs  
Written Record Appeals Unit  
Civil Service Commission  
P.O. Box 312  
Trenton, NJ 08625-0312

Attachment

- c. Gabriel Lopez  
Nicholas J. Palma, Esq.  
Lisa Gaffney  
Joe Hill



STATE OF NEW JERSEY  
CIVIL SERVICE COMMISSION  
Division of Classification & Personnel Management  
P. O. Box 313  
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Chris Christie  
*Governor*  
Kim Guadagno  
*Lt. Governor*

Robert M. Czech  
*Chair/Chief Executive Officer*

July 30, 2014

Gabriel Lopez

**Title: Correction Officer Recruit**

**Symbol: S9988R**

**Jurisdiction: Department of Corrections**

**Certification Number: JU13D01**

**Certification Date: 05/23/2013**

**Initial Determination:** Removal – Unsatisfactory Criminal Record

This is in response to your correspondence contesting the removal of your name from the above-referenced eligible list.

The Appointing Authority requested removal of your name in accordance with N.J.A.C.4A:4-4.7(a) 4 which permits the removal of an eligible candidate's name from the eligible list for unsatisfactory criminal history.

After a thorough review of our records and all the relevant material submitted, we find that there is not a sufficient basis to restore your name to the eligible list. Therefore, the Appointing Authority's request to remove your name has been sustained and your appeal is denied.

Please be advised that in accordance with Civil Service Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs (DARA) within 20 days of the receipt of this letter. You must submit all proofs, arguments and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to MSPLR. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Please be advised that pursuant to P.L. 2010, c.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C.44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees. Address all appeals to:

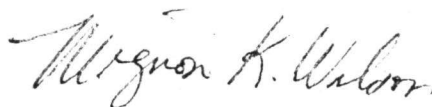


Gabriel Lopez

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Henry Maurer, Director  
Appeals and Regulatory Affairs  
Written Record Appeals Unit  
PO Box 312  
Trenton, NJ 08625-0312

Sincerely,  
For the Assistant Director, Joe Hill Jr.

A handwritten signature in cursive script, reading "Mignon K. Wilson".

Mignon K. Wilson  
Human Resource Consultant

