



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of John P. Sharkey III,
Police Officer (S9999M), Atlantic City

Request for Reconsideration

CSC Docket No. 2015-574

ISSUED: FEB 05 2015 (HS)

John P. Sharkey III requests reconsideration of the attached final administrative decision rendered on July 30, 2014, which restored the petitioner's name to the Police Officer (S9999M), Atlantic City eligible list but ordered that his name be reflected as bypassed on the January 29, 2013 certification. A copy of that decision is attached hereto and incorporated herein.

By way of background, the appointing authority requested the removal of the petitioner's name from the subject eligible list on the basis of an unsatisfactory employment record. In pertinent part, the appointing authority asserted that the petitioner had eight minor disciplinary action reports entered against him from February 2007 to November 2011. These incidents variously involved the petitioner's performance of duty, reporting for duty late, neglect of duty and reporting violations. The petitioner appealed to the Division of Classification and Personnel Management, which upheld the removal of the petitioner's name from the subject eligible list. Subsequently, he appealed to the Civil Service Commission (Commission), which found that although the petitioner's minor disciplinary history was not sufficient to remove his name from the eligible list, it was a sufficient basis on which to bypass his name on the January 29, 2013 certification. The Commission accordingly restored the petitioner's name to the subject eligible list but ordered that his name should be reflected as bypassed on the certification.

In his request for reconsideration, the petitioner notes that of the 38 eligibles listed on the January 29, 2013 certification, 18 were appointed, effective March 22, 2013. He also notes that he was listed at position 31 on the certification and that

the eligibles in positions 29, 30, 32, 33 and 36 respectively were appointed. Based on the foregoing, the petitioner contends that there was a violation of the "Rule of Three" and that he should be appointed.

A review of the January 29, 2013 certification, in light of the restoration of the petitioner's name to the subject eligible list ordered in the prior decision, indicates that 18 eligibles were appointed; 11 eligibles were removed from the eligible list for various reasons; five eligibles were not interested; two eligibles, including the petitioner, were interested and reachable for appointment but not appointed; and two eligibles were not reachable for appointment. The last appointment made from the certification was of the eligible in position 36. Prior to position 36, there were two interested eligibles who were not appointed: the petitioner, in position 31, and the eligible in position 34.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding. A review of the record reveals that the petitioner has not met the standard for reconsideration.

In the instant matter, the petitioner does not present new evidence or additional information that would change the outcome of his case, nor has he shown that a clear material error occurred. A review of the January 29, 2013 certification, in light of the restoration of the petitioner's name to the subject eligible list ordered in the prior decision, indicates that the last appointment made from the certification was of the eligible in position 36. Prior to position 36, there were only two interested eligibles who were not appointed: the petitioner, in position 31, and the eligible in position 34. The petitioner's restoration to the eligible list rendered the eligibles in positions 37 and 38 unreachable for the last appointment. Therefore, since only two interested eligibles, including the petitioner, can be considered to have been bypassed prior to the last appointment from the certification, no "Rule of Three" violation is evident in the disposition of the certification after the Commission ordered the petitioner's name to be reflected as bypassed rather than removed. *See N.J.A.C.* 4A:4-4.8(a)3.

While the petitioner also argues that he should be appointed, it is noted that the petitioner does not possess a vested property interest in the position at issue. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). Per agency records, the subject eligible list expired on May 1, 2014.

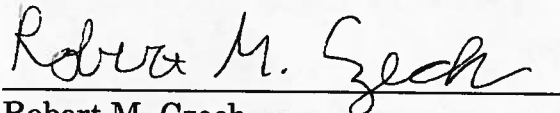
Accordingly, the petitioner has not presented a sufficient basis for reconsideration of the Commission's prior decision.

ORDER

Therefore, it is ordered that this request for reconsideration 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 4TH DAY OF FEBRUARY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312

Attachment

- c. John P. Sharkey III
Arch Liston
Kenneth Connolly



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of John P. Sharkey, III,
Police Officer (S9999M), Atlantic City

List Removal

CSC Docket No. 2014-2032

ISSUED: ~~31~~ 31 2014 (HS)

John P. Sharkey, III, represented by D. William Subin, Esq., appeals the attached decision of the Division of Classification and Personnel Management (CPM), which found that the appointing authority had presented a sufficient basis to remove the appellant's name from the Police Officer (S9999M), Atlantic City eligible list on the basis of an unsatisfactory employment record.

The appellant took the open competitive examination for Police Officer (S9999M), Atlantic City, which had a closing date of August 2010, achieved a passing score and was ranked as a non-veteran on the subsequent eligible list. The eligible list promulgated on June 10, 2011 and expired May 1, 2014. The appellant's name was certified to the appointing authority on January 29, 2013. In disposing of the certification, the appointing authority requested the removal of the appellant's name due to an unsatisfactory employment record. The appointing authority's background investigation revealed that the appellant, while serving as a County Correction Officer with the Atlantic County Department of Public Safety, had eight disciplinary action reports entered against him during the time period from February 2007 to November 2011. Specifically, the appointing authority's documentation showed that the appellant had received seven reprimands for various incidents. Although most of the incidents that resulted in a reprimand involved the appellant's performance of duty, these incidents also related to his reporting for duty late, neglect of duty and reporting violations. Additionally, the appellant received a one-day suspension for reporting for duty late in September

2007. The appointing authority's background investigation also indicated that the appellant had used 272 hours of sick time from February 2007 to December 2011.

On appeal to CPM, the appellant noted that the background investigation report indicates that his employer stated that "Officer Sharkey has improved over the years and would be a good candidate for the position of police officer." The appellant also noted that the "Adverse Information" section of the report was blank. In addition, the appellant submitted the following supporting documentation: an August 29, 2013 memorandum recognizing the appellant as Employee of the Month for September 2013 along with a copy of the Certificate; a September 12, 2013 memorandum indicating the appellant's promotion to Sergeant; a January 2, 2014 letter from the Lakehurst Police Department indicating that the appellant had no disciplinary issues during his employment with that department and supporting his efforts to become an Atlantic City Police Officer; a January 6, 2014 memorandum from the appellant's shift commander recommending the appellant to the Atlantic City Police Department and stating that he would make an "excellent officer;" a January 8, 2014 letter from the Chief of the Seaside Heights Police Department indicating that the appellant was a hard worker and had no disciplinary issues during his employment with that department; the appellant's resume; and a written statement regarding the written reprimands along with copies of the disciplinary reports. The appellant argued that none of the reprimands are significant. The appellant further argued that he used no sick time in 2012 and that his average use prior to that year was only six days per year. Finally, the appellant noted that he has no major discipline and has received praise and commendations. However, CPM found that the appointing authority had sufficiently supported and documented its decision to remove the appellant's name from the eligible list.

On appeal to the Civil Service Commission (Commission), the appellant notes that only one of the disciplinary reports resulted in a one-day suspension, which occurred in his first year of service as a County Correction Officer nearly seven years earlier, while the remaining reports resulted in written reprimands. He reiterates that he was promoted to Sergeant and named Employee of the Month for September 2013. The appellant contends that the conclusion that he has an adverse employment history is at odds with the concept of progressive discipline. Specifically, he argues that if any of the disciplinary matters had been considered significant adverse employment history, they would not have resulted in "mere" reprimands, and he would not have been promoted. The appellant argues that reprimands and a one-day suspension do not outweigh the promotion and commendation he received in 2013. The appellant explains that his two unauthorized absences in 2007 were unavoidable due to traffic, and he called his supervisor to explain the delay. He notes that his employer's policy mandates a one-day suspension as the penalty for two instances of lateness occurring in a six-month period regardless of cause. As to the remaining disciplinary matters, the appellant argues that they did not result in any loss of pay. Moreover, he argues,

the reprimands were issued merely to memorialize improvements that the appellant was required to make. Finally, the appellant reiterates that his shift commander recommends the appellant to be a Police Officer.

In response, the appointing authority, represented by Anthony A. Swan, Assistant City Solicitor, notes that the appellant used 272 hours of sick time from February 2007 to December 2011, the same time frame during which the disciplinary action reports were filed. The appointing authority emphasizes that, despite the significant amount of sick time used and factoring in vacation time and holidays, the appellant managed to commit nine disciplinary infractions during his abbreviated presence at work. The appointing authority states that it desires Police Officers who fulfill their assigned duties and requires Police Officers to be at work and patrolling Atlantic City. The appointing authority further states that the citizens require Police Officers who will be at work and competent. The appointing authority maintains that the appellant's inability to fulfill his duties to the extent his failures warranted disciplinary action and the excessive use of sick time supported the appointing authority's decision to remove the appellant from the eligible list.

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.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.

In the instant matter, the appointing authority requested the appellant's removal from the eligible list due to an unsatisfactory employment record. The record indicates that the appellant had received eight minor disciplinary actions over the period from February 2007 to December 2011: a one-day suspension and seven written reprimands.¹ 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 at 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

¹ Minor discipline is a formal written reprimand or a suspension or fine of five working days or less. See *N.J.A.C. 4A:2-3.1(a)*.

the appointing authority, for which appellant never received major discipline, were not sufficient to remove her name from the list); *In the Matter of Walter Langdon* (MSB, decided October 14, 1998) (Minor disciplines insufficient absent other evidence to remove employee, but sufficient to bypass employee on list for County Correction Sergeant). In the present case, the appellant received minor discipline for eight incidents which primarily address performance issues. The Commission finds that the appellant's minor disciplines are not sufficient to remove his name from the subject eligible list. Additionally, as the record does not indicate that the appellant received discipline related to his use of sick time, his use of sick time also does not present a sufficient basis to remove his name from the list. Therefore, the appellant must be restored to the Police Officer (S9999M), Atlantic City eligible list.

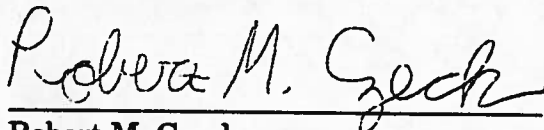
However, the appointing authority, in its discretion under *N.J.A.C. 4A:4-4.8*, could take into account the appellant's minor disciplines to bypass him on the subject eligible list. In the present case, the appellant's minor disciplines present a sufficient basis to bypass his name on the eligible list. *See N.J.A.C. 4A:4-4.8(a)3*. A review of the January 29, 2013 certification indicates that, once restored to the eligible list, the appellant could be bypassed without a violation of the "Rule of Three." *See N.J.A.C. 4A:4-4.8(a)3*. Accordingly, the appellant's name should be reflected on the January 29, 2013 certification as bypassed.

ORDER

Therefore, it is ordered that this appeal be granted and the appellant's name be restored to the eligible list for Police Officer (S9999M), Atlantic City but that his name be reflected as bypassed on the January 29, 2013 certification.

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 30TH DAY OF JULY 2014



Robert M. Czech
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals and
Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, NJ 08625-0312**

Attachment

- c. John P. Sharkey, III
D. William Subin, Esq.
Arthur M. Liston
Anthony A. Swan, Assistant City Solicitor
Kenneth Connolly**



Chris Christie
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
DIVISION OF CLASSIFICATION AND PERSONNEL MANAGEMENT
P. O. Box 313
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Robert M. Czech
Chair/Chief Executive Officer

February 11, 2014

D. William Subin, L.L.C.
Redding Business Park
308 S. New York Road
Suite B-1
Galloway, NJ 08205

RE: John P. Sharkey, III - Removal of name from Symbol

Title: Police Officer
Jurisdiction: Atlantic City
Symbol: S9999M

Certification No: OL130148
Certification Date: 01/29/13

Dear Mr. Subin:

This is in response to your correspondence contesting the removal of your client's name from the above-referenced Certification (OL130148).

The Appointing Authority requested removal of Mr. Sharkey's name in accordance with N.J.A.C. 4A:4-6.1(a)7, which permits the removal of an eligible candidate's name from the eligible list for an unsatisfactory employment record.

In support of its decision, the Appointing Authority provided a copy of nine (9) disciplinary actions occurring at your client's present employer (Atlantic County Justice Facility), including a suspension of one (1) day occurring on 10/22/2007.

After a thorough review of our records and all the relevant material submitted, we find that there is not a sufficient basis to restore Mr. Sharkey's name to the eligible list. Therefore, the Appointing Authority's decision to remove your name has been sustained and the appeal is denied.

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.

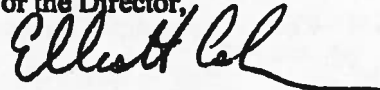
Please be advised that pursuant to P.L. 2010 C.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947,

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

c: Donald Guardian

Donald Guardian
City Of Atlantic City
1301 Bacharach Blvd
Atlantic City NJ 08401