



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Erasmo Assuncao,
Fire Fighter (M2554M), Newark

CSC Docket No. 2016-2072

List Removal Appeal

ISSUED: **DEC 07 2016** (WR)

Erasmo Assuncao, represented by Craig Gumpel, Esq., appeals the removal of his name from the eligible list for Fire Fighter (M2554M), Newark, on the basis of his unsatisfactory criminal record.

The appellant, a nonveteran, took the open competitive examination for Fire Fighter (M2554M), Newark, achieved a passing score, and was ranked on the subsequent eligible list.¹ The appellant's name was certified on July 11, 2014. In disposing of the certification, the appointing authority requested the removal of the appellant's name from the eligible list due to having an unsatisfactory criminal record. Specifically, it asserted that he was found guilty of criminal mischief on August 13, 1996. Additionally, it noted that on June 21, 1999, the appellant was arrested for possession of marijuana and distribution of a controlled dangerous substance. The appellant pled guilty to possession of marijuana over 50 grams, a felony, and was given two years of probation and ordered to attend an outpatient program.

On appeal to the Civil Service Commission (Commission), the appellant contends that there was no legitimate basis to remove his name from the subject eligible list. He explains that on December 11, 1995, when he was 18 years old, he was arrested while repairing a friend's car while she was at work. The appellant contends that he was authorized to make the repairs on her driveway, but a

¹ Agency records indicate that the eligible list promulgated on December 13, 2011 and expired on December 12, 2015.

neighbor called the police when she saw him on the driveway. He was charged with criminal mischief, burglary by entering a structure, possession of burglar's tools, theft of movable property and attempted criminal theft. He was found guilty of criminal mischief on August 13, 1996 and paid a \$250 fine. The burglary, possession of burglar's tools and theft charges were dismissed. The appellant further states that on June 21, 1999, when he was 22 years old, he was arrested for possession of marijuana. He explains that, at the time of the arrest, he was "sitting" in his car with three friends, none of whom "admitted to their involvement" in possessing the marijuana. Therefore, he claims that he "took the blame" for the marijuana because he was the owner of the car. As a result, the appellant pled guilty to possession of marijuana over 50 grams, was placed on probation for two years and attended an outpatient program. The appellant asserts that he has not been involved with drugs since the incident.

The appellant argues that the arrests occurred when he was young and he has not had any legal troubles since 1999. As evidence of rehabilitation, the appellant states that his criminal record was expunged on May 11, 2015. He also states that he has worked for a BMW dealership for 18 consecutive years, the last 17 years as the manager of the parts department. Finally, he asserts that he lives "in a stable home" with his wife and two children, "attends church regularly" and coaches his daughter's soccer team. Accordingly, the appellant requests that he be "immediately reinstated to the list and appointed with retroactive seniority, back pay and benefits." He also requests attorney's fees and costs. In support of his appeal, he submits three character reference letters. For example, his tenant describes him as a "family-oriented man who is very giving" and of "superb moral character." Similarly, a coworker describes him as a "selfless team player with a strong concern for his fellow man."

Despite the opportunity, the appointing authority did not respond.

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 Fire Fighter. 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 of a pardon or an expungement shall prohibit removal from a list, except for law enforcement, correction officer, juvenile detention officer, firefighter or judiciary titles and other titles as the Chairperson or designee may determine. See *N.J.A.C. 4A:4-4.7(a)4ii*; see also, *N.J.S.A. 2C:52-27(c)*. *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, the record reflects that the appellant was found guilty of criminal mischief in 1996 and pled guilty to possession of marijuana over 50 grams, a felony, in 1999. The Commission is ever mindful that Fire Fighters, like municipal 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). While his felony conviction is a serious offense, the incidents are relatively isolated events, the latter of which occurred approximately 15 years prior to the certification of his name from the subject eligible list. It must be emphasized that the appellant was only 18 and 22 years old at the time of the incidents. The record does not demonstrate further adverse involvement with law enforcement since that time. The record also indicates that the appellant has worked for the same employer for over 15 years and, as demonstrated by his character reference letters, appears to lead an upstanding life with his wife and two children. The appointing authority, despite the opportunity, has provided no evidence on appeal to contradict the appellant's claims. Finally, the appellant had his criminal record expunged in 2015, after his consideration for appointment. In this regard, the foundation for an expungement is the equivalent of evidence of rehabilitation. See *N.J.S.A. 2C:52-3* and *N.J.S.A. 2C:52-8*; See also, *In the Matter of J.B.*, 286 *N.J. Super.* 512 (App. Div. 2006). Under these circumstances, the Commission does not find sufficient cause to remove the appellant's name from the subject eligible list. However, there is no basis for an award of seniority, back pay, or counsel fees.

ORDER

Therefore, it is ordered that this appeal be granted and the list for Fire Fighter (M2554M), Newark be revived, and the appellant's name certified at the time of the next certification, for prospective employment opportunities only.

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 7th DAY OF DECEMBER, 2016



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