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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Keith Hernandez,
Police Officer (S9999M), Jersey City

List Removal Appeal

CSC Docket No. 2017-413

ISSUED:

(HS)

MAR 09 2017

Keith Hernandez, represented by Michael L. Prigoff, Esq., appeals the attached decision of the Division of Agency Services (Agency Services), which found that the appointing authority had presented a sufficient basis to remove the appellant's name from the Police Officer (S9999M), Jersey City eligible list on the basis of an unsatisfactory criminal record.

The appellant, a non-veteran, took and passed the open competitive examination for Police Officer (S9999M), which had a closing date of August 31, 2010. The resulting eligible list promulgated on June 10, 2011 and expired on May 1, 2014.¹ The appellant's name was certified to the appointing authority on October 7, 2013. In disposing of the certification, the appointing authority requested the removal of the appellant's name on the basis of an unsatisfactory criminal record. Specifically, the appointing authority's background investigation revealed that the appellant was arrested on March 25, 2006. The appellant was charged with theft in violation of *N.J.S.A. 2C:20-3*, a crime of the third degree. The charge was dismissed on March 7, 2008, following the appellant's participation in the Pre-Trial Intervention (PTI) Program. Further, the arrest was expunged on October 17, 2013. The appellant appealed to Agency Services. Agency Services found that the appointing authority had sufficiently documented and supported its request to remove the appellant's name from the subject eligible list.

¹ In *In the Matter of Entry Level Law Enforcement Exam (S9999M)* (CSC, decided June 5, 2013), the Civil Service Commission extended the June 9, 2013 expiration date of the eligible list until the eligible list for Entry Level Law Enforcement Exam (S9999R) became available.

On appeal to the Civil Service Commission (Commission), the appellant emphasizes that the factors found in *N.J.S.A. 11A:4-11* must be considered. He acknowledges that theft is a serious crime but argues that his own role was minimal. In this regard, he explains that he was approached by a friend with a "plan to make money." He was told that he would receive money if he would simply take a bag from one person and hand it to another. He was unaware that these individuals were plotting to steal a large sum of money (\$28,000) from Circuit City. The appellant succumbed to peer pressure in agreeing to play a "small part" in the theft. He acknowledges that he should have recognized his part in the offense as potentially illegal but feared not being accepted by people he believed to be his friends. The appellant notes that he was arrested when he was only 18 years old, an impressionable age when teenagers are known to act without thinking, and nearly eight years before seeking a Police Officer position with the appointing authority. He contends that the avoidance of permanent disqualification from employment opportunities is exactly what the PTI Program was designed to avoid. The appellant indicates that his arrest was an isolated event, and he has since maintained a clean record. Citing *In the Matter of J.B.*, 386 *N.J. Super.* 512 (App. Div. 2006), he also asserts that the expungement of his arrest is *prima facie* evidence of rehabilitation. The appellant avers that expungement has strong public policy support, namely to encourage individuals to correct their ways by preventing past indiscretions from harming future prospects. In the appellant's view, preventing him from bettering himself by serving as a Police Officer does not further those policy goals. He requests restoration to the subject eligible list and appointment with retroactive seniority for promotional and step-pay purposes. In support, the appellant submits arguments previously submitted to Agency Services and his and his father's respective certified statements.

In response, the appointing authority, represented by Jeremy Farrell, Corporation Counsel, maintains that the appellant's criminal history adversely reflects on his character and suitability for the position at issue. It notes that the appellant was arrested for committing a serious offense and argues that the details surrounding his arrest are reflective of poor character judgment and a lack of respect for the law. The appointing authority highlights that Police Officers are held to a heightened standard of conduct.

In reply, the appellant argues that the appointing authority has only discussed the nature and seriousness of the offense charged and ignored the other factors in *N.J.S.A. 11A:4-11*. He also contends that the surrounding circumstances regarding the alleged offense are entirely unknown since the matter was never tried in court. In his view, any reliance on police reports and similar unsubstantiated statements is misplaced as such documents cannot be accepted as the absolute truth regarding the allegations. The appellant contends that it is unfair for the appointing authority to claim that the details of his arrest reflect poor character since his participation in the PTI Program required him to waive his right to a trial

on those details. He asserts that involvement in the PTI Program, at best, is only an admission of involvement in the offense charged and only speculation can be gleaned from police reports and similar materials.

CONCLUSION

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).

Participation in the PTI Program is neither a conviction nor an acquittal. See *N.J.S.A.* 2C:43-13(d). See also *Grill and Walsh v. City of Newark Police Department*, Docket No. A-6224-98T3 (App. Div. January 30, 2001); *In the Matter of Christopher J. Ritoch* (MSB, decided July 27, 1993). *N.J.S.A.* 2C:43-13(d) provides that upon completion of supervisory treatment, and with the consent of the prosecutor, the complaint, indictment or accusation against the participant may be dismissed with prejudice. In *Grill, supra*, the Appellate Division indicated that the PTI Program provides a channel to resolve a criminal charge without the risk of conviction; however, it has not been construed to constitute a favorable termination. Furthermore, while an arrest is not an admission of guilt, it may warrant removal of an eligible's name where the arrest adversely relates to the employment sought. Thus, the appellant's arrest and entry into the PTI Program could still be properly considered in removing his name from the subject eligible list. Compare *In the*

Matter of Harold Cohrs (MSB, decided May 5, 2004) (Removal of an eligible's name reversed due to length of time that had elapsed since his completion of his PTI).

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.

A review of the record indicates that the appointing authority reasonably requested the removal of the appellant's name from the subject eligible list based on his March 2006 arrest and charge for theft in violation of *N.J.S.A.* 2C:20-3, a crime of the third degree. While the charge was resolved through the PTI Program, such resolution has not been construed as a favorable termination. *Grill, supra*. The circumstances of the incident at issue are concerning. In this regard, the appellant indicates that he agreed to participate in the theft by passing a bag from one person to another, after being promised money. The appellant acknowledges that he should have recognized his part in the offense as potentially illegal. The incident at issue occurred less than five years before the August 2010 closing date for the subject examination and, as such, was not so remote in time as to render the appointing authority's request unjustified. Moreover, the appellant, though 18 years old at the time of the incident, was nevertheless an adult.

It is noted that the appellant's arrest was an isolated event and there is evidence of rehabilitation in the record. Regarding rehabilitation, the appellant completed the PTI Program and had his arrest expunged. The foundation for an expungement is the equivalent of evidence of rehabilitation. *See J.B., supra*. However, the isolated nature of the arrest and the evidence of rehabilitation cannot outweigh the circumstances of the appellant's involvement in the incident at issue as he describes them, his age at that time, and the closeness in time of his arrest to the examination closing date. Moreover, an expungement does not prohibit the removal of an eligible's name from an eligible list for a law enforcement title. *See N.J.A.C.* 4A:4-4.7(a)4ii. The Commission further notes that a Police Officer is a law enforcement employee who must enforce and promote adherence to the law. Municipal Police Officers hold highly visible and sensitive positions within the community, and the standard for an applicant includes good character and the 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). The public expects Police Officers to present a personal background that exhibits respect for the law and rules. Therefore, considering the

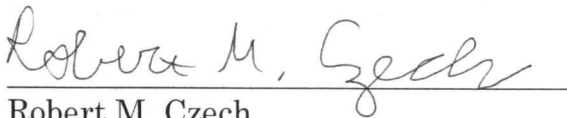
factors in *N.J.S.A.* 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4, there is not a sufficient basis in this particular case to restore the appellant's name to the eligible list. However, provided the appellant maintains a clean record going forward, his criminal record would be an insufficient basis to remove his name from any future eligible list on which his name may appear.

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 9TH DAY OF MARCH, 2017



Robert M. Czech
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

Attachment

- c. Keith Hernandez
- Michael L. Prigoff, Esq.
- Robert J. Kakoleski
- Jeremy Farrell, Corporation Counsel
- Kelly Glenn



STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
AGENCY SERVICES
P. O. Box 313
Trenton, New Jersey 08625-0313

Robert M. Czech
Chair/Chief Executive Officer

Chris Christie
Governor
Kim Guadagno
Lt. Governor

June 7, 2016

Michael L. Prigoff, Esq.

RE: Removal of Name from Eligible List – Keith Hernandez

Title: Police Officer
Jurisdiction: City of Jersey City
Symbol: S9999M
Certification No: OL131322
Certification Date: 10/07/13

Dear Mr. Prigoff:

This is in response to your correspondence contesting the removal of your client's name from the above-referenced eligible list.

The Appointing Authority requested removal of Mr. Hernandez' name in accordance with N.J.A.C. 4A:4-4.7(a)4, which permits the removal of an eligible candidate's name for a criminal record which adversely relates to employment. Note that an expunged record does not preclude removal from a list for certain titles, including police officer [4A:4-4.7(a)4ii].

In support of its decision, the Appointing Authority provided a copy of your client's arrest record which includes a conviction for theft in the third degree; this charge was adjudicated by a Pre-Trial Intervention program, which was successfully completed by your client.

You have provided a statement in response to the information submitted by the Appointing Authority, and state that you believe that your client should not be removed from the eligible list, especially considering his record since the incident which occurred when he was eighteen and "running with the wrong crowd"; you note that his record has since been expunged and he has remained out of trouble since that one, isolated, incident.

However, recognizing the nature of the position at issue, a Police Officer is a law enforcement employee who must enforce and promote adherence to the law. Police Officers hold highly visible and sensitive positions within the community and the standards for an applicant include good character and an image of utmost confidence and trust. Based on the information presented, your client's background

shows questionable judgment. Nonetheless, the Appointing Authority made the determination to remove your client's name based on the information discovered while performing the Background Check.

After a thorough review of our records and all the relevant material submitted, we find that there is not a sufficient basis to restore your client's name to the eligible list. Therefore, the Appointing Authority's decision to remove Mr. Hernandez' name has been sustained and your appeal is denied. Furthermore, it is noted that Symbol S9999M expired on May 1, 2014; there will be no further certifications issued from this eligible list.

In accordance with Merit System Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs (DARA) within 20 days of receipt of this letter. You must submit all proofs, arguments and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

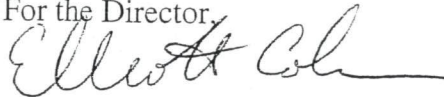
Please be advised that pursuant to P.L. 2010 C.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, C. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees.

Address all appeals to:

Henry Maurer, Director
Division of Appeals and Regulatory Affairs
Written Appeals Record Unit
PO Box 312
Trenton, NJ 08625-0312

Sincerely,

For the Director,



Elliott Cohen,
Local Placement Services

Robert J. Kakoleski



