



**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. 2023-1734

List Bypass Appeal

**ISSUED: June 7, 2023 (SLK)**

Yvonne Zirrith, represented by Daniel J. Zirrith, Esq., appeals the bypass of her name on the Sheriff's Officer Lieutenant (PC1557A), Middlesex County Sheriff's Office eligible list.

By way of background, the appellant, a disabled veteran, appeared on the PC1557A eligible list, which promulgated on December 16, 2021, and expires on December 15, 2024. The appellant's name was certified on January 12, 2022, (PL220040) for a position in the subject title. A total of nine names were certified. The first positioned candidate, a disabled veteran was appointed, the second positioned candidate, a veteran was appointed, the third positioned candidate, D.S., a non-veteran was bypassed, the fourth positioned candidate, a veteran, was appointed, the appellant, the fifth positioned candidate, was bypassed, and the sixth through ninth positioned candidates, were not reachable for appointments.

Subsequently, the appellant's name was certified on November 4, 2022, (PL221601) for positioned in the subject title. D.S., the first positioned candidate, was bypassed, the appellant, the second positioned candidate, was bypassed, T.G., the third positioned candidate, a non-veteran, was appointed, the fourth and fifth positioned candidates were not reachable for appointment, and the sixth positioned candidate was removed.

On appeal, the appellant states that on January 21, 2022, D.S., a then Sheriff's Officer Sergeant, received a Preliminary Notice of Disciplinary Action (PNDA)

seeking to demote him to Sheriff's Officer, and was assigned Sheriff's Officer duties starting on January 24, 2022. Thereafter, she presents that there were three appointments to Sheriff's Officer Lieutenant, effective March 14, 2022. Subsequently, D.S. was issued a Final Notice of Disciplinary Action (FNDA) on November 3, 2022, demoting him to Sheriff's Officer, effective that date. Further, on November 4, 2022, certification PS221601 was issued certifying D.S.'s name despite his demotion.

The appellant argues that D.S.'s name improperly remained on the subject eligibility list and should not have been certified on certification PL221601 as he was no longer eligible for a position in the subject title once he was demoted to Sheriff's Officer. Further, she asserts that had D.S.'s name been removed from the eligible list, she would have been the first positioned candidate on certification PL221601, and since she is a veteran and the two subsequent positioned candidates were non-veterans, her appointment was mandated under *N.J.A.C.* 4A:4-4.8.

In response, the appointing authority, represented by Kyle J. Trent, Esq., presents that after the subject examination November 21, 2019 closing date and the issuance of certification PL221601 on November 4, 2022, on November 7, 2022, it served the FNDA at issue to D.S., who then appealed his discipline to the Civil Service Commission (Commission), and the matter was transmitted to the Office of Administrative Law as a contested case. The appointing authority asserts that it bypassed the appellant in favor of appointing another candidate because the appellant's disciplinary history includes multiple prior reprimands and counseling in addition to a major discipline that she received that resulted in a 45-day suspension after a settlement. It notes that the appointee has seven more years of experience than the appellant and his only discipline was a 2012 reprimand. Additionally, the appointing authority highlights that the appointee has more "Outstanding" ratings on his most recent annual Employee Evaluation Report than the appellant who had more "Acceptable" ratings.

The appointing authority argues that the appellant's appointment was not mandated under the Rule of Three. It reiterates that D.S. was not served with the FNDA until November 7, 2022, which was after certification PL221601 was issued on November 4, 2022. Further, it emphasizes that since D.S. appealed his demotion to the Commission, the final determination is still pending. The appointing authority presents that eligibility is determined as of the announced closing date under *N.J.A.C.* 4A:4-2.6(a) and D.S. was eligible as of the subject examination closing date. Additionally, the appointing authority indicates that under *N.J.A.C.* 4A:4-4.7(a), an appointing authority "may" request to remove a name from an eligible list, and, therefore, it is not required to do so. Therefore, it asserts that list removal is not automatic or mandated. The appointing authority also contends that D.S. could still be appointed to the subject title as a Sheriff Officer since, under *N.J.A.C.* 4A:4-2.4, an examination can be open to "[t]he next two lower in-series titles." It indicates that as an alternative to removing a candidate from an eligible list, an appointing

authority may bypass a candidate under the Rule of Three, and the threshold for bypassing a candidate is less than removing a candidate from a list. The appointing authority states that the Commission has previously upheld the bypassing of candidates with disciplinary histories far less severe than the appellant's. Moreover, it contends that the appellant's employment history, which includes a 45-day suspension for admitted untruthfulness and insubordination, is sufficiently adverse that it could have also removed her name from the subject list. The appointing authority notes that in late 2019, the State Attorney General issued a directive to all law enforcement agencies regarding law enforcement officers who have been found to be untruthful in the past, where heightened scrutiny is required for such officers. Further, it presents case law that indicates that the Commission has found untruthfulness to be problematic for law enforcement officers. The appointing authority emphasizes that this is especially true for candidates applying to high level positions like Lieutenant.

In reply, the appellant notes that the subject certification does not list a reason why she was bypassed. Further, the appointing authority failed to sign the bottom of it indicating that appointments were not made based on discriminatory or other invidious reason. She presents that the appointing authority's Undersheriff's certification in opposition to this appeal only refers to an 11-year-old suspension. The appellant contends that per the Collective Negotiations Agreement (CNA), the counseling and written reprimands that have also be referenced as justification for her bypass should not have been included in her personnel file as these entries should have been removed 12 months from the date of entry. Therefore, she contends that the only disciplines that should have been in her file were the over a decade old discipline and an alleged sustained counseling from a September 6, 2022, incident. The appellant provides that there was no written finding supporting the September 6, 2022, incident. Moreover, when she recently reviewed her personnel file, as there was no documentation regarding the September 6, 2022, incident, this allegation should not have been considered regarding the subject promotion. Concerning her Employee Evaluation Report, she indicates that it was prepared by a supervisor who had only been reviewing her work as a Sergeant for three months and her prior report had several ratings of "Outstanding" and described her as doing "an excellent job." Additionally, her background as a Lieutenant Commander in the Navy, her disabled veteran status, her training with the appointing authority, her appointment as an Accreditation Manager by the New Jersey State Association of Chief of Police and her Acting-Lieutenant service on several occasions between 2020 to 2023 demonstrate her qualifications for promotion.

Additionally, the appellant argues that the appointing authority and this agency improperly failed to remove D.S. from the subject eligible list. It reiterates that D.S. was demoted on January 24, 2022, after a PDNA was issued and his demotion was upheld after a FNDA was issued on November 3, 2022, which was before the subject certification was issued on November 4, 2022. She asserts that it is irrelevant that the FNDA was actually served to D.S. on November 7, 2022. The

appellant notes that the appointing authority announced on December 7, 2022, that the appointee would be promoted, bypassing her, and the promotion would be effective January 9, 2023. She states that the timing of the official demotion was clearly known and should have properly resulted in notification to this agency to remove D.S. from the list. Regarding the appointing authority's claim that D.S. was still eligible for the subject promotion to Lieutenant even when demoted two levels down to Sheriff's Officer, the appellant presents that the subject announcement indicated that the subject examination was only open to Sheriff Officer Sergeants. Therefore, she contends that under *N.J.A.C. 4A:4-4.7(a)8*, D.S. should have been removed since he was no longer serving in the announced unit scope. The appellant states that this is similar to when an applicant fails to maintain residency requirements until the hiring date under *N.J.A.C. 4A:4-4.7(a)7*, and the applicant must be removed and there is no discretion. She provides that since this was not a retroactive application and there was a complete eligible list, it is disingenuous for the appointing authority to take the position that D.S. could have been promoted as a Sheriff's Officer, which is two levels below the subject title. She further highlights that her 2013 discipline did not impact the appointing authority's decision to promote her in 2018 to Sergeant.

In further response, the appointing authority asserts that neither it nor the Commission was required to remove D.S. from the eligible list as *N.J.A.C. 4A:4-4.7(a)* provides the limited reasons that an eligible "may" be removed from a list at the appointing authority's request. It presents case law that indicates that the courts have interpreted the word "may" as providing discretion where the word "shall" means that action is mandatory. The appointing authority provides that eligibility for a promotional examination is determined as of the announced closing date under *N.J.A.C. 4A:4-2.6(a)*. It argues that once a candidate is determined eligible by the Commission, it becomes the appointing authority's discretion whether to seek removal. Therefore, considering that D.S. was appealing his disciplinary demotion, the appointing authority exercised its discretion to not remove him from the list and bypassed him instead.

Additionally, the appointing authority contends that the CNA did not prohibit it from using reprimands and counseling regarding bypasses, which is not discipline, as the CNA language only prohibits the use of these actions for progressive discipline purposes. The appointing authority highlights that the State Attorney General Guidelines on Internal Affairs (AG Guidelines) requires law enforcement agencies to maintain an internal affairs investigation file separate from an employee's personnel file. Moreover, in December 2019, the State's Attorney General issued a directive requiring law enforcement agencies to keep its full investigation file so that the file can be disclosed to prospective law enforcement employers. The appointing authority notes that the appellant does not dispute that she has been subject to multiple sustained internal affairs findings against her, including multiple counseling and even more significant, the 45-day suspension for untruthfulness and related misconduct. It asserts that it would be remiss for not considering her complete

disciplinary record for a high-level position like Lieutenant when there is another candidate who has not demonstrated a disregard for a law enforcement officer's obligation to be truthful. The appointing authority also argues that the appellant's background would have justified her removal if she had been first on the list for a high-level position as a Lieutenant.

## CONCLUSION

*N.J.A.C.* 4A:4-2.6(a)1 and 2 provides, in pertinent part, that applicants for promotional examination shall meet all criteria by the announced closing date including having one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which the examination is open and be currently serving in the announced unit scope in a title to which the examination is open and meet all other requirements contained in the announcement.

*N.J.A.C.* 4A:5-2.2(c) provides that when a single vacancy is to be filled from a promotional certification headed by a veteran, any veteran among the top three interested eligibles may be appointed in accordance with the "rule of three." See *N.J.S.A.* 11A-4.8. A nonveteran shall not be appointed unless the appointing authority shows cause why the veterans should be removed from the promotional list. See *N.J.A.C.* 4A:4-4.7 for removal procedures.

*N.J.A.C.* 4A:5-2.2(d) provides that when a single vacancy is to be filled from a promotional certification headed by a nonveteran, any reachable eligible may be appointed in accordance with the "rule of three."

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7 and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on an open competitive or promotional list provided no veteran heads the list.

*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 Commission to remove an eligible's name from an eligible list for having a prior employment history which relates adversely to the title.

*N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

*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 this matter, the record indicates that the subject examination was only open to candidates who were serving as a Sheriff Officer's Sergeant. Further, the record

indicates that a FNDA was issued indicating that D.S., the then first ranked candidate on the subject eligible list, had been demoted to Sheriff's Officer, effective November 3, 2022. Therefore, as of November 3, 2022, D.S. was no longer eligible for the promotion from the subject examination. If this agency had been made 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 appointing authority's discretion to bypass D.S. under list removal rules was not applicable. It does not matter that D.S. could have potentially appealed his demotion, which he did. A discipline that results from the issuance of a FNDA is considered final as of the effective date, and it does not matter that this "final" decision could thereafter be modified or reversed by settlement or a Commission decision. As such, the appellant should have been the first ranked eligible on PL221601. Therefore, under *N.J.A.C. 4A:5-2.2(c)*, the appellant needed to be appointed or removed from the PC1557A promotional eligible list.

Concerning the appellant's removal, initially it is noted that the appellant has been provided notice on appeal of the appointing authority's request to remove her name from the subject promotional eligible list, the basis for that request, and an opportunity to respond. Regarding the merits of the appointing authority's removal request, the appellant's employment record indicates there was an April 27, 2011, incident where the appellant consistently called another Sheriff's Officer offensive and derogatory names which led to a written reprimand, a November 29, 2012, incident where the appellant left her duty weapon in the restroom in a courthouse and she was untruthful about the location of her weapon when questioned about it which led to 45-day suspension via settlement, an August 11, 2013, incident where the appellant's badge had been recovered by another law enforcement agency and the appellant never reported her badge missing which led to a written reprimand and counseling, a September 25, 2017 or September 28, 2017, incident<sup>1</sup> where the appellant failed to initiate a proper car stop which led a written reprimand, counseling, and review of motor vehicle stop policy and MVR operation policy, and a September 6, 2022, incident where the appellant was advised during roll call that her duty weapon was not serviceable, the appellant wrote a memo as required and then proceeded to her assigned duty, but never asked what was wrong with her weapon which led to counseling.<sup>2</sup> Therefore, the record indicates that the appellant 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<sup>3</sup>

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<sup>1</sup> The incident is description of the incident lists both September 25, 2017, and September 28, 2017, as the date of the incident.

<sup>2</sup> There were also October 31, 2014, April 6, 2016, and June through August 2016, inmate complaints against the appellant where the appellant was exonerated, or the charges were not sustained.

<sup>3</sup> Under *N.J.A.C. 4A:2-3.1*, counseling is not considered minor discipline. However, that incident it still part of the appellant's employment record.

three years after the closing date. Consequently, the Commission finds that the that the appellant's employment record is adverse to the position sought due to the high standards for law enforcement officers. *See Moorestown v. Armstrong*, 89 N.J. Super. 560, 566 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 N.J. 567 (1990). Moreover, the standard in this case is even higher because the appellant seeks promotion to a higher-level law enforcement position, Sheriff's Officer Lieutenant, where incumbents supervise, evaluate, train and provide guidance to subordinate Sheriff Officer personnel. Concerning the appellant's assertion that the incidents after her major discipline should not be considered because these incidents were to be removed from her personnel file based on the CNA, it is noted that the record is unclear as to what the CNA states in regard to list removal for promotion, and the full CNA has not been provided to the Commission. Regardless, the Commission is not a party to the CNA, and the Commission can evaluate a candidate's entire employment history when considering a list removal request for promotion as it is in the public's interest for it to make its determination based on a complete record. Concerning the appellant's comment that her 2013 discipline did not impact the appointing authority's decision to promote her in 2018 to Sergeant, that decision was at the appointing authority's discretion and not relevant to the subject matter as the Commission was not asked to review the appellant's background for the Sergeant promotion, and that discretionary decision by the appointing authority did not prohibit or estop it from requesting that the appellant's name be removed from a future list based on the subject major discipline, since the appellant has subsequent adverse history, and a Sheriff's Officer Lieutenant is a higher title than Sheriff's Officer Sergeant.

### ORDER

Therefore, it is ordered that this appeal be denied. Further, the Division of Human Resources Information Services is directed to amend certification PL220040 to indicate that Yvonne Zirrith's's name has been removed 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 7<sup>TH</sup> DAY OF JUNE, 2023



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