

**IN THE MATTER OF YVONNE  
ZIRRITH, SHERIFF'S OFFICER  
LIEUTENANT (PC15571A)  
MIDDLESEX COUNTY  
SHERIFF'S OFFICE**

**SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION**

**DOCKET NO. A-000447-23**

**ON APPEAL FROM:  
June 7, 2023 and October 11, 2023  
Final Administrative Actions of the  
Civil Service Commission  
CSC Docket No. 2023-1734  
CSC Docket No. 2024-189**

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**BRIEF OF APPELLANT, YVONNE ZIRRITH  
IN SUPPORT OF APPEAL**

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**PRELIMINARY STATEMENT**

Appellant, Yvonne Zirrieth, (“Appellant”) appeals the June 7, 2023 and October 11, 2023 Final Administrative Actions (“FAA”) of the Civil Service Commission (“Commission” or “Respondent Commission”) that Appellant was ineligible for promotion to Sheriff’s Officer Lieutenant, Middlesex County.

When applying the controlling law to the undisputed facts of this case, the FAAs should be reversed. The Commission’s FAAs were arbitrary, capricious, and unreasonable. Appellant should have been promoted to Sheriff’s Officer Lieutenant as the number one candidate with a Veteran’s Preference pursuant to operation of Civil Service regulations. The decision by the Respondent Commission to remove her name based on clearly incorrect information concerning her disciplinary record was unreasonable and unsupported by the record.

## PROCEDURAL HISTORY

Appellant applied for and sat for the Civil Service promotional examination for Sheriff's Officer Lieutenant on May 25, 2021. (AA0001) She received a Notification of Certification, advising her she ranked No. 5 on the Eligibility List. (AA0001) She was not promoted on the first round of promotions from this List. (AA0001) On November 4, 2022, the eligibility list was certified a second time and Appellant was ranked No. 2 on the List. (AA0001) The No. 1 candidate was improperly certified by the Respondent Commission due to the Respondent Middlesex County Sheriff's Office ("MCSO" or "Respondent MCSO") failing to advise the Commission that the No. 1 candidate had been demoted due to disciplinary action. (AA0006) On December 9, 2022, MCSO announced promotions which reflected it had improperly applied the "Rule of Three" to bypass Appellant and appoint the No. 3 ranked eligible candidate. (AA0071-72)

Appellant, upon being advised of the promotion, filed an appeal with Civil Service on December 23, 2022. (AA0233-235) She was advised by Civil Service that her appeal was premature, as the Certification had not been returned to the Commission by the MCSO and she then refiled her Notice of Appeal on February 10, 2023. (AA0236-37) On March 23, 2023, Respondent MCSO filed opposition

to the appeal. (AA0223-232; AA0109-141)<sup>1</sup> On April 10, 2023, Appellant submitted a reply submission. (AA0035-AA0108)<sup>2</sup> On April 19, 2023, the Respondent MCSO filed a reply brief. (AA109-AA0117)<sup>3</sup>

On June 7, 2023, the Commission issued a decision that the No. 1 candidate was not eligible for promotion and Appellant was properly the No. 1 candidate for promotion. (AA0001-8) As such, the Appellant should have been the first ranked eligible on PL221601 (AA0006) Appellant was successful on her appeal that the action by the Respondent MCSO in using the Rule of Three to by-pass her proper promotion was improper. However, the Commission did not order Respondent MSCO to promote Appellant. (AA006-7) Instead, the Commission improperly decided that Appellant was ineligible for this promotion based upon inaccurate information and without properly allowing Appellant to address this issue. (AA0006-7)

On July 19, 2023, Appellant filed a Request for Reconsideration of the decision by the Commission. (AA0142-0208)<sup>4</sup> On August 20, 2023, Respondent

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<sup>1</sup> Civil Service Commission decision (AA0001-0008) to remove Appellant from promotion list based on alleged notice to Appellant in MSCO April 19, 2023, Opposition Brief.

<sup>2</sup> Included in the Civil Service Commission Items Comprising the Record.

<sup>3</sup> Included in the Civil Service Commission Items Comprising the Record.

<sup>4</sup> Included in the Civil Service Commission Items Comprising the Record.

MCSO filed opposition to the Request. (AA0209-221)<sup>5</sup> On October 11, 2023, the Respondent Commission improperly affirmed its determination that Appellant had notice of the request by MCSO that she be removed from the List based on her disciplinary record and that her alleged disciplinary record required removal of her name from the Eligibility List. (AA009-16) The Respondent Commission further affirmed its denial of Appellant's request for attorneys fees. (AA0015)

Appellant filed this Appeal with the Superior Court of New Jersey, Appellate Division, on October 12, 2023. (AA0017-20) Appellant filed an Amended Notice of Appeal on October 13, 2023. (AA0021-25)

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<sup>5</sup> Included in the Civil Service Commission Items Comprising the Record.



**STATEMENT OF FACTS**

Appellant is a Lieutenant Commander in the United States Navy and had been on active duty or reserve duty with the Navy for a period of approximately thirty-three (33) years at the time of the FAA in this matter. (AA0050) She is also classified as a disabled veteran by the Veteran's Administration ("VA") and qualifies and is registered as a disabled veteran with Civil Service. (AA0050) She has received twenty-two (22) military awards during her career with the Navy, as reflected in the United States Navy Awards Record submitted to the Respondent Commission. (AA0102)

Appellant is also a Sheriff's Officer Sergeant with the Respondent MCSO and registered and sat for the promotional examination for Sheriff's Officer Lieutenant on May 25, 2021. (AA0050) She thereafter appeared on the PC1557A eligible list, which promulgated on December 16, 2021, and expires on December 15, 2024. (AA0001) Her name was certified on January 12, 2022, (PL220040) for a position in the subject title. From that Certification, three candidates, all ranking higher than Appellant, were appointed. (AA0001)

Almost a year later, on November 4, 2022, the List was again certified, including Appellant's name. (AA0001) On the new Certification issued by the Respondent Commission, D.S. was the first positioned candidate, the Appellant was

the second positioned candidate and T.S., a non-veteran, was the third positioned candidate. (AA0001) On December 9, 2022, the Respondent MCSO issued a memo announcing several personnel would be promoted on January 9, 2023, including T.S., to the rank of Lieutenant. (AA0071)

On December 23, 2022, Appellant filed a Notice of Appeal with the Respondent Commission's Division of Appeals and Regulatory Affairs ("DARA") because the listed first ranked individual, D.S., had been disciplined and demoted to the title of Sheriff's Officer, rendering him ineligible for promotion to Lieutenant. (AA0233-235) Appellant argued in her Notice of Appeal that since D.S. had been demoted, and because the two subsequent positioned candidates were non-veterans, she was properly the first ranked eligible and entitled to appointment, as a veteran, pursuant to N.J.A.C. 4A:4-4.8(a), which provides, in part as follows:

Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:

ii. if the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed.

(AA0233; AA0002) After being advised her Notice of Appeal was premature because the Respondent MCSO had not yet returned the Certification to Civil Service, Appellant refiled her Notice of Appeal on February 10, 2023. (AA0236-237)

In the interim, the Respondent MCSO had completed and returned the Certification of Eligibles to the Respondent Commission, despite the fact it had been served with Appellant's Notice of Appeal and the Certification improperly listed the recently demoted D.S. as the first ranked eligible. (AA0005-6) The returned Certification reflected D.S., a non-veteran and the first ranked eligible, had been bypassed and further reflected that Appellant, a disabled veteran and the second ranked candidate, was bypassed. (AA0001; AA0122) The returned Certification fails to list any reason for the bypass of Appellant. (AA0122) The Certification also reflected the appointment of T.S., a non-veteran and the third ranked candidate, to Sheriff's Officer Lieutenant. (AA0001; AA0122) The Respondent MCSO did not request that Appellant's name be removed from the List. (AA0001; AA0122)

Despite the fact the Respondents had been put on notice that D.S. had been demoted and was ineligible for promotion, rendering Appellant the first ranked eligible and the only veteran in the top three, the Respondent Commission did not require the Respondent MCSO to appoint Appellant, even though the MCSO had

completed and returned the Certification of Eligibles without requesting to remove her name. (AA0005-0007) Instead, the Respondent Commission proceeded with an appeal on the papers. (AA0001-8; AA0122) Even on appeal, the Respondent MCSO did not formally request Appellant's name be removed from the Eligibility List. (AA0223-232; AA0109-141)<sup>6</sup>

Respondent MCSO submitted the Certification of Undersheriff Kevin Harris on appeal below before the Respondent Commission. (AA0118-141) Undersheriff Harris claimed that the MCSO considered experience, disciplinary history and work performance of the candidates eligible for promotion under Certification No. PL221601. (AA0118) Undersheriff Harris claimed a Major Disciplinary Action in the form of a 45-day suspension for an incident which occurred in 2012 was a factor in bypassing Appellant's name on the Certification, in favor of T. S., a non-veteran. (AA0119) Significantly, Undersheriff Harris did not refer to any other disciplinary action in his Certification, other than the eleven (11) year old suspension. (AA0118-120)

More significantly, Appellant was promoted from Sheriff's Officer to Sheriff's Sergeant by the Respondent MCSO on January 2, 2018, five (5) years after

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<sup>6</sup> Civil Service Commission decision (AA0001-0008) to remove Appellant from promotion list based on alleged notice to Appellant in MSCO April 19, 2023, Opposition Brief.

the suspension. (AA0053) She had no major disciplinary actions before or since the one referenced from more than eleven (11) years ago. (AA0053) Furthermore, despite the Respondent MCSO's false entry concerning September 6, 2022, discussed below, she had no disciplinary actions after her promotion to Sergeant in 2018. (AA0131)

Although Undersheriff Harris did not claim in his Certification that any other disciplinary action was the basis for the bypass of Appellant's name, attached to his Certification was what he called "the discipline history summary" for Appellant Yvonne Zirrieth. (AA0131) The counselings and written reprimands listed on this internal document should not have been part of Appellant's record at the MCSO or in this matter. Pursuant to the Collective Negotiations Agreement between the County of Middlesex and the Middlesex County Sheriff's Superior Officers Association, P.B.A. Local 165A ("CNA"), none of the investigations, counselings and/or reprimands in the MCSO's exhibit should have ever been included in the Appellant's personnel file and/or should have been removed by the MCSO years ago. (AA0185-187)

Article 16: Personnel File, subsection E, of the CNA between the MCSO and PBA Local 165A provides, in relevant part, as follows:

E. No documents shall be entered in a Superior Officer's personnel file that fall within the following

categories:

a. Any accusation that does not result in a hearing and finding of guilt.

b. Departmental investigations and/or hearings that do not result in a finding of guilty:

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f. Any letter, statement, report, or other document that implies a wrongdoing or inefficiency is not substantiated by a hearing and finding of guilty except in cases of written reprimands.

Subsection F provides:

All personnel file and training file entries concerning, negative performance notices, oral reprimands and written reprimands will be removed from the Superior Officer's personnel file or training file twelve (12) months from the date of entry provided no other similar negative performance notice or reprimand follows within said twelve (12) month period. If these conditions are met, the removed items shall not be used for progressive discipline purposes.

(AA0185-187) Based upon the foregoing provision in the CNA, every entry in the discipline history summary attached to Undersheriff Harris' Certification should have either never been included in Appellant's personnel file, or removed from Appellant's file years ago. (AA0131; AA0185-187) Therefore, based upon the CNA and the undisputed false entry concerning the September 6, 2022 alleged counseling, the only prior discipline that should have been in Appellant's file and properly subject to review by the Commission is the suspension from 2012.

(AA0053-54)

As outlined in the Appellant's Certification submitted below, the September 6, 2022 incident was a false entry as counselings are required to be presented on a form to and signed by the employee and Appellant was never presented with, nor signed any form for the alleged September 6, 2022 counseling. (AA0054; AA0156-57) Indeed, Appellant reviewed her file following review of the Undersheriff's Certification and her personal file did not include any documents regarding this allegation. (AA0157) This allegation should not have been considered in any decision to promote by the Respondent MCSO or on appeal by the Respondent Commission. Significantly, this undisputed false entry of discipline was the only entry on the "discipline history summary" which occurred after the Respondent MCSO promoted Appellant to Sergeant in 2018. (AA0131)

Undersheriff Harris' Certification below improperly compared the Appellant, as a veteran and the first ranked candidate, to the non-veteran appointee T.S. (AA0138-141) Furthermore, in making this comparison, the Undersheriff relied upon Exhibit 5 to his Certification, an evaluation for Appellant which was prepared by a Supervisor who had only been reviewing the work of Appellant for less than three (3) months, as reflected in the evaluation. Appellant's full year evaluation for the period October 1, 2020 to October 1, 2021, prepared by the MCSO Chief Sheriff Officer, submitted to the Respondent Commission below, awarded her several

ratings of “Outstanding” and described her as “one of the agencies most versatile Supervisors” and states “she is well versed in all divisions and does an excellent job.” (AA0055; AA0083-85)

In addition to demonstrating that she had no discipline subsequent to her 2018 promotion to Sergeant, the Certification of Appellant submitted below to the Respondent Commission further demonstrated her overwhelming experience and qualifications for this promotion, including her rank as Lieutenant Commander in the United States Navy, her status as a disabled veteran, her training with the MCSO, being appointed as an Accreditation Manager by the New Jersey State Association of Chiefs of Police, as well as serving as an Acting-Lieutenant on several occasions from 2020-2023. (AA0055-56; AA0088-93) Appellant’s submission on appeal demonstrated her character and fitness for promotion were overwhelmingly supported by other female Officers in the MCSO and high-ranking superior Officers within the United States Military. (AA0093-0100)

The Respondent Commission issued its FAA on June 7, 2023 confirming Appellant properly appealed the decision of the MCSO to utilize the Rule of Three in appointing T.S., a non-veteran third positioned candidate. The Respondent Commission found that the inclusion of D.S., the first positioned candidate on the Certification, was improper, since D.S. was no longer eligible for the promotion based on the Final Notice of Disciplinary Action (FNDA) issued on November 3,



2022, demoting D.S. to Sheriff's Officer. (AA0005-6) Therefore, the MCSO's utilization of the discretion afforded by the Rule of Three to bypass D.S. and Appellant, in order to appoint the third positioned non-veteran candidate was also deemed improper. (AA0005-6) Since the Respondent MCSO chose to bypass Appellant, not show cause to remove her name, she should have been appointed pursuant to N.J.A.C. 4A:4-4.8(a).

Appellant properly appealed and requested the relief that the MCSO be ordered to promote her to Sheriff's Officer Lieutenant based on the Veteran's Preference requirements of N.J.A.C. 4A:5-2.2(c). (AA0232-0236) The basis for the appeal was the failure of the MCSO to properly follow the requirements for considering eligible candidates for the Sheriff's Officer Lieutenant position. (AA0233-0237) The decision of the Respondent Commission reflected that Appellant clearly met the burden of proof required for this appeal:

In this matter, the record indicates that the subject examination was only open to candidates who were serving as a Sheriff Officer's Sergeant. Further, the record indicates that a FNDA was issued indicating that D.S., the then first ranked candidate on the subject eligible list, had been demoted to Sheriff's Officer, effective November 3, 2022. Therefore, as of November 3, 2022, D.S. was no longer eligible for the promotion from the subject examination. If this agency had been made aware that D.S. no longer met the eligibility requirements, it would have removed D.S. from the subject promotional eligible list and his name would not have been certified on November 4, 2022, (PL221601). Therefore, the appointing authority's discretion to bypass

D.S. under list removal rules was not applicable. It does not matter that D.S. could have potentially appealed his demotion, which he did. A discipline that results from the issuance of a FNDA is considered final as of the effective date, and it does not matter that this “final” decision could thereafter be modified or reversed by settlement or a Commission decision. As such, the appellant should have been the first ranked eligible on PL221601. Therefore, under N.J.A.C. 4A:5-2.2(c), the appellant needed to be appointed or removed from the PC1557A promotional eligible list.

(AA0005-6) (emphasis added).

However, the Respondent Commission failed to require the MCSO to appoint Appellant pursuant to operation of N.J.A.C. 4A:5-2.2, even though at no point in the disposition of the Certification or in opposition to the list bypass appeal did the MCSO formally request the removal of Appellant from the certified list. (AA0006; AA0070; AA0223-232)<sup>7</sup> Instead, the Commission improperly moved forward with a determination to remove Appellant from the eligible list without allowing her a proper opportunity to respond.

The Respondent Commission’s June 7, 2023 FAA erroneously found that Appellant had been provided notice of the Respondent MCSO’s request to remove her name from the List:

Concerning the appellant’s removal, initially it is noted that the appellant has been provided notice on appeal of the

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<sup>7</sup>Included in the Civil Service Commission Items Comprising the Record.

appointing authority's request to remove her name from the subject promotional eligible list, the basis for that request, and an opportunity to respond.

(AA0006) However, the Respondent MCSO returned the Certification to the Respondent Commission reflecting a bypass of Appellant, not a removal of her name. (AA0122; AA0001) Further, as set forth above, Undersheriff Harris' Certification, the MCSO's position statement and the MCSO's reply all requested vigorously that the bypass be upheld. (AA018-20; AA0223-232<sup>8</sup>; AA0109-117<sup>9</sup>) Although in its reply, the MCSO argued by analogy that Appellant's name could be removed under that more stringent standard, it still only requested that the bypass be upheld. (AA0109-AA0117)<sup>10</sup>

The Respondent Commission's June 7, 2023 FAA also reflects that it erroneously considered the counselings and reprimands which pre-dated Appellant's promotion by Respondent MCSO to Sergeant and which had been removed from her personnel file and not subject to consideration in the appeal below. (AA0001-7) The Respondent Commission specifically relied upon an April 27, 2011 incident which resulted in a written reprimand, an August 11, 2013 incident which led to a

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<sup>8</sup> Included in the Civil Service Commission Items Comprising the Record.

<sup>9</sup> Civil Service Commission decision (AA0001-0008) to remove Appellant from promotion list based on alleged notice to Appellant in MSCO April 19, 2023 Opposition Brief.

<sup>10</sup> Civil Service Commission decision (AA0001-0008) to remove Appellant from promotion list based on alleged notice to Appellant in MSCO April 19, 2023 Opposition Brief.

written reprimand and counseling and a September 28, 2017 incident which led to a written reprimand. (AA0006-7) As set forth above, each of these minor incidents pre-dated her promotion to Sergeant and had been properly removed from her personnel file years before her consideration for promotion to Lieutenant, as Appellant demonstrated in her submission to the Respondent Commission. (AA0053-54)

Significantly, the Respondent Commission placed significant emphasis upon the September 6, 2022 alleged incident, which it clearly failed to properly or accurately address in its June 7, 2023 FAA. (AA0006) The Respondent Commission incorrectly found in its decision as follows:

... and a September 6, 2022, incident where the appellant was advised during roll call that her duty weapon was not serviceable, the appellant wrote a memo as required and then proceeded to her assigned duty, but never asked what was wrong with her weapon which led to counseling.

(AA0006) As set forth above and in Appellant's Certification submitted below to the Respondent Commission, this was a false entry on the discipline history summary, as she did not receive any discipline. (AA0054) Furthermore, during the pendency of the appeal below, Appellant certified she reviewed her file, which contains no documentation relative to this false entry. (AA0054)

Even worse, even if this was not a false entry, the Respondent Commission's findings are drastically different than the unsupported allegations of the "discipline

history summary” submitted by the Respondent MCSO, which provided as follows:

On September 6, 2022, S/O Massano told Sgt. Zirrith at roll call that his duty weapon was not serviceable. Sgt. Zirrith told him to write a memo. Massano wrote the memo and proceeded to his assigned duty. Zirrith never asked Massano what was wrong with his weapon.

(AA0131). This incorrect factual finding regarding a false entry of discipline was very significant as it was the only allegation which was after the Respondent MCSO’s promotion of Appellant to Sergeant and the Respondent Commission specifically relied upon this erroneous finding in the final sentence of its analysis in support of denying her appeal:

Concerning the appellant’s comment that her 2013 discipline did not impact the appointing authority’s decision to promote her in 2018 to Sergeant, that decision was at the appointing authority’s discretion and not relevant to the subject matter as the Commission was not asked to review the appellant’s background for the Sergeant promotion, and that discretionary decision by the appointing authority did not prohibit or estop it from requesting that the appellant’s name be removed from a future list based on the subject major discipline, since the appellant has subsequent adverse history, and a Sheriff’s Officer Lieutenant is a higher title than Sheriff’s Officer Sergeant.

(AA0007) (emphasis added).

The Appellant requested Reconsideration from the Respondent Commission clearly demonstrating that the false entry concerning September 6, 2022 was not an official finding by the Respondent MCSO and was incorrectly included in the

improper “discipline history summary.” (AA0157) She certified that the subject of the investigation was another Officer, not Appellant. (AA0157) She argued that the Respondent Commission also incorrectly found that she had been disciplined for failure to report her own service weapon was not functioning, when the false entry alleged by the Respondent MCSO actually stated another Officer’s gun was not functioning. (AA0031; AA0157) The Appellant further certified she was never served with an discipline regarding the September 6, 2022 allegation and properly and immediately reported the alleged issue to her Superior Officer upon learning of it. (AA0157)

Moreover, Appellant certified in support of Reconsideration that she reviewed her personnel file under Internal Affairs Supervision and there is no document referencing the September 6, 2022 allegation therein. (AA0157) She further certified on Reconsideration that the MCSO Detective confirmed to her that if a signed Counseling Form is not in her file, then the discipline does not exist. (AA0157) Significantly, in its opposition to Reconsideration, the Respondent MCSO did not dispute the September 6, 2022 was a false entry contained in the improper “discipline history summary,” but rather simply noted Appellant acknowledged she was involved in an incident that day. (AA0217)

Appellant further certified, in support of her Request for Reconsideration, that other than the 2012 major discipline action, none of the disciplines listed on the

improper “discipline history summary” submitted by the Respondent MCSO existed in her personnel file. (AA0158) She asserted the Respondent erred by relying on these minor incidents, including the false entry, which was the only alleged incident subsequent to her promotion to Sergeant in 2018. (AA0158) Since she had improperly not been provided notice of a request to remove her name from the eligible list, she also explained the nature of the minor incidents improperly relied upon by the Respondent Commission to remove the name of a first ranked disabled veteran from the list:

Despite the fact that no documents from these minor disciplinary incidents are in my official personnel file, the Commission improperly relied upon a disciplinary history document provided by the MCSO. The April 2011 incident was a disagreement between co-workers. It was properly removed from my file years ago. The November 16, 2013 incident was a lost badge and wallet from a kayaking trip. Again, it was properly removed from my file years ago. The improper motor vehicle stop on September 28, 2017 was similarly a minor incident in which I was exonerated on the allegation of obedience to laws and regulations and issued a written reprimand on performance of duty. This two was removed from my personnel file years ago.

(AA0158) None of these minor incidents involved truthfulness, all predated the Respondent MCSO’s promotion of Appellant to Sergeant in 2018 and none sufficiently supported a decision to remove the name a disabled veteran who ranked first on the eligible list. (AA0131) In opposition to Reconsideration, the Respondent MCSO referred to Law Enforcement Directive No. 2019, which was issued after the

closing date for the examination for Sheriff's Officer Lieutenant and addresses background investigations for new recruits and candidates from another law enforcement agency, neither of which apply to the disabled veteran Appellant's application for promotion. (AA0213-14)

On October 11, 2023, the Respondent Commission issued a FAA denying Appellant's Request for Reconsideration on the "List Bypass Appeal" and again confirming its reliance on the false entry concerning September 6, 2022 and the improper "discipline history summary":

The Commission noted that Zirrith's disciplinary history included major discipline, more recent minor discipline, and counseling after the closing date. Therefore, it found that Zirrith's employment record was adverse to being a Lieutenant, a high-level law enforcement position.

(AA0010) (emphasis added). The Respondent Commission's decision on Reconsideration reflects that, on one hand, the Commission understood that Appellant had demonstrated that the September 6, 2022 matter on the "discipline history summary" was an undisputed false entry, but it ignored this fact in denying her appeal, request for reconsideration and request for a hearing on the disciplinary record dispute. (AA0011-15) The Respondent Commission stated:

Concerning the September 6, 2022, incident, she presents that there were no written findings that were provided to her ... she was never served any disciplinary action. She disputes this incident, which is not part of her personnel



file, and contends it should not be the basis for finding she has an adverse history. Zirrieth believes that if her removal from the list is going to be considered, there should at least be a hearing as there are factual disputes tht need to be resolved before the Commission can make a proper decision.

(AA0011) Despite the foregoing and despite the fact that Respondent MCSO described it's owns exhibit as a "discipline history summary," the Respondent Commission erroneously found that "the appointing authority presented Zirrieth's complete disciplinary history as a basis for it bypassing her name." (AA0013) The Respondent Commission's decision improperly ignored Appellant's point that the September 6, 2022 false entry was not part of her record or history and failed to grant a hearing to resolved this issue concerning the only entry which was after her promotion to Sergeant:

Additionally, while Zirrieth argues that if her minor disciplinary history is to be considered, there should be a hearing as there are factual disputes, these incidents are part of her disciplinary history, and the Commission is not going to relitigate these issues. ... the Commission finds that this matter is properly reviewed on the written record as there are no material and controlling disputes of fact that can only be resolved by a hearing.

(AA0015) The Commission erred by ignoring the fact it had only been provided an inaccurate "summary" of Appellant's disciplinary history, which contained a false entry as the only entry subsequent to her promotion to Sergeant. (AA0013-15) Since Appellant was a disabled veteran who ranked first on the certified list, her

promotional appointment was proper, or alternatively, there were material and controlling disputes of fact which required the granting of a hearing.

**LEGAL ARGUMENT**

**POINT I**

**THE RESPONDENT COMMISSION ERRED BY  
DISREGARDING CIVIL SERVICE REGULATIONS  
AND DEPRIVING A DISABLED VETERAN OF HER  
VETERAN'S PREFERENCE WITHOUT PROPER  
BASIS (AA0001-8; AA0009-16)**

The Appellate Court is permitted to reverse Commission actions if they are “arbitrary, capricious or unreasonable or [if the action] is not supported by substantial credible evidence in the record as a whole.” N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 384-85 (2008). Under the arbitrary, capricious, and unreasonable standard, the Appellate Division’s scope of review is guided by three major inquiries: (1) whether the agency's decision conforms with the relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether in applying the law to the facts, the administrative agency clearly erred in reaching its conclusion. In re Stallworth, 208 N.J. 182, 194 (2011). The Commission failed to correctly apply the relevant law, made a decision which is contrary to the substantial credible evidence in the record and clearly erred in reaching an unjust conclusion which deprived a disabled veteran of her veteran’s preference without proper basis.

Pursuant to N.J.A.C. 4A:4-4.8(a), “Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

\* \* \*

3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:

\* \* \*

ii. if the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed.

N.J.A.C. 4A:4-4.8 (emphasis added). Furthermore, pursuant to N.J.A.C. 4A:5-2.2 (c), “When a single vacancy is to be filled from a promotional certification headed by a veteran, any veteran among the top three interested eligibles may be appointed in accordance with the ‘rule of three.’ N.J.S.A. 11A:4-8. Significantly, “[a] nonveteran shall not be appointed unless the appointing authority shows cause why the veterans should be removed from the promotional list.” N.J.A.C. 4A:5-2.2.

Despite the clear direction of the Legislature and the foregoing provisions of the Civil Service regulations, the Respondent Commission disregarded the law and the proper preference owed to veterans, without proper basis.

In the present matter, as the Respondent Commission later found in its June 7, 2023 Final Administrative Action, when the Respondent MCSO returned the

completed Certification to the Respondent Commission, the MCSO had, pursuant to law, only two alternatives with respect to Appellant's name:

Therefore, as of November 3, 2022, D.S. was no longer eligible for the promotion from the subject examination. ... Therefore, the appointing authority's discretion to bypass D.S. under list removal rules was not applicable. ... As such, the appellant should have been the first ranked eligible on PL221601. Therefore, under N.J.A.C. 4A:5-2.2(c), the appellant needed to be appointed or removed from the PC1557A promotional eligible list.

(AA0005-6) (emphasis added). In violation of the Civil Service regulations, the Respondent MCSO took neither of the alternative required actions, i.e. it (1) failed to appoint the disabled veteran Appellant and (2) failed to request removal of her name. The Respondent Commission erred when it ignored the preference due to veterans and failed to enforce the above referenced correct interpretation of N.J.A.C. 4A:5-2.2(c).

Significantly, Appellant filed a Notice of Appeal with the Commission's Division of Appeals and Regulatory Affairs ("DARA") on December 23, 2022 in response to a December 9, 2022 Memo to All Personnel from the Sheriff announcing that T.S. would be promotionally appointed to Lieutenant. (AA0233-235) Appellant's Notice of Appeal clearly set forth that which the Respondent Commission ultimately held in its June 7, 2023 Final Administrative Action – that

because D.S. was ineligible, Appellant should be the first ranked eligible and Appellant needed to be appointed or removed from the List.

The Respondent MCSO returned the completed Certification to Civil Service, without appointing Appellant or removing her name, and Appellant, who had been advised her December 23, 2022 Notice of Appeal was premature, as the Certification had not been returned to the Commission by the Sheriff's Office re-filed her Notice of Appeal on February 10, 2023 (AA0235-236). The Commission erred when, instead of reviewing the returned Certification and Appellant's Notices of Appeal and ordering the appointment of Appellant as required by N.J.A.C. 4A:5-2.2(c), it instead ordered that Appellant's name be removed from the List, even though the Respondent MCSO did not request removal of the disabled veteran's name.

Appellant's promotional appointment to Sheriff Lieutenant was required upon the Respondent MCSO returning the completed Certification because the Respondent MCSO requested to bypass her, not to remove her name. Instead of ordering Appellant's appointment by operation of law pursuant to N.J.A.C. 4A:5-2.2(c), the Respondent Commission's DARA issued a March 8, 2023 letter stating "... in response to the appellant's appeal, it is requested that **the appointing authority submit the reason(s) why the same ranked eligible(s) was selected instead of the appellant,**" and further stating "[t]he appointing authority may also submit any argument in response to the appeal at that time." (emphasis in

original). Even after being given an improper “second bite of the apple,” the Respondent MCSO, in its March 28, 2023 submission to the Respondent Commission, again took the position its bypass of the disabled veteran Appellant should be upheld, but failed to request removal of her name. (AA0223-232)<sup>11</sup>

As the Respondent Commission held in its June 7, 2023 Final Administrative Action, based upon Appellant’s veteran status and her correct placement as the first ranked eligible, Appellant could only properly be (1) appointed pursuant to veteran’s preference or (2) removed from the List upon a showing of cause by the Respondent MCSO. This action was required to take place upon the Respondent MCSO’s disposition of the certified list. This occurs when the appointing authority completes the certified list by marking its action with respect to each listed eligible candidate and submits it to Civil Service. N.J.A.C. 4A:1-1.3 states “Disposition” “means the written report of actions taken by an appointing authority regarding a certification.” In the present matter, the disposed certification only reflects a bypass of Appellant, not a request to remove her name or any showing of cause why a disabled veteran should not be appointed.

Appellant was not subject to bypass, as the Respondent MCSO marked on the completed Certification, and there was no proper relevance or reason for the

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<sup>11</sup> Included in the Civil Service Commission Items Comprising the Record.

Respondent Commission's DARA to request the appointing authority to submit the reasons why the non-veteran T.S. was appointed instead of the disabled veteran Appellant. Pursuant to the preference granted to veterans, Appellant deserved to be evaluated on her own merit. The comparison to the non-veteran T.S. was both inappropriate and prejudicial. The Respondent Sheriff's Office's failure to request the removal of Appellant's name when it returned the completed Certification required her appointment to the position by operation of N.J.A.C. 4A:5-2.2(c). The Respondent Commission erred and violated veteran's preference when it requested the comparison to the non-veteran T.S. and provided the Respondent MCSO a "second bite of the apple" and an opportunity to make additional arguments.

In In the Matters of Yanzan Abaza and Nicholas Saliba, County Correction Officer (S9999U), Passaic County Sheriff's Office, 2019 N.J. CSC, LEXIS 420 (June 28, 2019), the Respondent Commission granted the list removal appeals of two entry-level candidates who had multiple criminal, employment and driving record adverse issues. When the Passaic County Sheriff's Office sought reconsideration, the Commission denied the Sheriff's Office a "second bite of the apple" and held the Sheriff's Office "needed to indicate [it's alternate arguments] at the time it submitted its background report when it returned the certification to this agency." Id. (emphasis added)



As a Veteran seeking promotion, Appellant should have been promoted to Lieutenant when the Respondent MSCO failed to request the removal of her name from the Certified List.

For these reasons, the June 7, 2023 and October 11, 2023 Final Administrative Action of the Respondent Civil Service Commission should be reversed and this Court should order the promotional appointment of Appellant with backpay and retroactive seniority.

**POINT II**

**THE RESPONDENT COMMISSION ERRED BY REMOVING APPELLANT'S NAME BASED UPON A FALSE, INACCURATE AND MISLEADING DISCIPLINARY HISTORY (AA0001-8; AA0009-16)**

The Commission erred when, in response to DARA's March 8, 2023 letter, the Respondent MCSO did not request the removal of Appellant's name, but the Respondent Commission nonetheless ordered the removal of Appellant's name, despite her veteran status and the failure of the MCSO to take the only available action to avoid her appointment under N.J.A.C. 4A:5-2.2(c), requesting removal of her name. The Respondent MCSO did not request, while returning the Certification to the CSC, or on appeal, removal of the name of the disabled veteran Appellant from the List. Accordingly, as a veteran and the first ranked eligible, the Respondent Commission should have ordered the appointment of Appellant to the rank of Lieutenant.

The Respondent Commission erred by removing a disabled veterans name from the Eligibility List based upon an inaccurate presentation of her disciplinary history, including a false entry.

The Respondent Commission's removal of Appellant's name from the Eligibility List based upon an inaccurate "disciplinary history summary" and was

arbitrary, capricious and unreasonable. First, the Respondent Commission improperly relied upon a major disciplinary action from over ten (10) years prior to Appellant's name being certified for consideration for promotion to Lieutenant. The Respondent Commission took this unreasonable action despite the fact that Appellant is a disabled veteran and had been promoted from Sheriff's Officer to Sheriff's Officer Sergeant in 2018, approximately five (5) years after her only major disciplinary action. Furthermore, Respondent Commission arbitrarily disregarded Appellant's long and impressive thirty-three (33) years of service to this country, as well as her fifteen (15) years service as a Sheriff's Officer and Sheriff's Sergeant in Middlesex County.

The Respondent Commission, in its June 7, 2023 decision also erred by relying upon a false, misleading and incomplete "discipline history summary" of Appellant. This document had been submitted by the Respondent MCSO in support of its bypass of Appellant, not in support of a request to remove her name from the List, as reflected in the Under Sheriff's Certification which sought to compare Appellant to non-veteran T.S., instead of to judge Appellant on her own merits as a veteran ranked first of the Eligible List. As a disabled veteran, Appellant was entitled to be judged on her own merit, without comparison to a non-veteran. Even assuming the Respondent MCSO had requested the removal of Appellant's name from the List, which it did not, the correct standard was whether a ten (10) year old

discipline should stand in the way of promoting a disabled veteran who, in the interim, had deployed to Iraq and had been promoted to Sergeant in 2018 and who did not receive any discipline following her promotion.

The Commission found “the appellants employment record is adverse to the position sought due to the high standards for law enforcement officers. See Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965). The factual basis for seeking the removal of Officer Armstrong in 1963 included threatening to kill the Chief of Police, threatened suicide, domestic battery with threats involving guns against his wife and family, and a litany of other alleged criminal acts, chronic absenteeism, and lateness. The Court in Armstrong does rationalize the decision to terminate Officer Armstrong by discussing in dicta the heightened duty of law enforcement, without any citations to laws or regulations supporting this standard. Further citations to this standard in support of determinations on list removal do not show any additional legal standards or guidelines. Respondent MCSO relied on In re Kerney, CSC Docket No. 2019-1396 and In re Reid, CSC Docket No. 2016-578 in support of its improper action. Kerney involved a candidate who provided false information on his residency, his driving record and his interactions with police. His removal was for the falsification of his application, the integrity of the job of police officer had no impact on this decision.

In Ried, the candidate for Police Lieutenant in East Orange alleged harassment by the Chief of Police as the basis for her improper bypass. The Respondent MCSO states that Ried supports removal where the employment history revealed extensive minor discipline or as little as one major discipline. Id. at 3. The extensive minor discipline matter involved 20 separate minor disciplines in a ten year period. In the matter of Louis Bernstein, Correction Lieutenant (PS63201) Department of Corrections (MSB, decided July 17, 2002) (cited in Reid). The one major discipline that was sufficient cited in Ried was the removal from a Sheriff's Officer Lieutenant promotional list for a Sergeant who received a six-day suspension for misuse of public property three months prior to the certification of his name for appointment. In the Matter of John Bonafide Docket No. A-1658-04TI, 2006 N.J. Super. Unpub 2002 Lexis 469 (App. Div. 2006). The final matter relied upon in Ried was the removal from a Correction Lieutenant list for a Correction Sergeant whose record included two official reprimands for absenteeism and a 30-day suspension for falsification of a report. In the Matter of Frank R. Jackson Correction Lieutenant, Department of Corrections (PS63201) Docket A-1617-00T2 (App. Div. 2002) (cited in Reid).

Appellant's record is not consistent with these matters. The major discipline is over ten years ago and is mitigated by her service to this Country and status as a veteran, as well as the decision of the Respondent MCSO to promote Appellant to

the position of Sergeant in 2018. The disciplinary history since this 2012 discipline does not support a determination that Respondent was permitted to deliberately maintain the ineligible candidate D.S. to by-pass Appellant under the Rule of Three and avoid her promotion based on her status as the number one candidate with veteran preference. Further, it does not support the untimely, improper and unsupported request to remove Appellant from the eligible list based on this disciplinary history. The actions of Respondent MCSO were deliberate and in bad faith and the Commission acted in an arbitrary, capricious and unreasonable in this decision to uphold this removal.


**CONCLUSION**

For the foregoing reasons, Appellant, Yvonne Zirrith respectfully requests that this Court reverse the June 7, 2023 and October 11, 2023 Final Administrative Actions of the Civil Service Commission and order the promotional appointment of Appellant with backpay and retroactive seniority.

Respectfully submitted,

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IN THE MATTER OF YVONNE  
ZIRRITH, SHERIFF'S OFFICER  
LIEUTENANT (PC1557A),  
MIDDLESEX COUNTY  
SHERIFF'S OFFICE.

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-000447-23

CIVIL ACTION

ON APPEAL FROM:  
New Jersey Civil Service Commission

CSC DOCKET NO.: 2024-189

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**BRIEF ON BEHALF OF RESPONDENT-RESPONDENT  
MIDDLESEX COUNTY SHERIFF'S OFFICE**

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**PRELIMINARY STATEMENT**

Yvonne Zirrith, a Sheriff's Officer Sergeant employed by the Middlesex County Sheriff's Office ("MCSO") appeals from the Civil Service Commission's decisions removing her from the eligible list for promotion to the rank of Sheriff's Officer Lieutenant. The Commission correctly considered Zirrith's entire employment history in determining whether she had "a prior employment history which relates adversely to the title" sufficient for her removal from the eligible list pursuant to N.J.A.C. 4A:4-4.7(a)(1) and N.J.A.C. 4A:4-6.1(a)(9). Zirrith's undisputed disciplinary history included multiple reprimands and counseling in addition to major disciplinary action in the form of a 45 day suspension for Zirrith's admitted guilt on untruthfulness and insubordination charges. The Commission correctly concluded that such history, especially the admitted untruthfulness and insubordination, adversely related to her potential promotion to the high rank of Sheriff's Officer Lieutenant. In fact, the Commission observed that her discipline for untruthfulness and insubordination alone could have warranted list removal.

Zirrith fails to satisfy her burden of demonstrating that the Commission's decision was arbitrary, capricious, unreasonable, or unsupported in any respect. As a result, her appeal must be denied and the Commission's decisions must be affirmed.

## **PROCEDURAL HISTORY**

Yvonne Zirrieth, a Sheriff's Officer Sergeant employed by the Middlesex County Sheriff's Office ("MCSO") filed an appeal with the Civil Service Commission challenging the MCSO's decision not to promote her to the position of Sheriff's Officer Lieutenant from the PC1557A eligible list. AA1-7. On June 7, 2023, the Commission denied her appeal. Ibid. Zirrieth requested that the Commission reconsider that decision and award her attorneys' fees. AA9-16. The Commission denied her request for reconsideration. Ibid. This appeal followed.

## **STATEMENT OF FACTS**

On or about November 4, 2022, the MCSO received a Certification of Eligibles For Appointment from the Civil Service Commission for Certification No: PL221601 – Sheriff's Officer Lieutenant. AA118; AA122. In relevant part, D.S. (a nonveteran) was first on the list, Zirrieth (a disabled veteran) was second on the list, and T.S. (a nonveteran) was third on the list. AA118; AA122. When presented with this certification, the MCSO bypassed the first and second ranked eligibles, D.S. and Zirrieth, and instead promoted T.S. AA122.

In considering Zirrieth's suitability for promotion it considered her disciplinary history, which included multiple prior reprimands and counseling in addition to major discipline related to Zirrieth's prior untruthfulness and insubordination.

AA119; AA131. Of most concern, as part of a settlement agreement to avoid a more significant penalty and dismissal of additional charges, Zirrih previously pled guilty to untruthfulness, insubordination, and related misconduct and served a forty-five (45) day suspension without pay. AA133-137. The discipline involved her losing her service firearm in an unsecured location and then being untruthful about its location and related insubordination in an effort to avoid accountability. See *ibid.*

In late 2019, the New Jersey Attorney General issued a directive to all law enforcement agencies to address the significant issues surrounding law enforcement officers who have been found to be untruthful in the past and the inconsistent past practices regarding such serious offenses throughout this State. Ra1-10. That directive required heightened scrutiny of law enforcement officers who have been subject to “a sustained finding that an investigative employee was untruthful or has demonstrated a lack of candor[.]” Ra5.

Subsequent to the closing date for the Sheriff’s Officer Lieutenant promotional examination and the issuance of the certification at issue in this appeal, on November 7, 2022, the MCSO served a Final Notice of Disciplinary Action demoting D.S. to the position of Sheriff’s Officer, and he thereafter filed an appeal with the Civil Service Commission on or about November 9, 2022. AA118-19; AA124-129.

Zirriith appealed the MCSO's decision to bypass her and to instead promote T.S. to the rank of Lieutenant to the Civil Service Commission. AA1-7. In its first decision on her appeal, the Commission explained that "[i]f this agency had been made aware that D.S. no longer met the eligibility requirements [due to his demotion], it would have removed D.S. from the subject promotional eligible list and his name would not have been certified on November 4, 2022, (PL221601)." AA6. The Commission further explained that if the MCSO had been presented with a certification where she had been ranked first, Zirriith would then have "needed to be appointed or removed from the PC1557A promotional eligible list" due to her veteran status. AA6. In light of the Commission's subsequent determination regarding D.S.'s removal, the Commission considered whether Zirriith should be removed from the eligible list as requested by the MCSO in opposition to her appeal given its own determination that she was unsuitable for promotion to the lieutenant rank when promoting T.S. Ibid.

The Commission concluded that the record contained sufficient basis for removing Zirriith from the list due to her prior employment history. Ibid. It emphasized that "the record indicates that [Zirriith] received major discipline which involved untruthfulness among other charges" and that such "employment record is adverse to the position sought due to the high standards for law enforcement officers." AA6-7 (citing Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App.



Div. 1965), cert. denied, 47 N.J. 80 (1966)). The Commission further emphasized that “the standard in this case is even higher because [Zirrith] seeks promotion to a higher-level law enforcement position, Sheriffs [sic] Officer Lieutenant, where incumbents supervise, evaluate, train and provide guidance to subordinate Sheriff Officer personnel.” AA7.

The Commission rejected Zirrith’s argument “that the incidents after her major discipline should not be considered because these incidents were to be removed from her personnel file based on the [Collective Negotiations Agreement between her union and the MCSO]” because “the Commission is not a party to the CNA, and the Commission can evaluate a candidate’s entire employment history when considering a list removal request for promotion as it is in the public's interest for it to make its determination based on a complete record.” Ibid.

The Commission also rejected Zirrith’s argument that because she was promoted to Sergeant after her major discipline for untruthfulness, that discipline could not be a basis for her removal from the eligible list for promotion to Lieutenant. Ibid. Instead, the Commission explained that the decision to promote her to Sergeant in 2018 (prior to Attorney General Directive 2019-6) “was at the appointing authority’s discretion and not relevant to the subject matter as the Commission was not asked to review [Zirrith]’s background for the Sergeant promotion, and that discretionary decision by the appointing authority did not

prohibit or estop it from requesting that the [Zirrith]’s name be removed from a future list based on the subject major discipline, since the appellant has subsequent adverse history, and a Sheriffs [sic] Officer Lieutenant is a higher title than Sheriffs [sic] Officer Sergeant.” Ibid. The Commission denied Zirrith’s appeal and upheld T.S.’s promotion, while further ordering the removal of Zirrith’s name from the certification. Ibid.

The Commission also denied Zirrith’s subsequent request for reconsideration. Although Zirrith disputed whether she actually received a counseling related to the September 2022 incident, she did not dispute that she received the major discipline, multiple other reprimands, or counseling reflected in the record. AA14. Nor does she do so on appeal. See, e.g., Ab19. Instead Zirrith tries to downplay those other reprimands and counseling as “minor incidents” which should have been ignored since they were removed from her personal file. Ibid. The Commission emphasized that “[w]hile there is an apparent dispute regarding [the September 2022] incident, **even discounting this as a disciplinary issue, Zirrith's other disciplinary history supports her removal from the list.**” AA14 n. 2 (emphasis added). The undisputed record reflected “that Zirrith received major discipline which involved untruthfulness among other charges approximately seven years prior to the subject examination November 21, 2019 closing date, minor discipline approximately two and six years prior to the closing date, and counseling three years after the closing

date.” AA14. The Commission concluded that “[t]his is clearly a record that is insufficient for a higher-level law enforcement position, Lieutenant, where incumbents supervise, evaluate, train and provide guidance to subordinate Sheriffs [sic] Officer personnel.” AA14-15. In fact, “[t]he Commission may have removed Zirrith from the subject eligible solely on the basis of the November 2012 45-day suspension where she agreed that she was untruthful.” AA15. This appeal followed.

### **STANDARD OF REVIEW**

A strong presumption of reasonableness must be afforded to the Civil Service Commission’s decision, and to disturb that decision an appellate court must “find the agency’s decision to be ‘arbitrary, capricious, or unreasonable, or [ ] not supported by substantial credible evidence in the record as a whole.’” In re Stallworth, 208 N.J. 182, 194 (2011) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579–80 (1980)). The burden rests on the appellant to establish that the administrative decision was unlawful, arbitrary, or capricious. See In re Foglio, 207 N.J. 38, 47 (2011). “Arbitrary and capricious action . . . means willful and unreasoning action, without consideration and in disregard of circumstances.” Worthington v. Fauver, 88 N.J. 183, 204-05 (1982) (quoting Bayshore Sewage Co. v. Dept. of Env’tl Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff’d, 131 N.J. Super. 37 (App. Div. 1974)).

## **LEGAL ARGUMENT**

### **I. The Commission's Decisions Removing Zirrieth From the Promotional List Must Be Affirmed.**

In Point I of her brief, Zirrieth argues that she should have been appointed because she was a veteran and should have been ranked first on the November 4, 2022 Certification (AA118) instead of D.S. Ab23-29. In Point II of her brief, she argues that the Commission “erred” by removing her name from the eligible list. Ab30-34. Zirrieth fails to meet her burden on appeal. Zirrieth fails to satisfy her burden of establishing that the Commission’s decisions were arbitrary, capricious, unreasonable, or unsupported in any respect. The decisions must be affirmed.

#### **A. The MCSO Found Zirrieth Unsuitable For Promotion To The Rank Of Lieutenant Due To Her Adverse Employment History Including Insubordination And Untruthfulness Resulting In Major Disciplinary Action And Properly Sought Her Removal.**

Perhaps recognizing the severity of her disciplinary history, Zirrieth repeatedly asserts that she should have been automatically promoted without consideration of her past untruthfulness and disciplinary history on the false premise that the MCSO never requested the removal of her name from the certification. See Ab26-27 & Ab30. Her assertion is unsupported by the record, as the MCSO made clear that she was unsuitable for promotion and should be removed from the list rather than promoted if the Commission removed D.S. from the certification.

The record is clear that the MCSO received a certification with D.S. ranked first. AA122. It acted consistent with the certification before it and bypassed D.S. and Zirrieth, who was then ranked second on that list, to promote the third ranked candidate, T.S. Ibid. The MCSO also made clear on the very first page of its March 28, 2023 submission to the Commission that Zirrieth should be removed from the list rather than promoted if D.S. were to be removed from the certification. AA222 (arguing that “Zirrieth did not have any entitlement to such promotion, and her adverse employment history, which included major discipline of a forty-five (45) day suspension for her prior insubordination and untruthfulness not only justified the bypass decision, but **also would have justified list removal if she had placed actually first on the certification.**”) The MCSO repeated its position on multiple occasions and put Zirrieth on notice of its position that she should be removed for the same reasons she was bypassed if she was placed first. AA228-29 (asserting that “her background not only justified her bypass in this matter, but would also justify her list removal if she were to become first ranked on a lieutenant certification.”); AA230 (explaining that “Zirrieth’s disciplinary history demonstrates a lack of judgment and reliability, which is simply unacceptable for someone seeking a law enforcement lieutenant position” and “the public interest would not be served by rewarding a person who has engaged in serious insubordination and untruthfulness in the past with elevation to the high ranking lieutenant position.”).

As emphasized by the Commission, Zirrith had an opportunity to respond to the MCSO before it considered whether to remove her. Zirrith clearly understood that the MCSO was seeking her list removal in the event that she was considered to be first on the certification. In fact, she argued against her list removal in her April 10, 2023 submission to the Commission before its first decision in this matter. See, e.g., AA45 (stating that “Sergeant Zirrith should have been properly considered as the first ranked individual and **there is no reasonable basis for Respondent to remove her name from this list based on a 2013 discipline settlement.**”)

Considering both parties’ arguments, the Commission correctly recognized that the MCSO sought Zirrith’s removal instead of having her promoted to a position it deemed her unsuitable for after it concluded that D.S. should also be removed from the eligible list. See AA6 (explaining that “[c]oncerning the appellant's removal, initially it is noted that the appellant has been provided notice on appeal of the appointing authority’s request to remove her name from the subject promotional eligible list, the basis for that request, and an opportunity to respond.”) The Commission then addressed the merits of whether she should be removed. Zirrith fails to satisfy her burden of demonstrating that the Commission’s decision to consider her removal was arbitrary, capricious, unreasonable, or unsupported. As a result, her appeal must be denied and the Commission’s decision must be affirmed.

**B. Even Absent a Request, The Commission Maintained Independent Authority To Remove Zirrith From The List As It Did.**

Zirrith's erroneous assertion that she should be promoted because the MCSO did not request the removal of her name from the certification also ignores that the Commission had the inherent power, *sua sponte*, to remove her from the list. In rejecting Zirrith's request for reconsideration and the same argument that the MCSO did not request her list removal that she makes on appeal, the Commission explained that "even without notice, the Commission has the authority to remove candidates from a Civil Service eligible list *sua sponte*" in upholding her list removal. AA14; see also N.J.A.C. 4A:4-4.7(a). Zirrith does not challenge that conclusion on appeal.

Accordingly, Zirrith still fails to satisfy her burden of demonstrating that the Commission's decision to consider her removal was arbitrary, capricious, unreasonable, or unsupported. As a result, her appeal must be denied and the Commission's decision must be affirmed.

**C. Zirrith's Status As A Veteran Provided Her No Protection From Being Removed From the Eligible List.**

Zirrith also suggests that the Commission "disregarded the law and the proper preference owed to veterans, without proper basis." Ab24, 28. Zirrith is correct that veterans are afforded certain preferential status when being ranked on promotional lists under the Civil Service law. N.J.A.C. 4A:5-2.2. But veteran status does **not**

provide any preferential status when considering whether a basis exists to remove the candidate from an eligible list. Ibid.; see also N.J.A.C. 4A:4-4.7. Even where a veteran is ranked first on a promotional list, his or her promotion is not “mandated” due to her veteran status; a veteran candidate can be removed from an eligible list by the Commission for the same reasons as a non-veteran. Ibid.; see also In re Dellagrazie, Middlesex County, CSC Docket No. 2021-1579, Civil Serv. Comm’n, List Removal Appeal, Final Decision (May 2, 2022), Ra21 (explaining that although the appellant was a disabled veteran, that “does not automatically guarantee an appointment” due to the Commission’s ability to consider the candidate’s background and potential list removal). Accordingly, Zirrith’s veteran status did not entitle her to the promotional appointment. Her argument must be rejected and the Commission’s decisions must be affirmed.

**D. The Commission Did Not Provide The MCSO With A “Second Bite Of The Apple” Regarding Her Unsuitability For Promotion To Lieutenant.**

Zirrith also argues that the Commission “provided the [MCSO] a ‘second bite of the apple’ and an opportunity to make additional arguments” as to why she should not be promoted. Ab28. She relies on a prior Commission decision for the proposition that an appointing authority “need[s] to indicate [its alternate arguments] at the time it submitted its background report when it returned the certification to [the Commission].” Ab28 (quoting In re Abaza, Passaic County Sheriff’s Office,



CSC Docket Nos. 2019-2634 & 2019-2630, Civil Serv. Comm'n, Reconsideration, Final Decision (June 28, 2019), Ra74-82 (emphasis and alteration in original). The Abaza decision does not support her contention and it is meritless.

In Abaza, the appointing authority removed county corrections officers from an eligible list “**due to unsatisfactory driving records**”. Ra74 (emphasis added). After the Commission determined that there was an insufficient basis for list removal due to those driving records, the appointing authority then sought reconsideration alleging that the subject employee actually “falsified his application” and should be removed on that entirely different basis. Ibid. The Commission denied the request for reconsideration because the appointing authority “could not bring up new grounds for removal that were not initially presented at the time it submitted its background report to this agency.” Ra77.

Unlike Abaza, the MCSO did not present new grounds for removing Zirrith at any point. As the Commission correctly explained, “the record indicates that the appointing authority presented Zirrith’s complete disciplinary history as a basis for it bypassing her name” and that “the appointing authority did indicate that if it did not bypass her, it would have removed her, which should have put Zirrith on notice that the appointing authority was seeking her removal if it was determined that she could not be bypassed under the Rule of Three.” AA13-14.

The MCSO was not provided a second bite at the apple, because Zirrieth's unsatisfactory disciplinary history has been the grounds for its conclusion that she was not suitable for promotion to the high rank of Lieutenant and its determination not to promote her from the very beginning. The Commission's decision must be affirmed.

**E. The Commission Properly Considered Zirrieth's Complete Disciplinary History Including All Reprimands And Counseling And It Was Not Barred From Doing So By Union Contract.**

Although not included in her legal argument, in the fact section of her brief, Zirrieth asserts that "every entry in the discipline history summary attached to Undersheriff Harris' Certification should have either never been included in Appellant's personnel file, or removed from Appellant's file years ago" under the collective negotiations agreement between her union and the MCSO. Ab10 (citing AA185-87). She argues that the Commission was barred from considering her complete employment history material. But the Commission correctly rejected such argument and this Court must affirm.

N.J.A.C. 4A:4-4.7(a)(1) and N.J.A.C. 4A:4-6.1(a)(9) permit the Commission to remove the name of a candidate from an eligible list for various reasons, including "a prior employment history which relates adversely to the title". The rules permit the Commission to consider the candidate's complete employment history without limitation. As the Commission explained in its first decision,

[c]oncerning [Zirrith]'s assertion that the incidents after her major discipline should not be considered because these incidents were to be removed from her personnel file based on the CNA, it is noted that the record is unclear as to what the CNA states in regard to list removal for promotion, and the full CNA has not been provided to the Commission. Regardless, the Commission is not a party to the CNA, and the Commission can evaluate a candidate's entire employment history when considering a list removal request for promotion as it is in the public's interest for it to make its determination based on a complete record.

AA7. On her motion for reconsideration, Zirrith submitted a copy of the CNA and the Commission again rejected her assertion as meritless. AA14.

Even if the CNA applied to the Commission (which it does not), the CNA language relied upon by Zirrith only confirms that there is no prohibition on considering a candidates complete employment and disciplinary history when the MCSO considers an employee's suitability for promotions or the Commission considers the merits of list removal. The specific CNA language at issue only prohibits the uses of "negative performance notices, oral reprimands and written reprimands . . . **for progressive discipline purposes**" in certain circumstances. AA186 (emphasis added). The Commission and MCSO's consideration of Zirrith's complete employment history including any discipline, reprimands, and counseling when deciding whether she was suitable for the privilege of promotion or should be removed from the eligible list was consistent with that provision.

In fact, the MCSO was required to maintain records related to such disciplinary history as part of her internal affairs file. The prior discipline remained part of her employment history suitable for consideration when considering potential promotion or list removal even if the CNA language applied in this matter (which it does not).

For example, the New Jersey Attorney General Guidelines on Internal Affairs (“AG Guidelines”) have long required that law enforcement agencies create and maintain an internal affairs investigation file separate from the employee’s personnel file. See Ra66 (explaining that “[a]n internal affairs investigation file is needed for all internal affairs reports” which “should contain the investigation’s entire work product, regardless of the author” including “investigators’ reports, transcripts of statements, and copies of all relevant documents.”) At the same time, the AG Guidelines unequivocally provided that

**Personnel records are separate and distinct from internal affairs investigation records**, and internal affairs investigative reports shall never be placed in personnel records. When a complaint has a disposition of exonerated, not sustained or unfounded, there shall be no indication in the employee's personnel file that a complaint was ever made.

Where a complaint is sustained and discipline imposed, the only items to be placed into the employee's personnel file are a copy of the administrative charging form and a copy of the disposition form. See form DPF-31C in Appendix O for an example. No part of the internal affairs investigative report shall be placed in the personnel file.

Ra70 (emphasis added).

The MCSO properly maintained records of the prior internal investigations into Zirrieth's alleged misconduct as part of its internal affairs file as it was required. In fact, in December 2019, then-Attorney General Gurbir Grewal issued Law Enforcement Directive No. 2019-5, which also required law enforcement agencies considering the employment of law enforcement officers to fully review such officer's internal affairs files before pursuing employment of such individuals. Among other changes, the Law Enforcement Directive

[f]acilitate[d] review of the disciplinary history of an officer who seeks employment with another law enforcement agency. **The revised IAPP requires that background investigations for new recruits must include a review of the internal affairs files of any candidate who previously worked for another law enforcement agency.** § 3.1.1. New Jersey law enforcement agencies are now generally required to disclose the entire internal affairs file of a candidate to prospective law enforcement employers, and a candidate with out-of-state law enforcement experience must waive confidentiality for their internal affairs files. § 3.1.2.

See Ra102 (emphasis added). The provision regarding the content of an employee's "personnel file" in the CNA had no impact on the MCSO obligation to maintain records of the internal affairs complaints against its employees and the investigation and outcome of same.

Significantly, Zirrith still does not dispute that she has been subject to multiple sustained internal affairs findings against her, including multiple minor disciplines and even more significant, the 45 day suspension for untruthfulness and related misconduct as reflected in the record. Neither the Commission nor the MCSO was prohibited from considering such adverse employment history when determining whether she was suitable for promotion to Lieutenant or whether should be bypassed or removed from the eligible list. It would have been contrary to the public interest to ignore Zirrith's substantial adverse disciplinary history when considering promotion to a position bearing the high responsibility as a Sheriff's Officer Lieutenant given Zirrith's prior demonstrated disregard for a law enforcement officer's obligation to be truthful and to follow orders, and the impact of such misconduct on her credibility and reliability moving forward.

An appointing authority's decision to bypass or remove a candidate from a promotional list is not a disciplinary action. Indeed, Zirrith conceded below that **"removal from the list is not disciplinary action[,]"** further defeating her claim regarding application of the CNA language. (See AA42 (emphasis added).) As such, the MCSO and Commission's consideration of the significant issues in Zirrith's background was consistent with the CNA's prohibition on considering **"negative performance notices, oral reprimands and written reprimands . . . for progressive discipline purposes"**. List bypass and list removal are not disciplinary

actions at all, let alone disciplinary actions subject to progressive discipline principles for which the CNA language would be applicable. See N.J.A.C. 4A:2-2.2(a) (identifying the types of major disciplinary action); N.J.A.C. 4A:2-3.1(a) (identifying the types of minor disciplinary action).

Accordingly, the MCSO properly considered Zirrith's complete employment and disciplinary history including the multiple minor disciplines and the 45 day suspension for her past untruthfulness and related misconduct in determining whether she was suitable for promotion. The Commission also correctly considered her complete employment record in determining whether there was basis to remove her from the eligible list. The Commission's decision must be affirmed.

**F. The Commission Evaluated Zirrith's Employment History On Its Merits And Properly Determined That She Should Be Removed From The Eligible List.**

Zirrith argues that she "deserved to be evaluated on her own merit" and that she should not have been removed on the list on the record before the Commission. Ab28, 30-34. The record is clear, however, that the MCSO and Commission both evaluated Zirrith's employment history on its own merits in determining that she was unsuitable for promotion to Lieutenant and in removing her from the eligible list. The Commission provided detailed analysis as to why her employment history demonstrated an unsuitability for promotion to the high rank of Sheriff's Officer

Lieutenant. Zirrieth fails to satisfy her burden in challenging the Commission's decisions and they must be affirmed.

As noted above, N.J.A.C. 4A:4-4.7(a)(1) and N.J.A.C. 4A:4-6.1(a)(9) permit the Commission to remove the name of a candidate from an eligible list for various reasons, including "a prior employment history which relates adversely to the title[.]" The record is clear that the Commission considered Zirrieth's prior employment history on its merits and concluded that the MCSO presented sufficient basis for removing her from the list. AA6-7, 14-15. In doing so, the Commission emphasized that "the record indicates that [Zirrieth] received major discipline which involved untruthfulness among other charges" and that such "employment record is adverse to the position sought due to the high standards for law enforcement officers." AA6-7. The Commission further emphasized that "the standard in this case is even higher because [Zirrieth] seeks promotion to a higher-level law enforcement position, Sheriffs Officer Lieutenant, where incumbents supervise, evaluate, train and provide guidance to subordinate Sheriff Officer personnel." AA7. Although Zirrieth continues to dispute whether she actually received the counseling related to the September 2022 incident, she did and does not dispute that she received the multiple other reprimands and counseling reflected in the record. AA14. Nor does she do so on appeal. See, e.g., Ab19. Instead she attempts to downplay them as "minor incidents". Ibid. The Commission emphasized that



“[w]hile there is an apparent dispute regarding [the September 2022] incident, **even discounting this as a disciplinary issue, Zirrieth's other disciplinary history supports her removal from the list.**” AA14 n. 2 (emphasis added). The undisputed record reflected “that Zirrieth received major discipline which involved untruthfulness among other charges approximately seven years prior to the subject examination November 21, 2019 closing date, minor discipline approximately two and six years prior to the closing date, and counseling three years after the closing date.” AA14. The Commission concluded that “[t]his is clearly a record that is insufficient for a higher-level law enforcement position, Lieutenant, where incumbents supervise, evaluate, train and provide guidance to subordinate Sheriffs Officer personnel.” AA14-15. In fact, “[t]he **Commission may have removed Zirrieth from the subject eligible solely on the basis of the November 2012 45-day suspension where she agreed that she was untruthful.**” AA15 (emphasis added).

Even putting aside the September 2023 incident and assuming that she did not receive counseling related to that incident, Zirrieth’s undisputed disciplinary history, and most notably the 45 day suspension for untruthfulness, insubordination, and related misconduct more than justified the Commission’s decision to remove her from the eligible list. As part of the settlement agreement imposing a forty-five (45) day suspension upon her, Ms. Zirrieth admitted to untruthfulness and insubordination

following the loss of her firearm. AA133-37. This conduct was in complete disregard of the MCSO's rules. The seriousness of her demonstrated untruthfulness and her unsuitability for promotion to the high ranking position of Sheriff's Officer Lieutenant has only been heightened since the incident occurred.

That is because in late 2019, the New Jersey Attorney General issued a directive to all law enforcement agencies addressing the significant issues surrounding law enforcement officers who have been found to be untruthful in the past. Ra1-10. That directive requires heightened scrutiny of law enforcement officers who have been subject to "a sustained finding that an investigative employee was untruthful or has demonstrated a lack of candor[.]" Ra5. Ms. Zirrieth's adverse employment history falls squarely within the ambit of that heightened scrutiny for law enforcement officers with a sustained finding for untruthfulness and a lack of candor. As such, the concerns arising from that major disciplinary incident alone would have justified her list removal as the Commission recognized. Zirrieth's prior promotion to the lower sergeant position before 2019 does not alter that analysis.

Indeed, although Zirrieth attempts to distinguish the Commission's prior decisions, the Commission has long recognized that law enforcement lieutenants must "present a personal background that exhibits respect for the law and rules." See In re Schreffler, Department of Corrections, CSC Docket No. 2018-184, Civil Serv. Comm'n, List Removal Appeal, Final Decision, (May 4, 2018) (May 4, 2018),

Ra86. It has also emphasized that Sheriff's Officers (let alone the higher rank of Sheriff's Officer Lieutenants),

are law enforcement employees who must enforce and promote adherence within to the law. They hold highly visible and sensitive positions within the community and that the standard for an applicant includes good character and an image of the utmost confidence and trust. It must be recognized that a law enforcement officer is a special kind of employee. His primary duty is to enforce and uphold the law. He is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.

In re Bonsanto, CSC Docket Nos. 2018-2104 and 2018-3065, Civil Serv. Comm'n, List Removal Appeals, Final Decision, (September 7, 2018), Ra91.

The Commission has previously recognized untruthfulness as particularly problematic for law enforcement candidates and sufficient justification for list removal given the need for a person in such position to demonstrate trust and personal integrity. See, e.g., In re Kerney, Bayonne, CSC Docket No. 2019-1396, Civil Serv. Comm'n, Civil Serv. Comm'n, List Removal Appeal, Final Decision, (July 11, 2019), Ra96 (denying list removal appeal for law enforcement position based on "totality of the appellant's background, which includes false and misleading statements").

It is well-settled that law enforcement officers are held to a higher standard of required conduct than other public employees. See In re Phillips, 117 N.J. 567, 577

(1990). In fact, even more than entry level law enforcement positions, a lieutenant law enforcement position is “a high-level law enforcement title that is reserved for employees who exhibit leadership skills, a positive work ethic, and respect for the rules and policies of the appointing authority.” In re Reid, East Orange, CSC Docket No. 2016-578, Civil Serv. Comm’n, List Removal Appeal, Final Decision, (December 17, 2015), Ra111. Consistent with such expectations, “the Commission has previously removed eligibles from promotional lists where their employment history revealed extensive minor discipline **or as little as one major discipline.**” Ibid. (emphasis added).

Similar to the adverse employment history at issue in this matter, the Commission and Appellate Division have specifically upheld “the removal from [a] Correction Lieutenant promotional list . . . for [a] 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[.]” See id. at 3. Zirrith’s proven insubordination and untruthfulness for which she served a forty-five (45) day suspension, in addition to her multiple reprimands and counseling which she admits she received in April 2011, November 2013, and September 2017 surpasses the disciplinary history at issue in that case.

The undisputed disciplinary history record before the Commission and this Court clearly demonstrates that Zirrith lacks judgment and reliability, which is

simply unacceptable for someone seeking the high ranking law enforcement lieutenant position. Indeed, the public interest would not be served by rewarding a person who has engaged in serious insubordination and untruthfulness in the past with elevation to such a high ranking law enforcement position. That is why the MCSO determined that she was unsuitable for promotion to the rank of Lieutenant and chose to promote an eligible other than Zirrith. For the same reasons, the Commission correctly recognized that Zirrith's adverse employment history supported her removal from the eligible list. It acted within its authority to remove her under the Civil Service rules. The Commission did not "err" when it removed Zirrith from the eligible list as she alleges. Ab30-34. Zirrith fails to satisfy her burden of demonstrating that the Commission's decisions were arbitrary, capricious, unreasonable, or unsupported decision as would be required to reverse those decisions on appeal. As such, the Commission's decision must be affirmed.

**G. Even If Zirrith Prevailed in Her Argument That She Was Improperly Removed From The Eligible List, She Would Not Be Entitled To Appointment.**

Finally, in this appeal, Zirrith requests that this Court "order the promotional appointment of Appellant with backpay and retroactive seniority." (Ab35.) Such relief is not available to her even assuming, *arguendo*, that she were to prevail on her appeal. It is well-settled that

[w]here a candidate is improperly removed from a list, or an appointing authority fails to consider a candidate as required under the Rule of Three, ‘[t]he **appropriate remedy**’ is **not appointment**, but rather a direction to ‘the [Commission] to add appellant’s name to the certified list of eligibles or to order [the Commission] to revive an expired list and add appellant's name.’”

Foglio, 207 N.J. at 48 (emphasis added) (quoting Nunan v. New Jersey Dep’t of Pers., 244 N.J. Super. 494, 498 (App. Div. 1990)). Accordingly, even if Zirrieth’s arguments against her list removal had merit, which they do not for the reasons addressed *infra*, Zirrieth would merely be entitled to be returned to the eligible list and not to the promotional appointment she seeks. Her appeal must be denied.

### CONCLUSION

For the forgoing reasons, Zirrieth fails to meet her burden on any issue on appeal. The Middlesex County Sheriff’s Office respectfully submits that the Civil Service Commission decision must be affirmed.

Respectfully submitted,

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Sheriff’s Office

By: /s/ Kyle Trent  
Kyle J. Trent

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-000447-23

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IN THE MATTER OF YVONNE  
ZIRRITH, SHERIFF'S OFFICER  
LIEUTENANT (PC15571A)  
MIDDLESEX COUNTY  
SHERIFF'S OFFICE

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Civil Action

On Appeal from June 7, 2023 and  
October 11, 2023 Final Administrative  
Actions of the Civil Service  
Commission  
CSC Docket No. 2023-1734  
CSC Docket No. 2024-189

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STATEMENT IN LIEU OF BRIEF ON BEHALF OF  
THE NEW JERSEY CIVIL SERVICE COMMISSION  
Date Submitted: May 15, 2024

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On the Statement

This Statement in Lieu of Brief is filed on behalf of the Civil Service Commission (Commission) pursuant to Rule 2:6-4(c). Appellant, Yvonne Zirrieth, appeals final administrative determinations of the Commission, issued June 7, 2023 and October 11, 2023, upholding Respondent, Middlesex County Sheriff's Office's (MCSO) bypass of Zirrieth for the position of Sheriff's Officer Lieutenant and ordering her removal from the eligible list for the subject position. (Aa001-0016).<sup>1</sup>

Zirrieth, a disabled veteran, appeared on the eligible list for Sheriff's Officer Lieutenant, MCSO, promulgated on December 16, 2021. (Aa001). Zirrieth's name was certified on January 12, 2022 for a position in the subject title. Ibid. The first positioned candidate, a disabled veteran, was appointed; the second positioned candidate, a veteran, was appointed; the third positioned candidate, D.S., a non-veteran, was bypassed; and the fourth positioned candidate, a veteran, was appointed. Ibid. Zirrieth, the fifth positioned candidate, was bypassed. Ibid.

Zirrieth's name was subsequently certified on November 4, 2022 for a position in the subject title. Ibid. The first positioned candidate, D.S., a non-veteran, was bypassed. Zirrieth was the second positioned candidate and was

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<sup>1</sup> "Aa" refers to Appellant's Appendix.



bypassed, and the third positioned candidate, a non-veteran, was appointed. Ibid. However, on November 3, 2022, D.S. was demoted to Sheriff's Officer. (Aa001-002). Despite D.S.'s demotion, D.S. was certified on November 4, 2022 for the subject position. (Aa002).

Zirriith appealed the bypass of her name to the Commission on December 23, 2022, arguing that she should have been the first ranked candidate on the certification and so, as a veteran, her appointment was mandated under N.J.A.C. 4A:4-4.8. (Aa232-236). The Commission informed Zirriith that her appeal was premature given the certification had not been returned by the MCSO to the Commission and Zirriith refiled her appeal on February 10, 2023. (Aa235-236). In response, the MCSO argued that it properly bypassed Zirriith given her adverse employment history and that the same conduct would have justified Zirriith's removal had she been the first positioned candidate on the certification. (Aa222-231).

The Commission issued its decision on June 7, 2023 determining that D.S. was ineligible for promotion to the subject position and that, had the Commission been made aware of D.S.'s demotion, D.S.'s name would not have been certified on November 4, 2022. (Aa001-008). As such, the Commission determined that Zirriith should have been the first ranked eligible on the November 4, 2022 certification and, accordingly, needed to be either promoted

or removed from the eligible list pursuant to N.J.A.C. 4A:5-2.2(c). (Aa005-006).

As to Zirrith's removal from the eligible list, the Commission noted that Zirrith had notice of MCSO's request to remove her name from the subject promotional eligible list, the basis for the request, and an opportunity to respond. (Aa006). As to the merits of the removal request, the Commission noted the record indicated that, among other charges, Zirrith had received major discipline involving untruthfulness approximately seven years prior to the subject examination, minor discipline approximately two and six years prior to the closing date, and counseling three years after the closing date. (Aa006-007). Moreover, the Commission noted that Zirrith's employment record was adverse to the position sought given the high standards for law enforcement officers generally and the even higher standard for the higher-level law enforcement position of Sheriff's Officer Lieutenant which involves supervision, evaluation, training, and guidance of subordinate law enforcement officers. (Aa007). As such, the Commission denied Zirrith's appeal and ordered her name be removed from the Sheriff's Officer Lieutenant, Middlesex County Sheriff's Office eligible list. (Aa008).

On July 19, 2023, Zirrith filed a Request for Reconsideration of the Commission's June 7, 2023 decision arguing that the Commission improperly removed her from the eligible list as MCSO had not requested that action and she

was not on notice that the Commission would consider it. (Aa142-Aa153). The Commission denied Zirrith's Request for Reconsideration on October 11, 2023. (Aa009-Aa016). The Commission reasoned that since the reasons for Zirrith's bypass were the same reasons for her removal, she had sufficient notice to respond to the reasoning in the original proceeding. (Aa013-014). Further, the Commission also noted that the MCSO had stated that if it had not bypassed Zirrith, it would have removed her. (Aa013). The Commission also noted that it has the authority to remove candidates from an eligible list *sua sponte*. (Aa014); see N.J.A.C. 4A:4-4.7(a). Regarding Zirrith's claims that her disciplinary history was insufficient to remove her name, the Commission reasoned Zirrith's reliance on a Collective Negotiations Agreement (CNA) that required the removal of counseling and written reprimands from her personnel file was misplaced, given the Commission was not a party to the CNA and that consideration of Zirrith's full record was in the public interest. Ibid.

Having reviewed the merits briefs filed by the primary parties, the Commission has determined that the factual and legal issues involved in this appeal do not warrant the filing of a separate brief. The primary issues raised in this appeal are: 1) whether the Commission was arbitrary and capricious in upholding MCSO's bypass of Zirrith and 2) whether the Commission was arbitrary and capricious in ordering Zirrith's removal from the eligible list.

Because this matter does not involve a challenge to the validity of the Civil Service statutes, or the rules promulgated thereunder, a separate brief on the merits is unnecessary. The primary parties to this appeal have adequately addressed the relevant issues, and the public interest does not require the Commission's participation.

Nevertheless, the Commission's decision should be affirmed. It is well-established that an agency's determination will not be upset unless it is affirmatively shown that it is arbitrary, capricious or unreasonable or that it lacks fair support in the record as a whole. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998). A strong presumption of reasonableness attaches to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001). Thus, a court must affirm the decision if the evidence supports it, even if the court may question its wisdom or would have reached a different result. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001).

In recognition of the fact that the Commission is the administrative agency which, given its expertise, is uniquely capable of regulating the public work force of this State, the Legislature has vested the agency with broad supervisory power, including in the area of selection and appointment of employees. See N.J.S.A. 11A:4-4 to -8. In light of this authority, the court will not interfere in the Commission's exercise of authority unless its determination is "patently

incompatible with the language and spirit of the law.” In re Hudson Cty. Probation Dep’t., 178 N.J. Super. 362, 371 (App. Div. 1981) (quoting Walsh v. Civil Service Dep’t., 32 N.J. Super. 39, 44 (App. Div. 1954), certif. granted, 17 N.J. 182 (1955) (subsequently dismissed)).

As the Commission noted in its June 7, 2023 decision, 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 having a prior employment history which relates adversely to the title. (Aa005). The Commission found Zirrith’s employment record, which included major discipline stemming from untruthfulness, was adverse to the position sought given the high standards for law enforcement officers. Thus, Zirrith’s removal from the eligible list was entirely reasonable. The Commission also properly denied Zirrith’s request for reconsideration as she did not present new evidence that would change the outcome and did not demonstrate that a clear material error occurred. (Aa013-015).

For these reasons, the Commission’s June 7, 2023 and October 11, 2023 decisions should be affirmed.

Respectfully submitted,

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May 30, 2024

**Via Electronic Filing**

Joseph H. Orlando, Appellate Clerk  
Superior Court of New Jersey  
Appellate Division  
Hughes Justice Complex  
25 W. Market St.  
Trenton, New Jersey 08625-0006

**Re: In The Matter Of Yvonne Zirrieth, Sheriff's Officer  
Lieutenant (PC15571A) Middlesex County Sheriff's  
Office  
Docket No. A-002000447-23**

Dear Mr. Orlando:

This firm represents Appellant Yvonne Zirrieth in the above-captioned matter. Please accept this letter reply brief on behalf of the Appellant.

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**REPLY TO COUNTERSTATEMENT OF FACTS**

Appellant, Yvonne Zirrieth, relies on the Statement of Facts from the Appellant’s brief. In response to Respondent’s Counterstatement of Facts, the Respondent does not state that the Middlesex County Sherrif’s Office (herein after “MCSO”) incorrectly applied the “Rule of Three” when it promoted T.S. to the position of Lieutenant which was the basis for the appeal by Zirrieth to the Civil Service Commission. However, the Civil Service Commission correctly determined that the MCSO improperly failed to advise the Civil Service Commission that D.S. had been demoted prior to the issuing of the certified list. (AA-0069) In response to the appeal of Zirrieth, the MCSO defended the use of



the “Rule of Three” as proper. This was the reason Appellant appealed this improper action.

The reason that the decision of the Commission to remove Appellant from the eligible list is improper and constitutes reversible error, is that the proper procedures were not followed by MCSO and the Commission to remove Appellant from the list and this was to the prejudice of Appellant, a disabled war veteran who deserved to receive her proper veteran’s preference. The other critical problem and reversible error in this matter is the confusion and erroneous findings of fact the Commission made regarding the review of Appellant’s employment history.

The Appellant has one major disciplinary action from a 2012 incident in which her service weapon was dislodged from her service belt while using the rest room in the Family Courthouse. This was the only disciplinary action considered by Respondent MCSO when it disposed of the Certified Eligible List as certified by Undersheriff Harris in responding to the appeal below. (AA0118-120) The Respondent MCSO once again misrepresents the settlement of this disciplinary charge in the counterstatement of facts. A settlement agreement is entered into between two parties who decide that the agreement is the best resolution to the matter. It is disingenuous for the Respondent MCSO to imply that the original charges somehow were supported by the evidence and Appellant was fortunate to resolve the matter with this agreement. The disputed facts and application of charges were not certain. The decision of both parties to resolve a matter is to the benefit of both parties. This cavalier language regarding settlements is further

evidence of the indifference the MCSO has for the rules regarding veteran's preference and promotion. There is no language in the Settlement Agreement which supports removing Appellant's name from the promotion list or ignoring veteran's preference.

There was no further support in the Certification of Undersheriff Harris referring to or explaining the alleged significance of any of the minor warnings or counselings in the chart attached to the MCSO submission below. None of the incidents were referred to in support of the bypass of Appellant when the MCSO improperly relied on the "Rule of Three".

Similarly, the improper inclusion of the September 6, 2022 matter is especially prejudicial due to the Commission's erroneous finding that it was a second incident involving Appellant's service weapon. The Commission also erroneously found this incident was a discipline of Appellant after her promotion to Sergeant in 2018. Not only was there no counseling or discipline of the Appellant, the incident involved a different Officer failing to advise Appellant about his malfunctioning service weapon. (AA0031, AA0157). Simply put, the Commission made a critical and prejudicial error concerning the facts of this matter. The Appellant certified as to the actual facts of the matter and she was never served with any discipline regarding the September 6, 2022, allegation and properly and immediately reported the alleged issue to her Superior Officer upon learning of it. (AA0157) Significantly, Appellant had no disciplinary actions following her promotion to Sergeant in 2018 and the Commission specifically

relied upon this erroneous finding in reaching the decision to deny the veteran's preference she has earned.

The proper procedures regarding removal from a promotional list due to an alleged adverse employment history were not followed. Appellant was not provided the basis of the removal prior to the appeal and was not allowed to review the basis for the removal and properly respond and provide support for the reversal of this decision. The most important reason this appeal should be granted is the employment history of the Appellant at the time of this list certification does not support her removal from the list and pursuant to N.J.A.C. 4A:5-2.2(c) requires her promotion to Sheriff's Officer Lieutenant for the Middlesex County Sheriff's Department.

Appellant has overwhelming experience and qualifications for this promotion, including her rank as Lieutenant Commander in the United States Navy, her status as a disabled veteran, her training with the MCSO, being appointed as the Accreditation Manager by the New Jersey State Association of Chiefs of Police and serving as an Acting-Lieutenant with the MCSO on several occasions from 2020-2023. Her character and fitness for promotion are supported by Officers in the MCSO and high-ranking Officers within the United States Military. (AA0093-AA-107)

**LEGAL ARGUMENT**

**POINT I.**

**THE APPELLANT'S EMPLOYMENT HISTORY IS NOT SUFFICIENT TO REMOVE HER NAME FROM THE PROMOTION LIST. (AA0001-8;AA0009-16)**

The MCSO promoted Appellant to Sergeant in 2018, after reviewing her employment history including the 2012 major discipline. The Commission dismissed this prior promotion as irrelevant, but it is clear that this 2018 promotion should be considered when reviewing the current improper request for removal in this matter. The correct standard was whether this major discipline should stand in the way of promoting a disabled veteran who, in the interim, had deployed to Iraq and had been promoted to Sergeant in 2018 and who did not receive any discipline following her promotion, contrary to the misrepresentations of the MCSO and the erroneous findings of the Commission.

Appellant has outlined the Commission's incorrect analysis of this matter under Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965) in its initial brief. Respondent MCSO has cited additional matters that are clearly distinguishable from this matter. In the Matter of Dominick Dellagrazie, Sheriff's Officer (S9999A) Middlesex County CSC Docket No.2021-1579, (May 2, 2022) (RA11-25) involves a candidate who had previously been terminated from the Port Authority Police for conduct unbecoming involving an incident at a bar in

Hoboken, New Jersey and an allegation that he attempted to convince other individuals to coordinate misleading versions of the incident. Dellagrazie was a disabled veteran, but that is the only similarity to this matter. Appellant Zirrieth's status as a qualified candidate for promotion to Lieutenant is clearly different than a full background review for a potential candidate for Sheriff's Officer. In addition, Dellagrazie was not fully forthcoming in his application about this incident. The standard of denying a disabled veteran the benefit provided by Civil Service regulations outlined in Dellagrazie does not support the denial of Appellant Zirrieth.

Respondent similarly argues that In the Matter of Thomas Schreffler, Correction Lieutenant (PS9465I), Department of Corrections CSC Docket No. 2018-184 (May 4 2018)(RA83-88) supports the position that only minor discipline can be sufficient. Schreffler was disciplined for using discriminatory language towards Muslims. The Department of Corrections Equal Employment Division (EED) investigation sustained the charges against Schreffler and he was issued a written reprimand. This matter was sufficient to remove him from the promotion list due to an internal Department of Correction's policy that states minor discipline related to EED violations within three years of the promotion list was sufficient basis to remove a candidate. If this same three year policy was followed by the MCSO, Appellant Zirrieth would have been properly promoted based on the significant passage of time between the 2012 discipline and this promotion list. Clearly, outside observers may question a written reprimand in Schreffler for the

violation related to this discriminatory act, but the policy was clearly written to support the removal of Schreffler from the promotion list.

In the Matter of David Bonsanto, Sheriff's Officer and County Correction Officer (S9999U), Passaic County CSC Docket Nos. 2018-2104 and 2018-3065 (September 7, 2018)(RA88-92) and In the Matter of Patrick Kerney, Jr., Police Officer (S9999U), Bayonne CSC Docket No. 2019-1396, (July 11, 2019)(RA93-102) are also not relevant to this Appeal. Bonsanto failed to properly include his complete driving and employment history as part of his application. Similarly, Kerney failed to reveal prior police activity and failed to prove he was a resident of Bayonne as required. There is no similarity between these matters and Appellant Zirrieth's removal from the promotion list.

In In the Matters of Yanzan Abaza and Nicholas Saliba, County Correction Officer (S9999U), Passaic County Sheriff's Office, 2019 N.J. CSC, LEXIS 420 (June 28, 2019)(RA74-82), the Respondent Commission granted the list removal appeals of two entry-level candidates who had multiple criminal, employment and driving record adverse issues. When the Passaic County Sheriff's Office sought reconsideration, the Commission denied the Sheriff's Office a "second bite of the apple" and held the Sheriff's Office "needed to indicate [it's alternate arguments] at the time it submitted its background report when it returned the certification to this agency." Id. (emphasis added) MCSO was fully aware of Appellant Zirrieth's employment history with the MCSO when it improperly utilized the "Rule of Three" to by-pass her promotion and requiring this appeal. The MCSO was fully

aware of it when it promoted her to Sergeant in 2018. Nothing about her employment history changed between this 2018 promotion and her certification for the promotion to Lieutenant.

The MCSO relies upon the New Jersey Attorney General Guidelines on Internal Affairs (“AG Guidelines”) in support of the improper provision of counselings and written reprimands that, pursuant to the Collective Negotiations Agreement between the County of Middlesex and the Middlesex County Sheriff’s Superior Officers Association, P.B.A. Local 165A, should have been removed from Appellant’s file. The AG Guidelines December 4, 2019 Supplemental Directive (RA101-108) clearly states that:

Internal Affairs Policies & Procedures (IAPP) places strict confidentiality requirements on records obtained and created during Internal Affairs investigations, to preserve the integrity of the investigative process. These records may only be released under a narrow range of circumstances including when a police department’s law enforcement executive has “good cause”. The revised IAPP makes clear that good cause may exist (a) when another law enforcement agency requests records related to a current or former officer that the agency is considering whether to hire; or (b) if a Civilian Review Board that meets certain minimum procedural safeguards has requested access to a completed investigation file. (RA104-105)

The MCSO providing Internal Affairs records to the Civil Service Commission is not supported by the AG Guidelines. The Civil Service Commission is neither a law enforcement agency nor a Civilian Review Board, as defined in the AG Guidelines. (RA 105 Section II, Clarification Regarding Civilian Review Boards)

The MCSO and Civil Service Commission improperly reviewed and relied upon this documentation in violation of the AG Guidelines.

Pursuant to N.J.A.C. 4A:5-2.2(c), as a veteran seeking promotion that was ranked number one on the Certified List, Appellant should have been promoted to Lieutenant when the Respondent MSCO failed to both initially request the removal of her name from the Certified List and later improperly attempted to justify a list removal without just cause.

**POINT II.**

**THE APPELLANT IS ENTITLED TO THE PROMOTIONAL APPOINTMENT UNDER N.J.A.C. 4A:5-2.2(C) (AA0001-8;AA0009-16)**

The Commission correctly determined that N.J.A.C. 4A:5-2.2(c) provides that when a single vacancy is to be filled from a promotional certification headed by a veteran, any veteran among the top three interested eligibles may be appointed in accordance with the “rule of three.” See N.J.S.A. 11A-4.8. A nonveteran shall not be appointed unless the appointing authority shows cause why the veterans should be removed from the promotional list. See N.J.A.C. 4A:4-4.7 for removal procedures. Therefore, under N.J.A.C. 4A:5-2.2(c), the Appellant Zirrith needed to be appointed or removed from the PC1557A promotional eligible list. (AA0006)

The MCSO incorrectly relies upon language in In Re Foglio, 207 N.J. 38, 48 (2011) (quoting Nunan v. New Jersey Dep’t of Pers., 244 N.J. Super. 494, 498



(App. Div. 1990). This case did not involve the rights of a veteran to appointment under N.J.A.C. 4A:5-2.2(c) but involved list removals utilizing the “Rule of Three”, a procedure clearly not applicable to this matter. Further, the language was further clarified by the Court in the following paragraph, holding :

However, where a candidate has proved actual discrimination on the basis of membership in a protected class, courts have imposed individualized, retroactive remedies such as mandatory appointments and back-pay. *E.g., Terry, supra, 86 N.J. at 151-52, 430 A.2d 194* (remedial provisions of Law Against Discrimination constitute exception to appointing body's discretion under Rule of Three). In other words, the remedy is directly related to the nature of the impropriety. That is the backdrop for our inquiry. Id.

Respectfully, the MCSO can point to no authority that supports the position that a Disabled Veteran is not entitled to the promotion if the removal of the disabled veteran candidate was unsupported by the record.

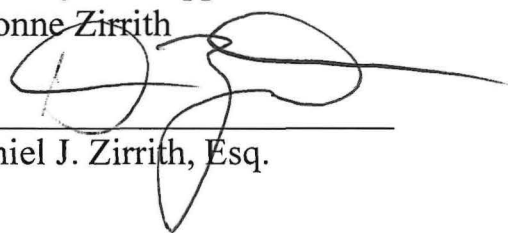
**CONCLUSION**

For these reasons, the June 7, 2023, and October 11, 2023, Final Administrative Actions of the Respondent Civil Service Commission should be reversed, and this Court should order the promotional appointment of Appellant to Sheriff's Officer Lieutenant with backpay, retroactive seniority and attorney fees pursuant to N.J.A.C. 4A:5-2.2(c).

Respectfully submitted,

LAW OFFICES OF  
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Attorneys for Appellant,  
Yvonne Zirrith

By:

  
\_\_\_\_\_  
Daniel J. Zirrieth, Esq.

Dated: May 30, 2024