



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Frank Giambona
Correction Officer Recruit (S9988T)

List Removal Appeal

CSC Docket No. 2016-2638

ISSUED: **NOV 3 0 2016** (ABR)

Frank Giambona appeals the decision of the appointing authority to remove the appellant's name from the Correction Officer Recruit (S9988T), Department of Corrections eligible list on the basis of an unsatisfactory criminal record and unsatisfactory employment record.

The appellant took the open competitive examination for Correction Officer Recruit (S9988T), which had a closing date of January 8, 2015, achieved a passing score, and was ranked as a non-veteran on the subsequent eligible list. The eligible list promulgated on July 23, 2015, and expires on July 22, 2017. In disposing of the certification, the appointing authority requested the removal of the appellant's name due to an unsatisfactory criminal record and an unsatisfactory employment record. Specifically, the appointing authority asserted that the appellant was charged with theft by unlawful taking in violation of *N.J.S.A. 2C:20-3* on November, 21 2005, which was diverted through a Juvenile Conference Committee, and the charge was dismissed on April 4, 2006. The appointing authority also cited the appellant's 2010 termination from Shoprite due to excessive lateness, as well as two verbal warnings from his current employer for cleanliness and missing paperwork in 2015.

On appeal to the Civil Service Commission (Commission), the appellant argues that the theft by unlawful taking charge does not fit the criteria for removal from the eligible list because the charge was ultimately dismissed. The appellant also argues that removal from the eligible list based on an unsatisfactory employment history was also improper. The appellant acknowledges that he was

terminated from his employment with Shoprite in 2010 due to excessive lateness and received two verbal warnings from his current employer in 2015. Nevertheless, the appellant stresses that he has had an excellent employment record since 2010, citing two promotions from his current employer. The appellant also contends that his employment record is not a valid reason for removal under the terms of the pre-employment application he completed for the appointing authority.

In response, the appointing authority argues that it appropriately removed the appellant's name from the eligible list based on an unsatisfactory criminal record and an unsatisfactory employment record. In the instant matter, it maintains that the appellant was charged with theft by unlawful taking in violation of *N.J.S.A. 2C:20-3* based on an incident that occurred on October 30, 2005, the charge was dismissed on April 6, 2006, and the appellant applied for the subject examination by the closing date of January 8, 2015. Citing *N.J.A.C. 4A:4-4.7*, 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. In the appellant's case, the appointing authority contends that his juvenile violation of the law clearly relates to the employment sought and does not demonstrate the respect for the law and good judgment required for the position. It further argues that the application clearly informed candidates of all potential reasons a candidate could be removed from the pre-employment process, including listing "Has entered into a Juvenile Diversion Program, a Conditional Discharge Agreement or Pre-Trial Intervention program for any offense under *N.J.S.A. 2C* or Title 24 (including disorderly persons or petty dishonesty offenses)" as one such ground.

The appointing authority also contends that *N.J.A.C. 4A:4-4.7* allows it to remove a candidate with an unsatisfactory employment record. The appointing authority observes that in October 2010 the appellant was fired by Shoprite for excessive lateness after he had been suspended two or three times on that basis. It also notes that the appellant admits to receiving two verbal warnings from his current employer in 2015: one for missing paperwork and another for office cleanliness.

CONCLUSION

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 prohibits 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)7, allows the Commission to remove an eligible's name from an eligible list on the basis of a prior employment history that relates adversely to the position sought.

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.

Additionally, although an eligible's arrest and/or conviction for a disorderly persons offense cannot give rise to the disability arising under *N.J.A.C.* 4A:4-4.7(a)4, the fact that an eligible was involved in such activity may reflect upon the eligible's character and ability to perform the duties of the position at issue. *See In the Matter of Joseph McCalla*, Docket No. A-4643-00T2 (App. Div. November 7, 2002) (Appellate Division affirmed the consideration of a conviction of a disorderly persons offense in removing an eligible from a Police Officer eligible list). Here, as the appellant was arrested for a disorderly persons offense, the offense did not rise to the level of a crime. Nevertheless, the appellant's arrest could still be considered in light of the factors noted in *N.J.S.A.* 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 to determine whether they adversely related to the employment sought.

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 a determination of the appellant's overall fitness for the position under *N.J.A.C.* 4A:4-4.7(a)1 in conjunction with *N.J.A.C.* 4A:4-6.1(a)9. In his pre-employment questionnaire, the appellant explains that the charge stemmed from a November 2005 incident, he was 17 years old when it occurred, and that the underlying incident involved a theft of pumpkins that he participated in with friends. The appellant's pre-employment application indicates some evidence of rehabilitation, namely completion of high school in 2007, award of an associate's degree in liberal arts in 2010, earning a bachelor's degree in law and justice in 2012, and full-time employment since 2011. However, this evidence of rehabilitation is undercut by the relatively recent timing of his termination for chronic lateness by Shoprite in 2010—just over four years before the closing date for the subject examination. The nature of the incident as a theft involving a group and the

appellant's near-adulthood at the time of the incident, together with the relatively recent timeframe and somewhat conflicting evidence of rehabilitation demonstrates that the appointing authority was justified in its request to remove the appellant's name from the subject eligible list.

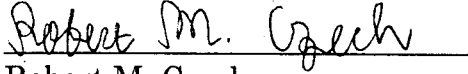
The Commission notes that a Correction Officer Recruit is a law enforcement employee who must help keep order in the State prisons and promote adherence to the law. Correction Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community, and the standard 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 demonstrate a personal background that exhibits respect for the law and rules, given their responsibilities for maintaining order in State prisons. Timeliness is part of the high standard of conduct expected of public safety workers because of the sensitive nature of their work. See *In the Matter of David O'Brien* (CSC, decided August 1, 2012). Here, the appellant acknowledges that he was suspended multiple times for chronic tardiness and was ultimately terminated by Shoprite in 2010 for that reason. The appellant's termination occurred just over four years before the closing date for the subject examination. The job specification for Correction Officer Recruit defines the duties of the position as tracking the number of inmates, escorting inmates to and from their quarters, patrolling assigned areas of the buildings and grounds, making required reports and assisting in controlling the general conduct and behavior of inmates who are gathered in groups. Clearly, termination from prior employment due to excessive tardiness reflects poorly on a candidate's ability to perform these law enforcement duties. Accordingly, the foregoing demonstrates that the record provides a sufficient basis to remove the appellant's name from the 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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF NOVEMBER, 2016



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