



STATE OF NEW JERSEY

In the Matter of Waleek Livingston,
Fire Fighter (M1566T), Plainfield

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2019-2241

List Removal Appeal

ISSUED: AUGUST 5, 2019 (SLK)

Waleek Livingston appeals his removal from the eligible list for Fire Fighter (M1566T), Plainfield on the basis that he possessed an unsatisfactory criminal background.

The appellant took the open competitive examination for Fire Fighter (M1566T), which had an August 31, 2015 closing date, achieved a passing score, and was ranked on the subsequent eligible list. In seeking his removal, the appointing authority indicated that the appellant possessed an unsatisfactory criminal background. Specifically, the appointing authority's background report indicates that he was arrested for possession of marijuana in 2004, 2005, 2007, twice in 2008, 2013, and on March 16, 2017. The appellant paid a fine and entered a diversionary program for the 2004 charge and was found guilty of the 2008 charge and paid a fine. All other marijuana charges were dismissed.¹

On appeal, the appellant presents that his name was originally certified to the appointing authority on certification OL170139. In May 2017, the appellant indicates that the appointing authority asked him to elaborate on his background and he responded by explaining that he had an open court matter. Thereafter, the Deputy Chief explained that the appellant would not be able to attend the academy with a pending court matter. Nevertheless, the appellant indicates that the Deputy Chief

¹ On appeal, the appellant indicates that although the 2017 marijuana charges from the March 16, 2017 arrest were dismissed, he was found guilty of failure to give a proper signal and paid a fine.

advised that he could attend either the first or second academy class, depending on when his court matter was resolved. The appellant indicates that on October 25, 2017, the open matter was resolved by him paying a fine and court costs for failure to use a signal. However, as the first academy class already started, he needed to wait for the second class. Thereafter, in February 2018, his name was certified on OL180111 and he started the second-class phase processing in April 2018. Subsequently, in July 2018, he was notified that his name was removed from the list due to an unsatisfactory criminal background. The appellant questions how his name could be removed after he previously passed the background check and nothing new has occurred. The appellant understands that he has been arrested for possession of marijuana numerous times, but emphasizes that he has not been convicted on numerous charges and contends that it was unfair for the appointing authority to remove his name without giving him the opportunity to explain these incidents. Further, he believes that if his background was unacceptable, he should have been removed on the first certification. The appellant states that he was advised that his background is not what the appointing authority is looking for in a Fire Fighter as the position requires incumbents to work closely with the police. However, the appellant highlights that he has friends who are in the police department who work closely with him. Additionally, he indicates that he works with councilmen and has a non-profit organization that tries to prevent juvenile delinquency and furthers youth education. The appellant requests that he not be hindered by his past and be given an opportunity.

Although given the opportunity, the appointing authority has not responded to the appeal.

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 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 (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, participation in a diversionary 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). In *Grill, supra*, the Appellate Division indicated that the diversionary 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, the appellant's arrest and entry into a diversionary program could still be properly considered in removing his name from the subject 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 diversionary program).

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 or her name from an eligible list was in error.

In the instant matter, a review of the record indicates that the appointing authority had a valid reason to remove the appellant's name from the list. Specifically, the record indicates that the appellant was arrested for possession for marijuana seven times between 2004 and 2017, including on March 16, 2017, which was after the August 31, 2015 closing date. The appellant's multiple adverse contacts with the law, including a recent arrest after the closing date, is relevant to the position sought, as such conduct is indicative of the appellant's exercise of poor judgment, which is not conducive to the performance of duties of a Fire Fighter. See *In the Matter of Nick Castello* (CSC, decided May 17, 2017). Concerning the appellant's belief that it is unfair that his name was removed from the list after previously being subjected to a background investigation where his name was not removed, a review of the record indicates that the appellant's name was certified on OL170139 and the disposition of the appellant's name was recorded as being retained, but not reachable for appointment. In other words, as the appellant was not reachable for appointment at that time, the appointing authority did not need to make any judgment on the appellant's background. It was not until the appellant was reachable for appointment on certification OL180111 that the appointing authority needed to make a judgment about his background, which it found unsatisfactory.

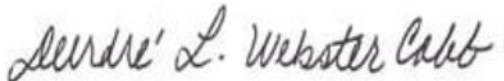
Accordingly, the appellant has not met his burden of proof in this matter and the appointing authority has shown sufficient cause for removing his name from the Fire Fighter (M1566T), Plainfield eligible list. The Commission notes, however, that with the further passage of time, and absent any further adverse incidents, the appellant's background as presented in this matter will be insufficient to remove his name from future similar lists.

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 31st DAY OF JULY, 2019



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