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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Fred Emmer, Police
Officer (S9999R), Oakland

List Removal Appeal

CSC Docket No. 2017-774

ISSUED: **MAR 23 2017** (HS)

Fred Emmer, represented by Catherine M. Elston, Esq., appeals the removal of his name from the eligible list for Police Officer (S9999R), Oakland on the bases of his age and an unsatisfactory criminal record.

The appellant, a veteran,¹ took and passed the open competitive examination for Police Officer (S9999R), which had a closing date of September 4, 2013. The resulting eligible list promulgated on May 2, 2014 and expires on May 1, 2017.² The appellant's name was certified to the appointing authority on January 8, 2016. In disposing of the certification, the appointing authority requested the removal of the appellant's name on the bases of his age and an unsatisfactory criminal record. Specifically, the appointing authority asserted that the appellant, notwithstanding his prior service with the United States Navy (Navy), did not meet the age requirement at the closing date of the examination since he was over 35 years old. In this regard, he was 37 years, seven months, and six days old at the time. The appointing authority noted that the appellant served in the Navy from April 16, 1996 to April 14, 2000 and that he indicated periods of deployment from August 1997 to February 1998 and June 1999 to December 1999. In addition, the appointing authority asserted that the appellant was charged with theft in violation of *N.J.S.A. 2C:20-3(a)* in 1994; forgery in violation of *N.J.S.A. 2C:21-1(a)(2)* in 1994; and eluding an officer in violation of *N.J.S.A. 2C:29-2(b)* in 2001. The appellant

¹ The appellant established veteran's status on October 16, 2000.

² The expiration date of the subject eligible list was extended one year, to May 1, 2017.

pled guilty to these charges. Subsequently, the appellant had his criminal record expunged.

On appeal to the Civil Service Commission (Commission), the appellant contends that he is entitled to deduct the entire period of his service with the Navy, three years, 11 months, and 28 days, from his age at the examination closing date, bringing him within the maximum age requirement. He states that he participated in Operation Southern Watch from August 29, 1997 to February 1998 and from October 25, 1999 to November 27, 1999, Operation Red Reef in 1999 and Operation Stabilize in 1999. The appellant asserts that he relied upon the notice of his veteran's status, certification notices, the certification disposition notice, the Civil Service Veteran's Preference Claim Form and the Municipal Police Officer Maximum Hiring Age Information Sheet, none of which indicate that the appellant's military time would not serve to reduce his age or provide for the appointing authority's interpretation. Assuming, *arguendo*, that the appointing authority's interpretation was correct, the appellant relies upon the principles of equitable estoppel and detrimental reliance and precedent including *Sellers v. Board of Trustees of the Police and Firemen's Retirement System*, 399 N.J. Super 51 (App. Div. 2008). In *Sellers*, the court held that the Police and Firemen's Retirement System Board of Trustees (PFRS Board) had the legal authority in certain instances to apply equitable estoppel and waive the statutory age requirements. In that case, where Sellers and the township honestly but mistakenly believed that Sellers' age would be adjusted for his time as a Police Officer and in military service, the court held that the statutory age requirement could be waived. The court said, in pertinent part:

A practice has developed whereby the [PFRS Board] has exercised equitable powers to waive the age requirement on a case by case basis . . . It is the balance of these individuals' interest in their employment against the competing public interest, coupled with the need to read all statutes fairly and reasonably, which compels this conclusion.

Id. at 55-57, citing Att'y Gen. Op. 97-1, pages 3-4 (1997). The appellant argues that as court rulings now provide for the applicability of the doctrines of estoppel and detrimental reliance against government agencies, he is entitled to the requisite age deduction and restoration to the eligible list. He maintains that he relied on various government-issued documents in making application for the position of Police Officer as qualifying him to do so. In his view, depriving him of the opportunity of employment imposes a substantial hardship on him, undermines the public policy of the Civil Service Act and serves an injustice to a veteran.

Additionally, the appellant argues that upon consideration of the factors in *N.J.S.A. 11A:4-11* and *N.J.A.C. 4A:4-4.7(a)4*, he does not have a criminal record that relates adversely to the employment sought. At the time of his 1994 and 2001

arrests, he was 18 and 25 years old, respectively. The 1994 offenses were municipal court matters, and the 2001 offense occurred at a time of stress and readjustment after his discharge from the Navy and after volunteering as an Emergency Medical Technician (EMT) at Ground Zero after 9/11. The offenses occurred approximately 12 or more years prior to the examination closing date. He also notes his service in the Navy, 15 years of steady work as an EMT and paramedic, six years of marriage and the expungement of his criminal record.

In response, the appointing authority, represented by Adam S. Abramson-Schneider, Esq., maintains that it properly removed the appellant's name from the eligible list because he did not meet the statutory maximum age requirement. It contends that the appellant fails to distinguish between military service and service during times of war or conflict, as required by statute, and it is only the latter that may be deducted. In this regard, the appointing authority argues that the only applicable military service during time of war that the appellant may deduct is his participation in Operation Southern Watch and that the appellant still would not meet the maximum age requirement. The appointing authority posits that ignorance to the statutory provisions governing an age reduction due to military service is not a defense and that the appellant cannot rely on his mistaken belief that he would be entitled to a more significant age reduction. The appointing authority also counters that no compelling argument has been put forth that the appellant is entitled to reduce his age based on his entire military service under a theory of equitable estoppel and contends that this case is unlike *Sellers, supra*. There, *Sellers* was not merely removed from the eligible list. Rather, *Sellers* was hired as a Fire Fighter and left his former employment under the belief that he met all eligibility requirements (emphasis in original). Here, the appointing authority did not hire the appellant under the mistaken belief that he met the age requirements because of prior military service but instead lawfully concluded that his military service during time of war was insufficient to bring him within the maximum age requirement. The appellant also did not rely on any action by the appointing authority or any expectation of being hired in a detrimental manner by, for instance, leaving other employment. The appointing authority's only action in this case was the removal of the appellant's name from the eligible list. It also argues that allowing an individual to base a detrimental reliance argument on his removal from an eligible list is illogical and would undermine an employer's responsibility to ensure that applicants are eligible for employment before hiring. The appointing authority further maintains that hardship is not detrimental reliance, and, regardless, the appellant provides no evidence of hardship.

In addition, the appointing authority asserts that the appellant's criminal record provides an additional basis to remove his name from the eligible list, upon consideration of the factors in *N.J.S.A. 11A:4-11* and *N.J.A.C. 4A:4-4.7(a)4*. It argues that the appellant's 2001 offense is of significant concern because the appellant sought to evade law enforcement while engaging in criminal conduct and

conduct that posed a risk to the general public. In the 1994 incident, the appellant was under the influence of drugs when friends challenged him to steal a purse and forge a check to purchase more drugs. While the appointing authority notes its respect for all who volunteered after 9/11 and sympathizes with the hardship the appellant may then have endured, his 2001 offense nevertheless showed a direct disregard for law enforcement officers seeking to determine whether he was engaging in unlawful conduct. The appellant was a mature adult capable of sound judgment at the time of each incident, particularly true of the 2001 offense in that it occurred after his military service. The appointing authority also contends that evidence of rehabilitation is not a determinative factor but must be assessed in light of all relevant circumstances surrounding the criminal conduct.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)2, allows the Commission to remove a candidate's name from a list because the candidate is ineligible by law for employment in that title. *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 the decision to remove his name from an eligible list was in error.

N.J.S.A. 40A:14-127 states, in pertinent part, that no person shall be appointed as a member or officer of the police department or force in any municipality who is over 35 years of age. *N.J.S.A.* 40A:14-127 also provides that in any municipality operating under Title 11A (Civil Service), the announced closing date of a Civil Service examination determines the age cut-off deadline. Further, *N.J.A.C.* 4A:4-2.3(b)2iii provides that veterans who are above a maximum age requirement, may recalculate their age for recording purposes pursuant to *N.J.S.A.* 38:23A-2. *N.J.S.A.* 38:23A-2 provides that an individual who served on active military or naval duty in time of war "shall be deemed to meet such maximum age requirement, if his actual age, less the period of such service, would meet the maximum age requirement in effect on the date the person entered into such service." The term "in time of war" is interpreted in accordance with *N.J.S.A.* 11A:5-1, which provides an exhaustive list of qualifying conflicts and types of service. Specifically, *N.J.S.A.* 11A:5-1(b) provides in pertinent part that:

"Veteran" means any honorably discharged soldier, sailor, marine or nurse who served in any army or navy of the allies of the United States in World War I, between July 14, 1914 and November 11, 1918, or who served in any army or navy of the allies of the United States in World War II, between September 1, 1939 and September 2, 1945 and who was inducted into that service through voluntary enlistment, and was a citizen of the United States at the time of the enlistment, and who did not renounce or lose his or her United States citizenship; or any

soldier, sailor, marine, airman, nurse or army field clerk, who has served in the active military or naval service of the United States and has been discharged or released under other than dishonorable conditions from that service in any of the following wars or conflicts and who has presented to the Adjutant General of the Department of Military and Veterans' Affairs sufficient evidence of the record of service and received a determination of status no later than eight days prior to the issuance of an employment list, for which that individual received a passing score on an examination:

* * *

(10) Operation Northern Watch and Operation Southern Watch, on or after August 27, 1992, or the date of inception of that operation, as proclaimed by the President of the United States, Congress or United States Secretary of Defense, whichever date of inception is earliest, who served in the theater of operation, including in the Arabian peninsula and the Persian Gulf, and in direct support of that operation for a period, continuously or in the aggregate, of at least 14 days in such active service commencing on or before the date of termination of that operation, as proclaimed by the President of the United States, Congress or United States Secretary of Defense, whichever date of termination is the latest; provided, that any person receiving an actual service-incurred injury or disability while engaged in such service shall be classed as a veteran whether or not that person has completed the 14 days' service as herein provided;

N.J.S.A. 11A:5-1(c) provides that "War service" means service by a veteran in any war or conflict described in this chapter during the periods specified.

In the instant matter, it is not disputed that the appellant was 37 years, seven months, and six days old at the time of the closing date and he established veteran's status as of October 16, 2000. Therefore, in order to be eligible for a Police Officer position, the appellant must be able to reduce his age by two years, seven months, and seven days so that he is not over the age of 35. It is noted that a candidate is considered to be over 35 years of age on the candidate's 35th birthday. Thus, the question before the Commission is whether the appellant possesses a sufficient amount of service "in time of war" to reduce his age pursuant to *N.J.S.A.* 38:23A-2. The record reveals that the appellant served in the Navy from April 16, 1996 to April 14, 2000. The appellant participated in Operation Southern Watch from August 29, 1997 to February 1998 and from October 25, 1999 to November 27, 1999 (approximately seven months). Operation Southern Watch is a qualifying conflict for age reduction purposes. However, the appellant's other service, including his participation in Operation Red Reef and Operation Stabilize, is not

specified as service in qualifying conflicts. It is noted that where the veteran's preference statute requires service *in* an area of conflict in order to establish entitlement to the preference, candidates for titles with maximum age requirements are only entitled to deduct service *in* the area of conflict from their age as of the closing date. See *In the Matter of Charles R. Wells, III* (CSC, decided February 26, 2014); *In the Matter of Wilfredo Ruiz* (CSC, decided May 1, 2013); *In the Matter of Andre F. Jones* (CSC, decided January 14, 2009); *In the Matter of Daniel M. Kimmel* (MSB, decided December 20, 2006). Consequently, the appellant has only presented that he can recalculate his age by approximately seven months and has fallen short of the required two years, seven months, and seven days to reduce his age.

The appellant's claim that various government-issued documents he relied upon failed to indicate that his military time would not serve to reduce his age is unpersuasive. In this regard, the announcement and application for the S9999R examination, which the appellant completed, clearly advised candidates of the age restrictions for municipal Police Officers. Specifically, in the announcement, applicants were informed:

4. Applicants must be at least 18 years of age as of September 4, 2013. Applicants for Municipal Police Officer positions cannot be over 35 years of age (one is considered over 35 on the day after his/her 35th birthday) as of September 4, 2013, unless they meet the exceptions in "Maximum hiring age requirement for Municipal Police Officer." NOTE: The age 35 maximum hiring requirement applies only to Municipal Police Officer and its bilingual titles.

The announcement also indicated: "Before proceeding, you MUST Click here and read the 2013 Law Enforcement Examination Fact Sheet." The section in the 2013 Law Enforcement Examination Fact Sheet entitled "Maximum Hiring Age Requirement for Municipal Police Officer Positions" specified that applicants could deduct from the actual age the amount of time they served in the military *only* during the conflicts and under the conditions for which they would qualify for Civil Service veteran's preference. That section also included the following note:

Appointing Authorities will be notified of any applicant who is over the age of 35 and who may be certified for a possible Municipal Police Officer appointment in order to determine whether the applicant satisfies the age requirement exception.

Therefore, the appellant, when he filed for the examination in 2013, was on notice of the age requirements, what service could be utilized to reduce his age, and the appointing authority's ability to determine whether he met the age requirement exception upon certification.

The appellant's contention that restoration to the eligible list is warranted pursuant to the principle of equitable estoppel noted in *Sellers, supra*, is similarly unpersuasive. In that case, Sellers appealed the determination of the PFRS Board denying him enrollment in PFRS because his age exceeded 35, the statutory maximum for such enrollment. Sellers had left his previous job and accepted employment as a Fire Fighter with the township. Both Sellers and the township thought that once Sellers' age was adjusted for his time as a Police Officer and his years in military service, he would meet the statutory requirements. The court found that the PFRS Board did have the authority to apply equitable principles to provide a remedy when justice so demands, provided the power is used rarely and sparingly, and does no harm to the overall pension scheme. Therefore, the court remanded the matter to the PFRS Board to determine whether the facts warranted application of equitable principles. However, the Commission finds that this matter is distinguishable from *Sellers* as the extraordinary circumstances in that case are not present here. In this matter, there is no evidence that the appointing authority made any material mistakes, made any misrepresentations, or was neglectful in any way towards the appellant, as there is no evidence that the appointing authority ever even made an offer of employment. There is also no evidence that the appellant relied on any actions by the appointing authority to his detriment.

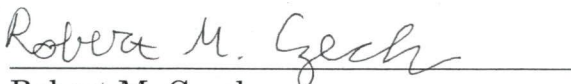
While the Commission is duly impressed by the appellant's military service, it emphasizes that it is the appellant's burden of proof to demonstrate that he is eligible for employment as a Police Officer. Therefore, after a careful review of the matter, the appellant has failed to meet this burden of proof. Accordingly, there is sufficient justification for removing the appellant's name from the Police Officer (S9999R), Oakland eligible list on the basis of his age. As such, it is unnecessary to determine whether his name could be removed on the basis of an unsatisfactory criminal record.

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 22ND DAY OF MARCH, 2017



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