



STATE OF NEW JERSEY

In the Matter of Yvonne Zirrith,
Sheriff's Officer Lieutenant
(PC1557A), Middlesex County
Sheriff's Office

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

CSC Docket No. 2024-189

List Bypass Appeal

ISSUED: October 11, 2023 (SLK)

Yvonne Zirrith, represented by Daniel J. Zirrith, Esq. requests reconsideration of *In the Matter of Yvonne Zirrith* (CSC, decided June 7, 2023) where the Civil Service Commission (Commission) denied her appeal of the bypass of her name on the Sheriff's Officer Lieutenant (Lieutenant) (PC1557A), Middlesex County Sheriff's Office eligible list and ordered that certification PL221601¹ be amended to indicate that her name had been removed from the subject eligible list.

By way of background, on November 3, 2022, D.S. was demoted from Sheriff's Officer Sergeant (Sergeant) to Sheriff's Officer. On November 4, 2022, a certification for Lieutenant (PC1557A), Middlesex County, was issued, where Zirrith, a disabled veteran, ranked number two and was bypassed. D.S., a non-veteran, who appeared as the number one ranked eligible was also bypassed. The third ranked candidate, a non-veteran, was appointed. Zirrith filed an appeal to the Commission, arguing that once D.S. was demoted to Sheriff's Officer, he was no longer eligible for the subject examination, and his name should not have been certified. Therefore, Zirrith maintained that her name should have been the first ranked candidate on the subject certification, and since she is a disabled veteran and the two subsequent positioned candidates were non-veterans, her appointment was mandated under *N.J.A.C. 4A:4-*

¹ The initial decision had a typo and incorrectly directed Division of Human Resources Information Services to amend certification PL220040 to indicate that Zirrith be removed from the list. The correct certification is PL221601. The Division of Human Resources Information Services has amended PL221601 pursuant to the Commission's decision.

4.8. The appointing authority argued, among other things, that since D.S. could appeal his discipline, which he did, under *N.J.A.C.* 4A:4-4.7(a), his removal was not mandated, and it used its discretion to bypass him instead of removing him. Therefore, the appointing authority argued that since Zirrieth was not the first positioned candidate, it could bypass her under the “Rule of Three” even though she was a disabled veteran. Upon its review, the Commission found that D.S. was no longer eligible for the subject examination as of the effective date of his demotion since he was no longer serving in a title to which the examination was open. Therefore, it found that Zirrieth was the first positioned candidate on the subject certification. Consequently, since Zirrieth was a disabled veteran, she needed to be either appointed or removed under *N.J.A.C.* 4A:5-2.2(c). The Commission noted that Zirrieth’s disciplinary history included major discipline, more recent minor discipline, and counseling after the closing date. Therefore, it found that Zirrieth’s employment record was adverse to being a Lieutenant, a high-level law enforcement position. Accordingly, the Commission denied Zirrieth’s appeal and ordered that the subject certification be amended to indicate that Zirrieth’s name had been removed from the subject eligible list.

In her request, Zirrieth states that the appointing authority never claimed that she should be removed from the subject eligible list, and while it discussed her disciplinary history to support its decision to bypass her, it only asked the Commission to deny her bypass appeal. She argues that the Commission improperly concluded that she had proper notice regarding the removal of her name and the chance to respond to her removal. Therefore, Zirrieth asserts that since the Commission found that she was improperly bypassed, she should have been appointed.

Zirrieth asserts that the Commission improperly removed her name from the subject eligible list. She maintains that the appointing authority presented inaccuracies regarding her service and disciplinary history. Zirrieth notes that the Undersheriff’s certification in support of her bypass only mentions a 2012 45-day suspension to support her bypass, and he does not present any other discipline to support this action. However, she highlights that this disciplinary did not prevent her from being promoted to Sergeant in 2018. Zirrieth acknowledges that the Undersheriff attached a summary of what he called her disciplinary history. However, she contends that counseling and written reprimands are no longer part of her record pursuant to her collective negotiations agreement (CNA), they should not be maintained in her personnel file and/or in a separate document listing prior discipline charges, and the appointing authority violated the CNA by maintaining and presenting these incidents. Zirrieth argues that the Commission’s decision to remove her name from the subject eligible list was based on impermissible evidence under the CNA. She states that the Commission can point to no authority that would permit it to use allegations unsupported by due process to deny a promotion. Zirrieth indicates that the Commission often looks to the CNA when determining employee

rights when faced with adverse action by management and the basis for disciplinary action is often based on both contractual rights and Civil Service rules. She notes that the Public Employment Relations Commission (PERC) routinely orders the removal of improper reprimands and warnings in a personnel file as part of the resolution to unfair practice actions by management. Therefore, Zirrieth contends that it was improper for the Commission to ignore her contractual rights and it only should have considered her 2012 suspension, which when properly weighed in conjunction with her 2018 promotion to Sergeant, would have been insufficient to deny her promotion.

Zirrieth asserts that even if all these incidents are considered, none of them impact truthfulness as alleged. She describes the April 2011 written reprimand as an incident between co-workers that was properly removed from her personnel file in April 2012. Zirrieth provides that the November 2013 incident involved a lost badge and wallet, which was removed from her personnel file in November 2014. She notes that she was exonerated for an improper motor vehicle stop and was only issued a written reprimand for performance of duty for this incident, which was removed in September 2018. Zirrieth reiterates that she was promoted to Sergeant in January 2018 without any reference to these incidents. She explains that these incidents are no longer part of her personnel file because they are not subject to a due process hearing. Zirrieth claims that the Commission's position that a complete record should be considered relies only on the appointing authority's position and a proper review of her complete record would be to disregard minor disciplines that contractually should not be part of the record or in her personnel file.

Concerning the September 6, 2022, incident, she presents that there were no written findings that were provided to her and should not have been considered. Further, she states that the Commission improperly stated that the matter involved her weapon, and she describes the incident. She indicates that although she was interviewed about the incident, she was never served any disciplinary action. She disputes this incident, which is not part of her personnel file, and contends it should not be the basis for finding that she has an adverse history. Zirrieth believes that if her removal from the list is going to be considered, there should at least be hearing as there are factual disputes that need to be resolved before the Commission can make a proper decision. She presents that the Commission noted that the decision to promote her to Sergeant was discretionary and not reviewed by the Commission. Similarly, she states that the appointing authority's decision to not request removal was discretionary. Additionally, Zirrieth argues that she is entitled to attorney's fees under *N.J.A.C.* 4A:2-2.12 since the Commission found that the appointing authority improperly bypassed her under the Rule of Three.

In response, the appointing authority, represented by Kyle J. Trent, Esq., states that Zirrieth has failed to meet the standards for reconsideration. It asserts that the Commission correctly considered Zirrieth's complete employment and

disciplinary history when it removed her from the subject eligible list. The appointing authority presents that the CNA only indicates that counseling and written reprimands should not be considered for progressive discipline purposes. However, the CNA does not prohibit these incidents from consideration regarding list bypass or removal matters. Further, it provides that the New Jersey Attorney General Guidelines (AG Guidelines) requires appointing authority's to maintain an internal affairs investigation file separate from an employee's personnel file, and by law, these are to be kept for at least five years. Moreover, the appointing authority emphasizes that Zirrith does not dispute the 45-day suspension for untruthfulness and related misconduct, and her multiple minor disciplines. It asserts that it would be against public policy to prohibit either the Commission or the appointing authority from considering an employee's entire disciplinary history when making a promotion to a high-level position such as Lieutenant. Therefore, the appointing authority asserts that the Commission did not commit any error in its decision.

The appointing authority presents that although Zirrith argues that it did not request that her name be removed from the list, it did indicate that if Zirrith was the first name on the list, her name should be removed as it stated that the reasons it cited for her bypass also supported her removal. It states that she had the opportunity to respond to these reasons in multiple submissions in the original proceeding, and now, on reconsideration. The appointing authority states that even putting aside the September 2022 incident, her undisputed employment history, including a 45-day suspension, justified her removal. As part of the settlement regarding the 45-day suspension, it indicates that she admitted to untruthfulness and insubordination related to the loss of her firearm. The appointing authority notes that under the 2019 AG Guidelines, it was directed that there should be greater scrutiny of law enforcement personnel who have been subject to an investigative finding of untruthful or demonstrated lack of candor. Therefore, it contends that this one disciplinary action supports her removal from the subject eligible list. Moreover, the appointing authority presents case law to demonstrate a matter where a Correctional Police Sergeant candidate was removed from an eligible list where the discipline that justified the removal was less than Zirrith's 45-day suspension plus her admitted reprimands and counselings. Finally, as the Commission did not grant Zirrith any relief, she is not entitled to counsel fees under *N.J.A.C. 4A:2-2.12(a)*.

In reply, Zirrith asserts that the proper procedures to request that her name be removed from the eligible list were not followed under Civil Service rules. In this regard, she states that it was not until the appointing authority's reply brief in the original proceeding where it first stated that she "could have been" removed from the eligible list. Further, even if this request was deemed proper, she contends that she was not given the proper opportunity to respond to this request prior to the Commission issuing its decision. Zirrith also contends that the Commission committed clear material error by indicating that the September 6, 2022, allegation supported her removal from the subject eligible list. She submits that the appointing

authority did not dispute the facts that she set forth regarding this incident and it provided no evidence that any formal disciplinary action was taken against her.

Regarding the other minor disciplines, Zirrieth reiterates that minor disciplines do not provide for a due process hearing allowing the employee to contest the allegations against them. She indicates that the trade-off for the employee is that for these minor disciplines to be removed following 12 months if there are no similar allegations. Zirrieth claims that since management did not prove the allegations regarding the minor disciplines, it is improper for these incidents to be used to remove her name from the subject eligible list. She believes that the only discipline that could have been considered was the major discipline, which she argues, based on the totality of the record, was insufficient to remove her name from the list. Concerning counsel fees, Zirrieth asserts that the only issue before the Commission was the appointing authority's improper use of the Rule of Three. Since she prevailed on that issue, she believes that she entitled to counsel fees.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred, or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

N.J.A.C. 4A:2-1.1(d) provides that an appeal will be reviewed by the Commission on a written record unless required by law or where the Commission finds that a material and controlling dispute of fact exists that can only resolved by a hearing.

N.J.A.C. 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceeding at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. *N.J.A.C.* 4A:2-1.5(b) provides, in part, that counsel fees may be awarded in non-disciplinary appeals where the appointing authority has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

In this matter, Zirrieth has not met the standard for reconsideration. Concerning her claim that she did not have notice and a chance to respond to her removal from the subject eligible list in the original proceeding, the record indicates that the appointing authority presented Zirrieth's complete disciplinary history as a basis for it bypassing her name. Therefore, as the same reasons were used to justify

the bypass, Zirrith had sufficient notice to respond to these reasons in the original proceeding and the fact that she may have only thought that bypass was the only potential consequence is unpersuasive. Moreover, it is noted that the appointing authority did indicate that if it did not bypass her, it would have removed her, which should have put Zirrith on notice that the appointing authority was seeking her removal if it was determined that she could not be bypassed under the Rule of Three. Additionally, even without notice, the Commission has the authority to remove candidates from a Civil Service eligible list *sua sponte*. Regardless, Zirrith had a full opportunity to respond to the reasons for her removal in the present matter.

Regarding Zirrith's claim that her disciplinary history is insufficient to remove her name from the subject eligible list, she states that the Undersheriff only presented her 2012 45-day discipline as the basis for her bypass, and this incident did not prevent her being promoted to Sergeant in 2018. Additionally, she contends that her counselings and written reprimands cannot be considered because they were removed from her personnel file under the CNA and there was no due process for these matters. Initially, it is noted that the appointing authority presents that the CNA only indicates that counseling and written reprimands cannot be considered for progressive discipline, which is not relevant as this matter was originally presented as a list bypass and is now a list removal, which are not disciplinary actions. Moreover, as stated in the original proceeding, the Commission is not a party to the CNA, and it is the public's interest for it make a determination based on a complete record. Referring to the appointing authority's decision to promote Zirrith to Sergeant in 2018, it is noted that the appointing authority may not have made that decision today as it presents that in 2019, the AG Guidelines directed appointing authorities to use heightened scrutiny regarding law enforcement officers who have been found to be untruthful after an investigation. Regardless, as stated in the original proceeding, Zirrith's promotion to Sergeant is not relevant as the Commission was not a party to that decision. Similarly, as the Commission's authority is not based on any contracts between the parties, it is irrelevant that PERC may order counseling and written reprimands be removed from a personnel file.

Additionally, as stated in the original proceeding, Zirrith's disciplinary history consists of an April 2011 incident where she received a written reprimand, a November 2012 incident which led to 45-day suspension via settlement where she agreed that she was untruthful, a September 2017 incident which led to a written reprimand, and a September 2022 incident which led to counseling.² Therefore, the record indicated that Zirrith received major discipline which involved untruthfulness among other charges approximately seven years prior to the subject examination November 21, 2019 closing date, minor discipline approximately two and six years prior to the closing date, and counseling three years after the closing date. This is clearly a record that is insufficient for a higher-level law enforcement position,

² While there is an apparent dispute regarding this incident, even discounting this as a disciplinary issue, Zirrith's other disciplinary history supports her removal from the list.

Lieutenant, where incumbents supervise, evaluate, train and provide guidance to subordinate Sheriff's Officer personnel. Concerning Zirrith's argument that she did not have an opportunity to dispute the minor disciplines because in return for such a policy, these matters were removed from her personnel record, as the Commission is not a party to that agreement, this argument is unpersuasive. It is noted that the Commission may have removed Zirrith from the subject eligible solely on the basis of the November 2012 45-day suspension where she agreed that she was untruthful. However, as Zirrith has not presented any legal authority that indicates that it cannot consider an employee's entire disciplinary history, which would be against public policy, the Commission need not make that decision. Additionally, while Zirrith argues that if her minor disciplinary history is to be considered, there should be a hearing as there are factual disputes, these incidents are part of her disciplinary history, and the Commission is not going to relitigate these issues. The fact that Zirrith claims that she did not have the opportunity to dispute these claims at the time that the charges were sustained is not relevant as the Commission was not part of the agreement on how to handle such disciplinary actions. Therefore, the Commission finds that this matter is properly reviewed on the written record as there are no material and controlling disputes of fact that exist that can only be resolved by a hearing.

Zirrith also asks for counsel fees because the appointing authority improperly used the Rule of Three to originally bypass her. However, as Zirrith's name has been removed from the list, she has not prevailed on any primary issue, *i.e.* the right to be appointed on the subject eligible list, before the Commission. Regardless, even if Zirrith had prevailed in this matter, her request is misplaced. *N.J.A.C.* 4A:2-2.12 only provides for counsel fees when an appellant prevails in a major disciplinary proceeding. The subject proceedings involved Zirrith's list bypass and list removal, which are not disciplinary matters. Therefore, this rule is inapplicable. The appropriate rule is *N.J.A.C.* 4A:2-1.5(b). Regardless, under that rule, there is no evidence that the initial bypass was in bad faith or made with invidious motivation.

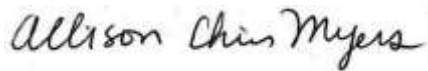
One other matter needs to be addressed. In the original proceeding, the Commission noted that D.S., who was the first ranked candidate on the subject eligible list, was no longer eligible for promotion from the subject examination. The Commission indicated that if this agency had been aware that D.S. no longer met the eligibility requirements, it would have removed D.S. from the subject promotional eligible list and his name would not have been certified on November 4, 2022, (PL221601). Therefore, the Commission directs Human Resources Information Services to remove D.S.'s name from the subject eligible list.

ORDER

Therefore, it is ordered that this appeal be denied. Further, the Division of Human Resources Information Services is directed to remove D.S.'s name from the Sheriff's Officer Lieutenant (PC1557A), Middlesex County Sheriff's Office eligible list.

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 11TH DAY OF OCTOBER, 2023



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