



STATE OF NEW JERSEY

In the Matter of Kenneth R.
O'Donnell, Police Officer
(S9999R), Teaneck

FINAL ADMINISTRATIVE
ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2016-2657

List Removal Appeal

ISSUED: NOV 30 2016 (JET)

Kenneth R. O'Donnell, represented by Michael L. Prigoff, Esq., appeals the attached decision of the Division of Agency Services (Agency Services), which upheld the removal of his name from the Police Officer (S9999R), Teaneck, eligible list on the basis of an unsatisfactory criminal record.

The appellant took the open competitive examination for Police Officer (S9999R), achieved a passing score, and was ranked on the subsequent eligible list. The appellant's name was certified to the appointing authority on October 22, 2014. In disposing of the certification, the appointing authority requested the removal of the appellant's name from the eligible list on the basis of an unsatisfactory criminal record. Specifically, the appointing authority asserted that on August 7, 2011, the appellant was arrested and charged in New York City with Driving While Intoxicated (DWI) in violation of N.Y.S. VTL § 1192(3) (dismissed). On December 14, 2011, the appellant agreed to a conditional discharge and pled guilty to Operating a Motor Vehicle While Impaired in violation of N.Y.S. VTL § 1192(1). The appellant paid a \$300 fine, a \$255 surcharge, and his drivers' license was suspended for 90 days.¹ On appeal to Agency Services, the appellant asserted, among other things, that his name should be restored to the eligible list. In a letter dated December 14, 2015, Agency Services determined that the appointing authority had presented a sufficient basis to remove the appellant's name from the subject eligible list.

¹ It is noted that the appellant refused to participate in a breathalyzer test.

In his appeal postmarked February 2, 2016, the appellant asserts that he was not found guilty of committing a criminal offense. Specifically, the appellant states that he was charged and pled guilty to Operating a Motor Vehicle While Impaired which is only a motor vehicle offense. The appellant adds that he agreed to participate in a one-year conditional discharge program, and his drivers' license was suspended for 90 days because he refused to participate in a breathalyzer test. Further, the appellant explains the charges were the result of youthful indiscretion and he has learned a lesson from the incident. The appellant adds that the incident occurred over three years prior to when he applied for the subject position. Moreover, the appellant asserts that the matter should be considered an isolated incident and, as such, his name should be restored to the list.²

Additionally, the appellant's attorney explains that, as a result of a medical condition that he experienced, he was unable to file the appellant's appeal on a timely basis. In light of his medical condition and the circumstances of the case, he now requests that the instant matter be reviewed by this agency.

In response, the appointing authority, represented by Jennifer Roselle, Esq., maintains that the appellant's name should be removed from the eligible list. Initially, the appointing authority asserts that the appellant's appeal is untimely and should be dismissed. Additionally, the appointing authority explains that the appellant's behavior was illegal and dangerous, and he cannot attempt to minimize his involvement in the incident as having "a little fun." The appointing authority states that the appellant engaged in underage drinking prior to his arrest, which is unacceptable for candidates applying for the position of Police Officer. In this regard, his actions demonstrate that he is unable to follow the rules, which cannot be tolerated in a paramilitary organization. The appointing authority adds that the appellant did not provide any evidence to refute the police reports or any other information to show that he did not engage in prohibited activity. Moreover, the appointing authority contends that police officers are held to a higher standard of conduct, and the appellant's behavior shows that he is not a suitable candidate for the subject position.

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

² In support of his argument, the appellant provides a certification dated January 29, 2016, which indicates, among other things, that he was under 21 at the time of the August 7, 2011 arrest. He states that he was drinking with friends a few hours prior to the arrest. Further, the appellant avers that he underwent counseling for drug and alcohol dependency and was evaluated for signs of drug and alcohol abuse. He states that urinalysis and breathalyzer tests revealed that he did not require substance abuse treatment.

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 Civil Service 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).

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 Civil Service 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. Additionally, the Commission, in its discretion, has the authority to remove candidates from lists for law enforcement titles based on their driving records since certain motor vehicle infractions reflect a disregard for the law and are incompatible with the duties of a law enforcement officer. See *In the Matter of Pedro Rosado v. City of Newark*, Docket No. A-4129-01T1 (App. Div. June 6, 2003); *In the Matter of Yolanda Colson*, Docket No. A-5590-00T3 (App. Div. June 6, 2002); *Brendan W. Joy v. City of Bayonne Police Department*, Docket No. A-6940-96TE (App. Div. June 19, 1998).

Moreover, pursuant to *N.J.S.A. 2C:36A-1*, under a Conditional Discharge, termination of supervisory treatment and dismissal of the charges shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly person offense but shall be reported by the clerk of the court to the State Bureau of Identification criminal history record information files. See *State v. Marzolf*, 79 *N.J.* 167 (1979) (Drug offense which has resulted in supervision and discharge was part of the defendant's personal history to be revealed for purposes of sentencing for subsequent drug offenses, but such record was not to be given the weight of a criminal conviction). Thus, the appellant's arrest and Conditional

Discharge, even though it was done in accordance with New York law, could still properly be considered in removing his name from the subject eligible list.

Initially, the appointing authority argues that this matter should be dismissed as untimely. With regard to timeliness, it is noted that there is no jurisdictional statutory time limit within which the appellant was required to appeal. See *In the Matter of Allen*, 262 N.J. Super. 438 (App. Div. 1993). N.J.A.C. 4A:2-1.1(b) provides that an appeal shall be filed within 20 days of notice of the action, decision, or situation being appealed, and N.J.A.C. 4A:1-1.2(c) provides that a rule may be relaxed for good cause. The record does not evidence any basis in this particular case to extend or to relax the time for appeal. In this regard, it is appropriate to consider whether the delay in asserting the right to appeal was reasonable and excusable. *Appeal of Syby*, 66 N.J. Super. 460, 464 (App. Div. 1961) (construing "good cause" in appellate court rules governing the time for appeal); *Atlantic City v. Civil Service Com'n*, 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 Bd. of Educ.*, 90 N.J. 145 (1982). See, also *Allen*, *supra* (allowing relaxation of the Commission's appeal rules where police officer repeatedly, but unsuccessfully, sought clarification of his employment status); *In the Matter of Roberta Howard* (MSB, decided January 28, 2004); *In the Matter of Henrietta Mik* (MSB, decided November 19, 2003). See also, *In the Matter of Rochelle Rosen*, Docket No. A-6468-03T3 (App. Div. June 24, 2005) (Appropriate to decline to relax 20-day time frame for filing an appeal, in light of an unexplained two-year delay in filing an appeal); *In the Matter of Wayne Varga* (MSB, decided March 23, 2005) (Appellant unaware of time period for filing appeal who ultimately filed appeal six months later who argued that he had to address the consequences of his job loss not a basis to overlook inordinate delay in filing appeal).

A review of the record reveals that Agency Services notified the appellant in its December 14, 2015 determination that he had a 20-day timeframe to submit an appeal to this agency regarding the removal of his name from the subject list. Additionally, records reflect that the appellant filed an appeal which was postmarked February 2, 2016. As such, the appellant's appeal was received by this agency beyond the 20-day timeframe indicated in Agency Services' December 14, 2015 determination. The appellant's attorney explains that, as a result of a serious medical issue that he was experiencing, he was unable to file the appeal within the 20-day timeframe. Although it is unfortunate that his counsel's medical condition may have impacted the timeliness of his appeal, there is no evidence in the record that the appellant was not aware of Agency Services' adverse determination or that he took any action at an earlier time to pursue this matter with the Commission. Therefore, this appeal can be dismissed solely on the grounds that it is untimely.

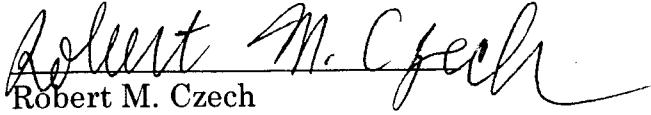
Nevertheless, even assuming the appellant filed a timely appeal, he has not established that it was improper to remove his name from the subject list. In the instant matter, the documentation indicates that the appellant was arrested and charged with DWI (amended to Operating a Motor Vehicle While Impaired). The appellant argues that his name should be restored to the eligible list since the arrest was an isolated incident and he was a youth at the time of the arrest. However, at the time of the incident, the appellant was 20 years old when he was charged in August 2011. As such, he was an adult at the time of the incident. Further, the appellant does not provide an adequate explanation regarding the circumstances of his arrest. In this regard, although the appellant states that the police documentation does not indicate that he was drunk at the time of the arrest, he admits that he was driving after drinking just a few hours prior to his arrest. Although the appellant states that he has learned a lesson from the incident, only two years had passed from the date of his arrest to the date he applied for the subject examination. Thus, not enough time has elapsed to show that he has been sufficiently rehabilitated. Additionally, the appellant's ability to drive a vehicle in a safe manner is not the main issue in determining whether or not he should remain eligible to be a Police Officer. The appellant has offered no substantive explanation for the infraction and his driver's license was suspended as a result of the 2011 arrest. As such, it is clear that the appellant's driving record shows disregard for the law and his questionable judgment. Such qualities are unacceptable for an individual seeking a position as a municipal Police Officer. Moreover, Police Officers hold highly visible and sensitive positions within the community and the standard for an applicant includes good character and an 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 Police Officers to present a personal background that exhibits respect for the law and rules. Therefore, there is 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



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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- c: Kenneth R. O'Donnell
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December 14, 2015

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RE: Removal of Name from Eligible List – Kenneth R. O'Donnell

Title: Police Officer
Jurisdiction: Teaneck
Symbol: S9999R
Certification No: OL141382
Certification Date: 10/22/14

Dear Mr. Prigoff:

This is in response to your correspondence contesting the removal of your client's 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 if "The eligible has a criminal record which adversely relates to the employment sought". Furthermore, per 4A:4-4.7(a)4(ii), "The presentation of a pardon or an expungement shall prohibit removal from a list, except for law enforcement, correction officer, juvenile detention officer, firefighter or judiciary titles and other titles as the Chairperson of the Civil Service Commission or designee may determine."

In support of its decision, the Appointing Authority provided copies of selected pages of your client's application to Teaneck and other documents which indicate that your client was arrested for Driving While Intoxicated in New York City on August 7, 2011 and plead guilty to Operating a Motor Vehicle While Impaired on December 14, 2011.

In their most recent letter dated May 27, 2015 the office of Genova Burns, LLC, acting as the Attorneys for the Township of Teaneck, provided to you the last piece of information utilized by the Appointing Authority which justified their decision to remove your client's name. You had twenty (20) days to submit your appeal arguments after your receipt of the information provided by the Appointing Authority. To date, we have not received a formal appeal from you or your client. The time period to submit arguments has now elapsed and we therefore have made our determination based on the information submitted by all parties.

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 client's name to the eligible list. Therefore, the Appointing Authority's decision to remove your client's name has been sustained and the appeal is denied.

In accordance with Merit System Rules, this decision may be appealed to the Division of Appeals and Regulatory Affairs (DARA) within 20 days of 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 DARA. 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:

Henry Maurer, Director
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Sincerely,
For the Director,



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