



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jay Rivera-Ocasio,
Fire Fighter (M1551T), Township of
Millburn

List Removal Appeal

CSC Docket No. 2017-2963

ISSUED: NOV 02 2017 (HS)

Jay Rivera-Ocasio appeals the removal of his name from the eligible list for Fire Fighter (M1551T), Township of Millburn on the basis of an unsatisfactory background report.

The appellant, a veteran, took and passed the open competitive examination for Fire Fighter (M1551T), which had a closing date of August 31, 2015. The resulting eligible list promulgated on March 11, 2016 and expires on March 10, 2018. The appellant's name was certified to the appointing authority on March 15, 2016. In disposing of the certification, the appointing authority requested the removal of the appellant's name on the basis of an unsatisfactory background report. Specifically, the appointing authority noted his Article 15 proceeding for drug abuse misconduct, which resulted in his separation from the military on June 6, 2012, and his arrest and charge for improper behavior in violation of *N.J.S.A. 2C:33-2(a)*, a petty disorderly persons offense, on May 11, 2014. The improper behavior charge was amended to a charge of violating a noise ordinance, and the appellant was found guilty on the amended charge.

On appeal to the Civil Service Commission (Commission), the appellant states that he reached the home interview step of the preemployment process and had been assured that nothing in his background was found to be unsatisfactory. However, the appellant states that, thereafter, he was improperly asked to sign a letter indicating that he was not interested in the position at this time but that he would like to have his name retained on the eligible list for future consideration.

The appellant refused to sign the letter and responded by letter that he did not wish to "defer" the position and was currently interested.

In response, the appointing authority, represented by Littie Rau, Esq., maintains that it properly requested the removal of the appellant's name from the subject eligible list based on the totality of circumstances in the appellant's background rather than any unlawful or improper motive or protected status. It notes that Civil Service rules allow for the removal of an eligible's name from an eligible list based on a prior employment history that relates adversely to the title and other sufficient reasons, and contends that both reasons are supported in this case. The appointing authority argues that the Legislature intended to impose a higher standard on the eligibility of an individual seeking appointment to a safety-sensitive public position such as Fire Fighter, and it may thus consider the appellant's arrest record. It asserts that a Fire Fighter applicant may be removed from an eligible list not only for convictions but also for arrests where the underlying conduct relates to a Fire Fighter's public safety responsibilities considering the nature and seriousness of the offense, the individual's age at the time and evidence of rehabilitation. The appointing authority notes that while an Article 15 administrative proceeding in the military is not technically an arrest, it is an administrative detention that led to the appellant's separation from the military because of drug abuse. It avers that such behavior cannot be reconciled with a Fire Fighter's responsibilities. The appointing authority maintains that the appellant's military record and his arrest history are antithetical to the requirement that Fire Fighters be physically and mentally fit. It also argues that there is no evidence in the appellant's history to suggest that he has addressed or treated his drug abuse or undergone any rehabilitation.

In addition, the appointing authority states that prior to disposing of the March 15, 2016 certification and in lieu of the appellant's anticipated removal from the eligible list, it advised the appellant that he could choose to defer his interest in the position, but he chose not to do so. In support, the appointing authority submits the appellant's Certificate of Release or Discharge from Active Duty (DD-214) form and his preemployment application, among other documents.

In reply, the appellant explains that his drug use in the military followed his deployment to Iraq where he lost multiple friends. The appellant states that it was a long and hard deployment and he was dealing with the stress of war as a young man of 22 years of age. He states that he did not know how to properly deal with the stress and turned to marijuana, which he knows was not the right thing to do. The appellant states that he saw himself falling in a deeper hole and admitted his drug use to his chain of command. At that point, he was arrested and released, and the appellant asked to be placed in a drug program. The appellant states that he completed the program on March 14, 2012 and has not used any type of drug since then. With respect to his 2014 arrest, the appellant notes that the associated

charge was reduced to only a charge of violating a noise ordinance. As to the circumstances surrounding the arrest, the appellant explains that there was an argument between his cousin and friend, and the appellant was only there to try to defuse the situation. In support, the appellant submits documentation from the New Jersey Automated Complaint Summary and a certification from the United States Department of the Army indicating that the appellant successfully completed the Alcohol and Drug Abuse Prevention Training on March 13 and 14, 2012.

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 for the removal of an individual from an eligible list who has a prior employment history which relates adversely to the position sought.

N.J.S.A. 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 provide that an eligible's name may be removed from an eligible list when an eligible has a criminal record which includes a conviction for a crime which adversely relates to the employment sought. 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, correction officer, juvenile detention officer, firefighter or judiciary titles and other titles as the Chairperson of the Commission or designee may determine. Additionally, pursuant to *N.J.S.A.* 11A:4-10, an appointing authority may only question an eligible for a law enforcement, firefighter or correction officer title as to any arrest. It is noted that the Appellate Division of the Superior Court remanded the matter of a candidate's removal from a Police Officer eligible 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*, 261 *N.J. Super.* 401 (App. Div. 1992).

Additionally, although an eligible's arrest and/or conviction for a disorderly persons offense cannot give rise to the disability arising under *N.J.A.C.* 4A:4-4.7(a)4, the fact that an eligible was involved in such activity may reflect upon the eligible's character and ability to perform the duties of the position at issue. See *In the Matter of Joseph McCalla*, Docket No. A-4643-00T2 (App. Div. November 7,

2002) (Appellate Division affirmed the consideration of a conviction of a disorderly persons offense in removing an eligible from a Police Officer eligible list). Here, as the appellant was arrested for a petty disorderly persons offense, the offense did not rise to the level of a crime. Nevertheless, the appellant's arrest could still be considered in light of the factors noted in *N.J.S.A.* 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 to determine whether it adversely related to the employment sought.

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 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 appointment. *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 name from an eligible list was in error.

In this matter, the record indicates that the appellant was arrested on May 11, 2014 and charged with improper behavior. The appellant was ultimately found guilty of violating a noise ordinance, which is not a serious offense. However, the appellant was an adult at the time of his arrest, and the arrest occurred only approximately one year and four months prior to the August 31, 2015 examination closing date. The arrest is also problematic in this case in that it is not the only instance of misconduct in the appellant's background. In this regard, the record indicates that the appellant was separated from the military on June 6, 2012 due to misconduct. Such action, in both the military and firefighting contexts, reflects on an individual's reliability and respect for his employer. It is noted that the removal of eligibles from Fire Fighter lists on the basis of an adverse background has been upheld. See *In the Matter of James Alessio* (MSB, decided March 9, 1999). In that case, the eligible attempted to deceive the appointing authority in regard to his three prior arrests and the actual reason supporting his separation from the Postal Service, *i.e.*, his 1992 conviction for a federal offense which was committed during this employment. In *Alessio, supra*, it was concluded that such disregard is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization in which the ability to follow orders is crucial to saving lives. *Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998) was relied upon in that matter. In *Karins*, the Supreme Court stated:

Firefighters are not only entrusted with the duty to fight fire; they must also be able to work with the general public and other municipal employees, especially police officers, because the police department responds to every emergency fire call. Any conduct jeopardizing an excellent working relationship places at risk the citizens of the municipality as well as the men and women of those departments who

place their lives on the line on a daily basis. An almost symbiotic relationship exists between the fire and police departments at a fire.

In this case, the appellant's arrest and his separation from the military for misconduct are relevant to the position sought as these events are indicative of the appellant's exercise of poor judgment, which is not conducive to the performance of the duties of a Fire Fighter. While not minimizing the difficult circumstances the appellant faced while serving in the military, the Commission is mindful that the public expects Fire Fighters to present a personal background that exhibits respect for the law and the rules. Accordingly, the appointing authority has presented sufficient cause to remove the appellant's name from the subject eligible list and the appellant has failed to meet his burden of proof in this matter.

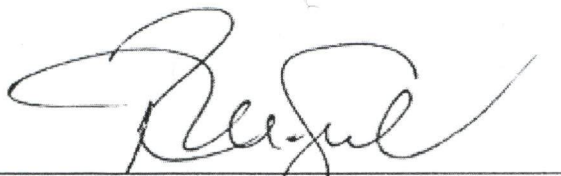
As a final matter, the Commission notes that, in this particular case, it was not inappropriate that the appointing authority provided the appellant with an opportunity to indicate that he was only interested in future consideration since, as discussed above, the appointing authority had sufficient cause to request the removal of 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 1ST DAY OF NOVEMBER, 2017



Robert M. Czede, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

- c. Jay Rivera-Ocasio
Alexander McDonald
Little Rau, Esq.
Kelly Glenn