



B-034

STATE OF NEW JERSEY

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

In the Matter of Angel E. Herrera,
Correctional Police Officer (S9988V),
Department of Corrections

CSC Docket No. 2019-3478

List Removal Appeal

ISSUED: May 1, 2020 (JET)

Angel E. Herrera appeals the removal of his name from the Correctional Police Officer (S9988V), Department of Corrections eligible list on the basis of an unsatisfactory background report.

The appellant took the open competitive examination for Correctional Police Officer (S9988V), achieved a passing score, and was ranked on the subsequent eligible list. The appellant's name was certified on October 20, 2017. 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 background report. Specifically, the appointing authority asserted that, on January 2, 2003, the appellant was arrested in Trenton and charged with Prohibited Weapons/Devices in violation of *N.J.S.A. 2C:39-3H* (4th degree), plead guilty, paid a fine, and completed a 36 month diversionary program.

On appeal to the Civil Service Commission (Commission), the appellant asserts, among other things, that the 2003 arrest occurred several years ago and he requests that his name be restored to the list as he is still interested in an appointment to the subject position.

In response, the appointing authority maintains that the appellant was properly removed from the subject list. Specifically, the appointing authority asserts that the appellant did not explain his involvement in the 2003 incident. The appointing authority adds that its appointment criteria allows for the

removal of candidates who completed diversionary programs within seven years of promulgated civil service list. Moreover, the appointing authority contends that the appellant's background demonstrates that he is not a suitable candidate for an appointment to the subject position.

CONCLUSION

N.J.S.A. 11A:4-11, in conjunction with *N.J.A.C.* 4A:4-4.7(a)4, provides that an eligible's name may be removed from an employment list when an eligible has a criminal record which includes a conviction for a crime which adversely relates to the employment sought. In addition, when the eligible is a candidate for a public safety title, an arrest unsupported by a conviction may disqualify the candidate from obtaining the employment sought. See *Tharpe, v. City of Newark Police Department*, 261 *N.J. Super.* 401 (App. Div. 1992). In this regard, the Commission must look to the criteria established in *N.J.S.A.* 11A:4-11 and *N.J.A.C.* 4A:4- 4.7(a)(4) to determine whether the appellant's criminal history adversely relate to the position of Correction Officer Recruit. 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, firefighter or correction officer and other titles as determined by the Commission. It is noted that the Appellate Division of the Superior Court remanded the matter of a candidate's removal from a Police Officer employment 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, supra*.

Additionally, participation in the PTI Program is neither a conviction nor an acquittal. However, it has not been construed to be a favorable disposition. See *In the Matter of Clifton Gauthier, Rockaway Township*, *N.J. Super.* ___ (App. Div. 2019); *Grill and Walsh v. City of Newark Police Department*, Docket No. A- 6224-98T3 (App. Div. January 30, 2001); See also *N.J.S.A.* 2C:43-13(d). *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, the appellant's arrest and entry

into the PTI program could still be properly considered in removing his name from the subject eligible list.

Additionally, *N.J.A.C.* 4A:4-4.7(a), 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 an 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); *In the Matter of Yolanda Colson, Correction Officer Recruit (S9999A), Department of Corrections*, Docket No. A-5590-00T3 (App. Div. June 6, 2002); *In the Matter of Pedro Rosado v. City of Newark*, Docket No. A-4129-01T1 (App. Div. June 6, 2003). *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.

Initially, with respect to the appointing authority's arguments that its hiring criteria excludes candidates who have been involved in a diversionary and/or a conditional discharge within seven years of the promulgated Civil Service list, the Commission is not bound by the appointing authority's hiring criteria. However, in this case, the appointing authority is not following its own guidelines with respect to its hiring criteria, as the appellant's infraction occurred more than seven years ago.

In this matter, the record indicates that the appellant was charged with Prohibited Weapons/Devices in violation of *N.J.S.A.* 2C:39-3H (4th degree), plead guilty, paid a fine, and completed a 36-month diversionary program. Although the appellant states several years have passed since the time of the incident, he does not provide any information to explain his involvement in the incident, nor does he provide any evidence of rehabilitation. Regardless, given the age of the incident, the fact that he successfully completed PTI, and has no further criminal infractions, his criminal background cannot be used to remove him from the list. However, the appellant indicated on his employment application that as recently as 2015 he was involved in various driving related infractions including DUI and failure to report an accident. These serious infractions occurred just over two years from his certification on the list.

The Commission is ever mindful of the high standards that are placed upon law enforcement candidates and personnel. The public expects Correctional Police Officers to present a personal background that exhibits respect for the law and rules. In this regard, it is recognized that a Correctional Police Officer is a law enforcement employee who must

maintain the safety and order of the prison population. Correctional 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). Accordingly, the appellant's recent driving infractions provide sufficient cause to remove his name from the eligible list for Correctional Police Officer (S9988V). However, the removal in this matter does not prevent the appellant from applying for any similar positions in the future, as the further passage of time without further infractions may be sufficient to show that he has been rehabilitated.

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 29TH DAY OF APRIL , 2020



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