

that he violated the State Policy that resulted in his receiving an OWR in September 2013, in accordance with its Standard Operating Procedure #49 (SOP) the DOC removed the appellant's name from the list.

On appeal, the appellant states that he was deemed ineligible for appointment pursuant to the SOP. In pertinent part, that policy indicates that all State Policy related disciplinary infractions, either major or minor, must be considered and will result in a candidate's ineligibility for first consideration for promotion for three years from the date of the last infraction. The appellant argues that his name was improperly bypassed for appointment as he was the number one ranked veteran on the certifications. He contends that pursuant to *N.J.A.C. 4A:4-4.8(a)3ii*, his appointment is mandated. Additionally, he claims that his name was not removed from the eligible list until October 31, 2014. In this regard, the appellant asserts that two other individuals were improperly appointed while his name was still on the certification. Further, the appellant argues that the SOP is in conflict with *N.J.A.C. 4A:4-4.8(a)3ii*, which does not permit a non-veteran to be appointed when the eligible who ranks first on the promotional list is a veteran. Moreover, the appellant alleges that he contacted Custody Recruitment and spoke with Correction Lieutenant Bryant when he was offered an OWR to settle the State Policy violation matter. The appellant contends that Bryant assured him that an OWR would not affect his promotion. In this regard, the appellant claims that he relied on the information he received from Bryant in accepting the OWR. Finally, the appellant also claims that a simple OWR is insufficient to justify a removal of his name from the eligible list.

In response, the DOC states that it properly removed the appellant from the eligible list based on its SOP. In this regard, it argues that there are legitimate concerns with enabling veterans' preference to trump internal policy that places a three year hold on promotions for all employees who have been found to have violated the State Policy, regardless if the infraction resulted in major or minor discipline. Specifically, it states that if veterans are to be exempted from the internal policy, this would contradict the fair, impartial, and consistent application of this policy and result in a veteran receiving a "pass," despite a violation of the State Policy. As a result, if the internal policy is not applied in a fair and consistent manner, other employees in protected categories could claim that they have been subjected to discriminatory treatment when they are denied promotions or denied an exemption from the policy. With regard to the appellant's claims concerning Bryant, it asserts that Bryant did not nor did he ever oversee or process any aspect of the Custody Promotional Eligible Lists and his response to the appellant was outside the scope of his responsibilities and was inaccurate. The appellant was misinformed because he did not contact his human resource office or the Custody Recruitment Unit Office of Human Resources for clarification. Finally, the appointing authority argues that the appellant's veteran's preference should not

trump its internal policy regarding promotions for all employees who have been found to have violated the State Policy.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)7, allows the removal an individual from an eligible list who has a prior employment history which relates adversely to the position sought. *N.J.A.C.* 4A:4-4.8(a)3ii provides, in pertinent part, that upon receipt of a certification, an appointing authority shall appoint one of the top three interested eligibles (rule of three) from a promotional list, and that: if the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed. Additionally, *N.J.A.C.* 4A:5-2.2(c) provides that when a vacancy is to be filled from a promotional certification headed by a veteran, a nonveteran shall not be appointed unless the appointing authority shows cause why the veterans should be removed from the promotional list.

Initially, the Civil Service Commission (Commission) notes that it is not bound by criteria utilized by the appointing authority and must decide each list removal appeal on the basis of the record presented. *See In the Matter of Victor Rodriguez* (MSB, decided July 27, 2005), and *In the Matter of Debra Dygon* (MSB, decided May 23, 2000). As such, the terms of the SOP do not determine whether the Commission can restore or remove an eligible's name from a list.

In the instant matter, the appellant's name was in the first position on certifications issued on August 19, 2014 and September 8, 2014. The appointing authority removed the appellant's name from the subject eligible list based on its SOP because the appellant received minor discipline, an OWR, for violating the State Policy, in September 2013. The appellant argues that the SOP is in conflict with *N.J.A.C.* 4A:4-4.8(a)3ii. However, the fact the appellant has veteran status does not preclude him from being removed from an eligible list pursuant to *N.J.A.C.* 4A:4-4.7(a)1, and/or *N.J.A.C.* 4A:4-6.1(a)7. *See In the Matter of Julian J. Maruri* (CSC, decided April 20, 2011) (No basis to restore appellant's name to eligible list just because he is a veteran when it was determined a sufficient basis existed to remove his name due to an adverse employment history). Moreover, as stated above, the Commission is not bound by the criteria utilized by the appointing authority when it adjudicates list removal appeals.

In disposing the certifications, the appointing authority attached the appellant's complete minor disciplinary history, not only the OWR he received in September 2013. The appellant's disciplinary record also evidences a two-day suspension in April 2013, an OWR in July 2013, and a three-day suspension in July 2013, as well as a five-day suspension in December 2007. The appellant argues that the OWR for the State Policy violation should not be considered because, in deciding to accept a settlement regarding the State Policy violation, he relied on information

from the appointing authority that the OWR would not affect his promotion. While it is unfortunate that the appellant may have relied on incorrect information in deciding to accept an OWR, the Commission will still consider the disciplinary action in making its present determination.

In the instant matter, the position sought, Correction Major, the highest title in the Correction Officer title series, is reserved for employees who exhibit leadership skills, a positive work ethic, and respect for the rules and policies of the Department of Corrections. Further, the Commission has previously removed eligibles from promotional lists where their employment history revealed extensive minor discipline or as little as one major discipline. See *In the Matter of Louis Bernstein, Correction Lieutenant (PS6320I), Department of Corrections* (MSB, decided July 17, 2002) (Removal upheld from a Correction Lieutenant eligible list for 20 minor disciplinary infractions in a 10-year period.); *In the Matter of John Bonafide*, Docket No. A-1658-04T1 (App. Div. February 7, 2006) (Removal from Sheriff's Officer Lieutenant promotional list upheld for Sheriff's Officer Sergeant who received a six-month suspension for misuse of public property three months prior to the certification of his name for appointment); and *In the Matter of Frank R. Jackson, Correction Lieutenant, Department of Corrections (PS6320I)*, Docket No. A-1617-00T2 (App. Div. March 28, 2002) (Removal from Correction Lieutenant promotional list upheld for Correction Sergeant whose disciplinary record included two official reprimands for absenteeism and a 30-day suspension for falsification of a report, despite the recommendation of his immediate supervisor).

Although the appellant essentially argues that his minor discipline does not warrant the removal of his name from the list, the Commission finds that the totality of this case evidences that his name should be removed. Generally, the Commission has determined that minor disciplinary actions do not constitute a sufficiently adverse employment record to justify the removal of an eligible's name from a list. In these situations, it has found that an applicant with a minor disciplinary history, such as documented attendance or performance issues, could be bypassed by an appointing authority in its discretion under *N.J.A.C. 4A:4-4.8*. See *In the Matter of Laura Verdi* (CSC, decided July 30, 2008) (Commission determined that attendance issues provided by the appointing authority, for which the appellant never received major discipline, were not sufficient to remove her name from the list). In this case, however, the appellant was appointed as a Correction Lieutenant on January 2, 2010. As a Correction Lieutenant, and, in the year prior to issuance of the certifications, the appellant received minor discipline on four occasions. Moreover, these minor disciplinary actions were not merely for such things as attendance infractions. Rather, they were for such things as official reports not being on file that he was supposed to submit, not being properly relieved by another Correction Lieutenant when he left his post, not following protocol before activating emergency procedures, and finally, for violating the State Policy by referring to a Communications Operator as "you bitch."

The Commission has serious concerns with the appellant's minor disciplinary history that he accumulated in his brief tenure as a Correction Lieutenant as well as prior to the certification of the Correction Major list, particularly given that the nature of the infractions evidence his inclination for bad judgment and lack of discipline. Such qualities are unacceptable for individuals applying for the position of Correction Major. Indeed, the public interest would not be served by rewarding such conduct by considering the appellant for a high ranking law enforcement position. Clearly, an extensive minor disciplinary history of a supervisory law enforcement officer cannot be casually regarded by the Commission. In this regard, the Commission notes that a law enforcement officer is held to a higher standard than a civilian public employee. *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). Therefore, based on the totality of the circumstances, the nature of the charges, and the frequency of which the appellant was charged with disciplinary matters during his brief tenure as a Correction Lieutenant and just prior to the certification of the Correction Major list, notwithstanding any of the provisions in the SOP, it was appropriate for the appointing authority to remove the appellant's name from the eligible list. *See In the Matter of Albert S. Waddington, County Correction Sergeant (PC0349T), Camden County*, Docket No. A-568-99T2 (App. Div. December 5, 2000) (Removal from County Correction Sergeant promotional list upheld for County Correction Officer with a lengthy list of counseling reports, poor evaluations, reprimands, minor disciplinary sanctions and two major disciplinary actions over approximately 13 years). *See also, In the Matter of James Schulkes, Police Lieutenant (PM2547K), Plainfield* (CSC decided July 17, 2013).

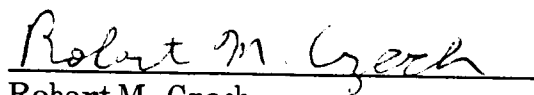
Based on the foregoing, and the entirety of the record, the Commission finds that the appellant's prior disciplinary history adversely relates to the position sought and is sufficient cause to remove his name from the eligible list. Accordingly, the appellant has not met his burden of proof in this matter and the appointing authority has shown sufficient justification for removing his name from the subject eligible list.

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 5TH DAY OF NOVEMBER, 2015



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