MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

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IN THIS ISSUE

TO OUR READERS:

When we launched the premier issue of the Merit System Reporter in 1988, we told our readers that this publication "was developed in response to numerous requests from attorneys, union leaders, public employers and other interested parties for a source of information on decisions concerning merit system law and rules." We went on to express our hope that readers "will find this publication informative and useful."

Through the years, we have received significant positive feedback from our readers. We have heard from many of you that the Merit System Reporter is both informative and useful. Indeed, the only criticism we received was that the publication did not appear often enough, or did not include enough decisions.

Now, with the development of the Internet and the enhancement of the Department of Personnel's web site, we have the means to provide all interested parties—not just those on our mailing list—with an abundant source of decisions on merit system law and rules. Beginning with January 2004, notable decisions by the Merit System Board and the Commissioner of Personnel are being placed on our web site at www.state.nj.us/personnel. In the months and years ahead, we will add to this resource, without the limitations of printing, paper and mailing. We also plan to index these decisions, so that this portion of the web site will become a valuable research tool.

With this new resource, it will no longer be necessary to publish the Merit System Reporter. Therefore, with mixed feelings, I am announcing to our readers that this is the final issue of the Merit System Reporter.

Henry Maurer
Editor-in-Chief

New Jersey Department of Personnel

WRITTEN RECORD APPEALS AND HEARING MATTERS

Active Military Service Warrants List Revival

In the Matter of Giocchino Panico, Police Officer (S9999B), City of Paterson

(Merit System Board, decided September 3, 2003)

Giocchino Panico requests that the eligible list for Police Officer (S9999B), City of Paterson, be revived so that his name may be certified to the appointing authority when he is released from active military duty.

The subject eligible list was promulgated on April 20, 2001 and expired on June 19, 2002. Appellant's name appeared as the 26th ranked non-veteran on the October 16, 2001 certification of the subject eligible list (Certification No. OL012085). Although appellant had an interview with the subject jurisdiction, he was unable to complete preemployment processing prior to being activated into the United States Marine Corps Reserves. As such, the appointing authority indicated that appellant was to be retained as "Interested, future certifications only" when it returned the certification for disposition on June 5, 2002.

On appeal, appellant asserts that when he contacted the Paterson Police Department to inform them of his active status, "everyone made it seem that it was not a big deal, that I would still be on the list, and that I would most likely be in the next academy upon my return. Unfortunately, this is not what happened. I was told that my scores were to be thrown out and that I would have to start the entire process over and retake the exam." In support of his appeal, appellant has submitted additional documentation, including a copy of the orders dated December 12, 2001, calling him to active duty status and correspondence on his behalf from Police Lieutenant William Mott, Paterson Police Department. Additionally, appellant submits a copy of his new orders for active duty from March 2003 to March 2004.

It is noted that the appointing authority was notified of this matter and has filed no objection.

CONCLUSION

In the instant matter, appellant asserts that because he was called to active duty and unable to complete the appointment process, he should not be punished for his decision to "honor and defend my country by entering the United States Marine Corps." Lieutenant Mott indicates that "[a]s a former United States Marine I know what it is to serve your Country. At the very least in this time of war this Country can attempt to assist these men and women of the armed services in any legal way possible."

Under the circumstances presented, appellant should be given an opportunity to be considered for appointment upon his return from active military duty. However, if appointed, appellant is not entitled to a retroactive date of appointment. *N.J.A.C.* 4A:4-4.6(a) provides that interested eligibles on military leave shall continue to be certified and the appointing authority **may** consider such eligibles immediately available for appointment even though reporting for work may be delayed. Therefore, appellant did not possess a vested property interest in employment and his appointment is not mandated. Further, the only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). *See also In the Matter of Emilio Nazario, Sheriff's Officer (S9999B), Mercer County* (Merit System Board, decided January 15, 2003) (The Board found that although the appointing authority had not sufficiently supported its request to remove a veteran from an eligible list, the veteran was not entitled to a mandated appointment pursuant to *N.J.A.C.* 4A:4-4.6(a); however, the Board ordered that once available, he was to be certified for future employment opportunities). In addition,

N.J.A.C. 4A:5-2.1(b) provides that veteran's preference is effective for all examinations in which the closing date for applications falls on or after the determination of veteran's preference eligibility. A review of the record indicates that the application filing deadline for the subject exam was February 25, 2000 and appellant established veteran's preference on September 27, 2002. As such, appellant cannot receive veteran's status for the subject exam. However, he will be eligible to claim veteran's preference for all future examinations.

ORDER

Therefore, it is ordered that this request be granted and once appellant notifies Human Resource Information Services (HRIS) and the appointing authority of his availability, the list for Police Officer (S9999B), City of Paterson be revived at that time, in order that appellant may be considered for appointment at the time of the next certification, for prospective employment opportunities only.

Board's Statutory Authority to Increase Disciplinary Penalty Properly Exercised

In the Matter of Craig Davis, Department of Corrections

(Merit System Board, decided March 26, 2003)

Craig Davis, a Senior Correction Officer at South Woods State Prison, Department of Corrections, represented by Colin M. Lynch, Esq., petitions the Merit System Board for reconsideration of the final decision, rendered on December 4, 2002, which affirmed the ALJ's recommendation to increase his disciplinary penalty from a 15-day suspension to a six-month suspension.

The record reflects that the petitioner was served with a Final Notice of Disciplinary Action, dated August 17, 2001, charging him with inappropriate physical contact or mistreatment of an inmate and suspending him for 15 days. Specifically, the appointing authority asserted that, on June 6, 2001, the petitioner slapped an inmate, JB, on the buttocks while conducting a routine strip search. The petitioner filed an appeal of this disciplinary action with the Board, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, Administrative Law Judge (ALJ) Israel D. Dubin recounted, in detail, the testimony presented at the hearing at the OAL. Specifically, the ALJ was confronted with two distinct accounts of the events of June 6, 2001. According to JB, he and 19 other inmates were assigned to complete a highway clean-up detail on June 6, 2001. Upon returning to the facility after completion of the detail, JB and the other inmates waited on line to be strip searched before returning to their cells. When he entered a partitioned area where the petitioner was conducting the searches, JB testified that the petitioner slapped him on the buttocks. JB immediately dressed and reported

to Correction Lieutenant Richard Battle's office to complete a report on the incident. Another inmate, MB, testified in support of JB's account. MB testified that he was in the cubicle next to JB, when he heard somebody encourage the petitioner to slap JB on the buttocks. MB then saw the petitioner "take a swing," and he heard a slapping noise. Inmate TB testified that, while he was waiting in line to be strip searched, he heard someone jokingly make a comment about JB's desire to be slapped on the buttocks. Shortly thereafter, TB heard a slapping noise, and he saw an "expression of shock" on JB's face. Similarly, inmate SP testified that he witnessed the petitioner's hand "swing upward at medium speed," and he heard a slapping noise. On the other hand, the petitioner testified that nothing unusual occurred during his strip search of JB on June 6, 2001. The petitioner denied touching JB in any way during the search, and he claimed that the only noise the other inmates could have heard was the sound of boots being clapped together.

Based on the above testimony, the ALJ found that the account of the June 6, 2001 incident presented by the inmates was the more credible account. In this regard, the ALJ first noted that the inmates who testified in support of JB's version of events had no reason to lie for him. Specifically, many of the inmates who worked the highway detail on June 6, 2001 were resentful towards JB because he was relatively new to the assignment, and he had been designated the "A-man," a position of leadership. The ALJ also indicated that TB did not even know JB's name until he was asked to prepare a statement regarding this incident. In addition, both the petitioner and JB agreed that there was no history between them, which would have motivated JB to concoct a story regarding the incident. The ALJ also noted the consistencies among the testimony presented by the inmates, and that their testimony at the hearing was consistent with written statements the inmates produced on the date of the incident. Moreover, the ALJ found that the petitioner's testimony was not credible, based on both the substance of the petitioner's testimony and his demeanor during his testimony. Thus, the ALJ found that the petitioner engaged in the conduct charged, and that his conduct warranted major discipline. In his determination of the proper penalty, the ALJ noted the serious nature of the petitioner's conduct. In this regard, the ALJ considered not only the inappropriate nature of the incident itself, but also the potential that such conduct could "easily escalate into violence." Accordingly, the ALJ determined that a six-month suspension would serve as an appropriate penalty, as it "is more in line with the severity of the offense." Upon its *de novo* review, the Board affirmed the ALJ's recommendation to uphold the charges and impose a six-month suspension.

In his petition for reconsideration, the petitioner asserts that the Board made a clear material error by adopting the ALJ's initial decision without comment. The petitioner argues that the ALJ and the Board failed to identify any compelling reason which would justify such a radical increase in a penalty, from 15 days to six months, which was particularly necessary in light of the appointing authority's failure to propose such a stiff penalty. In this regard, the petitioner notes that no significant physical injury resulted from his contact with JB, and there was no evidence that his conduct was a "gratuitously violent act." Moreover, the petitioner emphasizes that there were no facts revealed during the hearing which were not known to the appointing authority at the time it determined that a 15-day suspension was appropriate. In addition, the petitioner contends that the ALJ and the Board failed to utilize the concept of progressive discipline in determining the proper penalty, and no basis was provided for the failure to do so. In this regard, the petitioner emphasizes that his prior disciplinary record is devoid of any prior incidents involving mistreatment or improper contact with inmates. Finally, the petitioner argues that the significant increase of the penalty in this case "will have a chilling effect on employees' exercise of their statutory right

of appeal," and the issue of the proper penalty should be revisited for public policy reasons. In support of this assertion, the petitioner cites *In re Bruni*, 166 *N.J. Super.* 284 (App. Div. 1979). In that case, the Appellate Division held that an increase in a disciplinary penalty by a County Court violated public policy. The petitioner asserts that, while *Bruni, supra,* concerned an employee of a non-civil service municipality, the "public policy considerations which lead [sic] the Court in *Bruni* to reverse the increased penalty imposed by the reviewing court on appeal apply with equal force here." The petitioner also emphasizes that such an increase in the disciplinary penalty is at odds with the primary purpose of civil service laws and regulations, which he claims "are intended to protect public employees from political coercion, partisanship, and personal favoritism." Finally, the petitioner requests that the Board grant a stay of his suspension, pending the outcome of the instant matter. It is noted that the appellant's suspension was scheduled to commence on January 25, 2003.

In response, the appointing authority argues that the ALJ and the Board properly considered additional aggravating factors in increasing the penalty for the petitioner's offense. Specifically, the appointing authority notes that, while it viewed the petitioner's conduct as a straightforward simple assault, the testimony presented at the *de novo* hearing at the OAL brought to light the dangerous potential for violence and sexual overtones underlying the petitioner's conduct. Moreover, the appointing authority contends that the Board has consistently found that certain conduct clearly warrants a severe disciplinary penalty, regardless of an employee's prior disciplinary history. Further, concerning the petitioner's public policy arguments, the appointing authority notes that the Board has the authority to increase the penalty imposed by an appointing authority, and this power has been exercised in past cases. The appointing authority also emphasizes that the sole case cited by the petitioner in support of his public policy arguments, *In re Bruni, supra,* is distinguishable from the present matter. In this regard, the appointing authority notes that *Bruni* dealt with an employee in a non-civil service jurisdiction. In addition, in *Bruni,* the County Court increased the penalty imposed on a municipal Police Officer from a 15-day suspension to removal. The appointing authority maintains that "there is a qualitative difference between increasing the term of the suspension and transforming a suspension into a removal."

In response, the petitioner maintains that the significant increase in the disciplinary penalty in this matter was not warranted. In this regard, the petitioner notes that "the facts as found by the ALJ were the same as those alleged at the time of the 15-day suspension." Absent new factual circumstances, the petitioner asserts that the Board is without the authority to increase the penalty so significantly. Further, the petitioner contends that the Board "neither reviewed the ALJ's initial decision in any depth, nor provided any reasons for its decision to affirm the ALJ's recommendation."

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Merit System Board may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

The instant request for reconsideration does not involve new evidence or additional information, but is based on the assertion that the Board made an error. It is noted that all of the evidence relied upon and arguments advanced by the petitioner in support of his position were presented either at the hearing before the ALJ or in the exceptions submitted to the Board prior to its decision.

As an initial matter, the petitioner contends that the increase in the disciplinary penalty, recommended by the ALJ and adopted by the Board is contrary to public policy and disregards the impact on employees who wish to exercise their statutory right to appeal the imposition of disciplinary action. In this regard, the powers and duties of the Merit System Board are set forth in the Civil Service Act. *See N.J.S.A.* 11A:1-1, *et seq.* Significantly, *N.J.S.A.* 11A:2-19 specifically provides that the Board "may increase or decrease the penalty imposed by the appointing authority." The only limitation on this authority, which was expressly conferred by the Legislature, is that "removal shall not be substituted for a lesser penalty." Thus, the petitioner's arguments that the Board's action in this matter are contrary to public policy and disregard the potential "chilling effect" on the exercise of the statutory right of employees to file appeals are not persuasive. The same public laws which grant the statutory right to appeal also grant the Board the statutory authority to increase a disciplinary penalty where such an appeal is filed. The Board also notes that its ability to increase a disciplinary penalty upon its *de novo* review is not at odds with the legislative purpose of civil service laws and rules. In this regard:

> [T]he primary object and the purpose of civil service law is to secure for government, state, county and municipal, efficient public service in all its many functions. The welfare of the people as a whole, and not specifically or exclusively the welfare of the civil servant, is the basic policy underlying the law. *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 44 (1956).

See also State-Operated School District v. Gaines, 309 *N.J. Super.* 327, 334 (App. Div. 1998). Thus, it is the Board's obligation to strike an appropriate balance between the substantive and procedural rights afforded to public employees and the duties of those employees to provide effective and efficient service to the public. This obligation mandates the imposition of appropriate disciplinary penalties for employees whose conduct or performance interferes with these goals.

In addition, the petitioner's reliance on *Bruni, supra,* is misplaced. In *Bruni,* the Appellate Division held that a County Court's action in dismissing an employee in a non-civil service jurisdiction was improper, where a lesser penalty had been imposed by the municipality. In determining that *N.J.S.A.* 40A:14-150, the statute which granted the County Court the jurisdiction to entertain such an appeal and "affirm, reverse or modify" the recommended penalty, did not vest the County Court with the authority to increase the recommended penalty, the Appellate Division specifically distinguished *N.J.S.A.* 11:15-6, the statutory predecessor to *N.J.S.A.* 11A:2-19. At the time of the decision in *Bruni, N.J.S.A.* 11:15-6 vested the Civil Service Commission with the authority to "modify or amend the penalty imposed by the appointing authority." The court noted that, by specifically withholding the authority to substitute the penalty of removal for a lesser

penalty, the Legislature implicitly granted the Civil Service Commission the power to increase a disciplinary penalty, so long as the final penalty imposed was less than removal. *See also Sabia v. City of Elizabeth*, 132 *N.J. Super.* 6, 16 (App. Div. 1974). In any event, the Legislature removed any doubt regarding the scope of the power delegated to the Board with regard to modifying disciplinary penalties, when it adopted *N.J.S.A.* 11A:2-19, which expressly provides that the Merit System Board may increase a disciplinary penalty upon its *de novo* review. It is noted that the Appellate Division has upheld the Board's exercise of this power in the past. *See, e.g., Sabia, supra* (Appellate Division upheld Civil Service Commission's increase in penalty from 30-day suspension to six-month suspension for Police Officers who broke into a locked building and removed personal property from within); *see also Dunn and Shogeke v. Merit System Board*, Docket No. A-4645-96T1 (App. Div. March 20, 1998) (Appellate Division upheld Board's increase in penalty from 30 days to four months for two Correction Officers who were charged with conduct unbecoming a public employee following their convictions for assault and resisting arrest).

Further, the appellant argues that the Board improperly increased the penalty in the instant matter, noting that the appointing authority never advocated anything more than a 15-day suspension for the petitioner's conduct. However, nothing in *N.J.S.A.* 11A:2-19 suggests that the appointing authority's consent must precede the Board's exercise of its authority to increase the penalty. The fact that the Board is vested with the authority to increase or decrease disciplinary penalties obviates the need for the appointing authority's support for such modification. The purpose of this power is, indeed, to permit the Board to substitute its determination of the proper penalty where the circumstances warrant such action.

Moreover, the petitioner contends that neither the ALJ nor the Board has set forth any compelling reason to justify such a significant increase in the disciplinary penalty. The petitioner also asserts that the concept of progressive discipline was inappropriately disregarded in assessing the proper penalty for his conduct. On the contrary, the ALJ's initial decision, which was adopted in full by the Board, provides a detailed and thorough summary and analysis of the testimony presented at the hearing at the OAL, which painted a disturbing picture of the events of June 6, 2001, and presented a compelling reason to justify a significant increase in the disciplinary penalty imposed by the appointing authority. In this regard, it must be recognized that, in determining the propriety of a penalty, several factors must be considered, including the nature of the petitioner's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463, 465. Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). Even when a Correction Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may nevertheless warrant the penalty of removal where it compromises the safety and security of the institution or has the potential to subvert prison order and discipline. *Henry v. Rahway State Prison, supra,* 81 *N.J.* at 579-80. In the petitioner's case, despite the absence of any major disciplinary history, his offense was sufficiently egregious to warrant an increase in the proposed penalty from a 15-day suspension to a six-month suspension. The unprovoked physical assault of an inmate, an individual under the petitioner's charge, certainly compromises the safety and security of the institution and has the dangerous potential to subvert prison order. Such conduct signals an inability to control one's behavior and is

contrary to the high standard of good conduct for a State Correction Officer, who is a law enforcement officer entrusted with maintaining the safety and security of State correctional facilities. *See Moorestown v. Armstrong*, 89 *N.J. Super*. 560, 566 (App. Div. 1965), *cert. denied*, 47 *N.J*. 80 (1966). *See also In re Phillips*, 117 *N.J*. 567 (1990). Therefore, the Board properly exercised its authority to increase the penalty imposed in this matter, and there is no basis for concluding that a clear material error has occurred. Accordingly, the petitioner's request for reconsideration is without merit and should be dismissed. Further, it is noted that the petitioner's request for a stay in this matter is moot.

ORDER

Therefore, it is ordered that this request for reconsideration be denied and the request for a stay be dismissed as moot.

Appointment of Veteran Mandated Where Top-ranked Non-veteran Not Interested

In the Matter of Thomas D'Angelo, Senior Sanitary Inspector (PC0781A), Warren County

(Merit System Board, decided October 22, 2003)

Thomas D'Angelo appeals the decision of the appointing authority to bypass his name on the Senior Sanitary Inspector (PC0781A), Warren County eligible list.

The subject eligible list was promulgated on October 21, 1999 and expired on October 20, 2002. The appellant, a veteran, was the number two ranked eligible on the October 8, 2002 certification of the subject eligible list. In disposing of the certification, the appointing authority bypassed the number one eligible, Tom Allen, a non-veteran, and the appellant, and appointed Kathy Davis and Sally Weirback, the third and fourth ranked non-veteran eligibles, effective December 5, 2002.

On appeal to the Merit System Board (Board), the appellant argues that he was unfairly bypassed on the certification. The appellant contends that the appointing authority incorrectly listed Allen on the certification as being bypassed for appointment. Rather, the appellant claims that Allen should have been listed as not interested in an appointment at this time. If Allen was not interested, the appellant contends that he could not be bypassed since he was a veteran. In support of this claim, the appellant submits Allen's October 21, 2002 response to the October 8, 2002 certification, which indicated that he was not interested in being appointed at that time, but would like to be considered for future appointments. Based on the foregoing, the appellant argues that once Allen indicated he was not interested in the position, he should have been appointed. Additionally, the appellant alleges that he spoke with an

employee of the Department of Personnel (DOP) who stated to him that once Allen declined interest in promotion, a new ranking was immediately generated. Further, the appellant claims that promotional procedures were not followed when a provisional appointment was made for the subject position while the subject eligible list was still valid.

In response, the appointing authority contends that it received advice from another DOP employee which indicated that as long as Allen wished to remain on the list, although not interested at the time, the selection process would be open to the following three eligibles. Additionally, the DOP employee indicated that the appellant, as a veteran, would not have exclusive rights to an appointment but could be considered among the next three eligibles. Further, the appointing authority asserts that it appointed Kathy Davis as provisional in the subject title after a position classification review was performed by the DOP.

It is noted that DOP records indicate that in a September 9, 2002 letter, the DOP's Division of Human Resource Management (HRM) informed the appointing authority that based on HRM's position classification review for Davis, her title was being reclassified from Sanitary Inspector to Senior Sanitary Inspector. This letter also indicated that Davis was considered to be serving provisionally as a Senior Sanitary Inspector pending a promotional examination for the subject title effective June 29, 2002. However, in a letter dated October 24, 2002, HRM advised the appointing authority that it had been brought to its attention that a complete promotional eligible list for the subject title was in existence, and as such, Davis' provisional appointment could not be approved.

CONCLUSION

Initially, a review of the record reveals that the appointing authority placed Davis as the provisional in the subject title in response to the outcome of HRM's position classification review for Davis. This provisional appointment was later disapproved because a complete promotional eligible list for the subject title was in existence. Based on the foregoing, the Board finds that the issue of Davis' provisional status was corrected and that no further action is required.

N.J.S.A. 11A:4-8 provides that "[a] certification that contains the names of at least three interested eligibles shall be complete and a regular appointment shall be made from among those eligibles." *N.J.A.C.* 4A:4-4.8(a)3 provides that an appointing authority shall appoint one of the top three interested eligibles (rule of three) from a promotional list. *N.J.A.C.* 4A:4-4.8(a)3ii states that "[i]f the eligible who ranks first on a promotional list is a veteran, then a nonveteran may not be appointed." *N.J.S.A.* 11A:5-7 provides that "[w]henever a veteran ranks highest on a promotional certification, a nonveteran shall not be appointed unless the appointing authority shall show cause before the [B]oard why a veteran should not receive such promotion." *See also N.J.A.C.* 4A:5-2.2(c). Additionally, *N.J.A.C.* 4A:5-2.2(b) states that "[a] list of eligibles who have passed a promotional examination shall appear in the order of their scores regardless of veteran or nonveteran status." Further, *N.J.A.C.* 4A:5-2.2(e) states that "[i]f there is more than one vacancy, and a veteran is ranked first on the certification as a result of the first appointment from the certification, then a veteran must be appointed to the next vacancy." Finally, *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

In the instant matter, the appellant was bypassed in favor of lower-ranked eligibles. The appellant argues that the appointing authority incorrectly listed Allen as being bypassed for appointment when in fact he was not interested in an appointment. He relies on Allen's letter to the appointing authority, which confirms the appellant's allegations. Based on Allen's non-interest, the appellant claims that he should have been appointed based on his status as a veteran. The appointing authority contends that it received advice from the DOP which indicated that a veteran is only required to be appointed from a promotional certification when he or she ranks highest on the certification, and that Allen is the highest ranking eligible, regardless of his non-interest in an appointment at that time. Thus, it was not required to appoint the appellant but could choose from among the top three interested eligibles.

The Board finds this interpretation of Merit System law and rules incorrect. As provided in *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3, the appointing authority shall appoint one of the top three *interested* eligibles from a promotional list. (emphasis added). In this regard, once Allen indicated that he was not interested in the position, he was no longer considered an eligible on that certification. Accordingly, the appellant became the number one interested eligible on the subject certification. Further, as the appellant was a veteran, he could not be bypassed for appointment. *See N.J.S.A.* 11A:5-7, *N.J.A.C.* 4A:5-2.2(c) and *N.J.A.C.* 4A:4-4.8(a)3ii. This interpretation is also consistent with the recent amendments to *N.J.A.C.* 4A:5-2.2 part (c) through (g) which took effect March 17, 2003. These rules were amended to clarify veterans preference on a promotional certification where more than one appointment is made and they provide that veterans preference is an issue that must be addressed for each appointment from a promotional certification. *See Zigenfus v. Balentine, etc.*, 129 *N.J.L.* 215 (S.Ct. 1942) (Court found that each appointment from a certification where multiple appointments are made should be considered separately. Thus, according to the Court, the first appointment is made from the top three eligibles and subsequent appointments are made from the top three eligibles on the list as it stands after each previous appointment). Accordingly, if a non-veteran heads the certification, a non-veteran may be appointed to the first vacancy. However, if a veteran is ranked first as a result of the first appointment, a veteran must be appointed to the second vacancy. Central to the issue of the amendments was the DOP's interpretation of *N.J.S.A.* 11A:5-7, which would continue to ensure the protection of the rights of veterans in the merit system selection process as guaranteed by the New Jersey State Constitution.

Given this analysis, the Board orders that the appellant's appointment is mandated. The Board notes that the appointing authority is not required to displace either of the two previously appointed individuals if another position exists, however, it is required to appoint the appellant. Once appointed, the appellant would be entitled to a retroactive date of appointment to December 5, 2002 upon the successful completion of a working test period. This date is for salary step placement and seniority-based purposes only. The Board notes that the appellant is not entitled to any back pay in this matter. The Board does not provide for awards of back pay for appeals that are decided by the Board based on the written record unless, pursuant to *N.J.A.C.* 4A:2-1.5(b), sufficient cause is presented. *N.J.A.C.* 4A:2-1.5(b) provides:

> Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C.* 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Commissioner or Board or where the Board finds sufficient cause based on the particular case.

The appellant's appeal is not a disciplinary appeal, nor was it one where the appointing authority failed or delayed to carry out a Board order. Thus, back pay may only be awarded if the Board finds sufficient cause in this particular matter. A thorough review of the record does not establish bad faith or some invidious reason for the appointing authority's actions. Rather, it appears that the appointing authority sought advice on how to properly dispose of the certification, and acted on that advice. Accordingly, the appellant is not entitled to back pay.

ORDER

Therefore, the Merit System Board orders that this appeal be granted and that the appellant's appointment is mandated. Upon the successful completion of his working test period, the Board orders that appellant be granted a retroactive date of appointment to December 5, 2002. This date is for salary step placement and seniority-based purposes only. However, the Board does not grant any other relief, such as back pay, except the relief enumerated above.

Good Cause Not Shown to Extend Certification Disposition Date

In the Matter of Police Officer (S9999B), City of South Amboy

(Merit System Board, decided May 7, 2003)

The City of South Amboy, represented by Franklin G. Whittlesey, Esq., appeals the decision of Human Resource Information Services (HRIS), which denied the appointing authority's request to extend the disposition due date of the November 27, 2001 certification of the eligible list for Police Officer, City of South Amboy (S9999B).

By way of background, the eligible list for Police Officer (S9999B), City of South Amboy promulgated on April 20, 2001 and expired on June 19, 2002. The eligible list was certified to the appointing authority on November 27, 2001 with a disposition due date of May 27, 2002. The appointing authority requested a 90-day extension of the due date, but HRIS only granted 60 days to July 27, 2002. The certification was returned to HRIS on July 26, 2002. In disposing of the certification, the appointing authority appointed Patricia Kanecke, the first ranked eligible, effective November 27, 2001. The appointing authority also indicated that James Charmello, Lenard Smith and John Sullivan, Jr., who ranked third, fifth and sixth on the certification, respectively, would be appointed on September 13, 2002 due to the fact that their appointments were contingent upon receipt of "Extraordinary Municipal Aid" and requested that the certification disposition due date be extended to that time.

However, HRIS denied the appointing authority's request, stating that the September 13, 2002 appointment date was prohibited on the basis that the date was past the extended certification disposition due date of July 27, 2002. *See N.J.A.C.* 4A:4-4.9(a)3. Additionally, it indicated that no good cause was shown to

grant further extensions of the disposition due date. In this regard, HRIS stated that since the eligibles did not take medical or psychological examinations, they were not given bona fide offers of employment to warrant further extensions. *See* Americans with Disabilities Act (ADA), 42 *U.S.C.A.* sec. 12101, *et seq.*; *N.J.A.C.* 4A:4-6.5(b). It is noted that the appointing authority amended the certification and appointed James Charmello, the third ranked eligible, effective July 26, 2002. It is further noted that a new eligible list for Police Officer (S9999D) promulgated on June 28, 2002 and expires on June 27, 2004. Smith and Sullivan's names appear on that eligible list.

On appeal to the Merit System Board (Board), the appointing authority argues that in denying its request to extend the certification disposition due date to September 13, 2002, HRIS did not take into consideration that the subject eligible list could be extended for good cause under *N.J.A.C.* 4A:4-3.3(a)1. In this respect, the appointing authority states that it was facing budgetary issues in appointing Smith and Sullivan. Moreover, it contends that Smith and Sullivan were extended bona fide offers of employment by virtue of the Mayor of South Amboy's verbal offer of employment to these eligibles. It is noted that the appointing authority has not submitted evidence, such as a certification or affidavit from the Mayor, in that regard. Finally, the appointing authority requests a hearing in this matter.

CONCLUSION

Initially, the appointing authority requests a hearing on this matter. However, requests for extensions of disposition due dates and requests for extension of lists are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6(b). Hearings are granted only in those limited instances where the Board determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978). *N.J.A.C.* 4A:4-3.3(a)1 states that an eligible list may, for good cause, be extended by the Commissioner of Personnel prior to its expiration date, except that no list shall have a duration of more than four years. Moreover, *N.J.A.C.* 4A:4-4.9(a)3 provides that an eligible shall not be appointed and begin work after the expiration date of the eligible list except when the certification is made just prior to the expiration of the eligible list, in which case the date of appointment and the date the eligible begins work shall be no later than the disposition due date.

The appointing authority contends that because of budgetary constraints, appointments were not available for Smith and Sullivan until September 13, 2002. At that time, it would have received the necessary aid to fund the eligibles' appointments. HRIS denied the appointing authority's request to extend the certification disposition due date to September 13, 2002 to effectuate the appointments. The Board agrees with HRIS' decision and finds that the appointing authority has not shown good cause to revive and extend the subject eligible list or to grant its request for an additional extension of the certification disposition due date. In evaluating whether good cause exists, the Board looks to the totality of the circumstances of each particular case. In this case, a new eligible list promulgated on June 28, 2002 for Police Officer (S9999D). Nevertheless, HRIS accommodated the appointing authority's situation by extending the disposition due date of the November 27, 2001 certification to July 27, 2002. However, a further extension of the due date would adversely affect the eligibles on the new list, who have been newly tested. The appointing authority's budgetary concerns do not overcome the Board's policy against using stale lists.

Moreover, the appointments of Smith and Sullivan are not mandated to warrant an extension of the disposition due date. In this regard, a review of the record indicates that Smith and Sullivan were not administered medical or

psychological examinations, which would have implicated the ADA and may mandate their appointments. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super*. 494 (App. Div. 1990). The Board notes that Smith and Sullivan are ranked on the new list for Police Officer (S9999D) and may have the opportunity to be considered for a position in the near future.

Most importantly, the appointments of Smith and Sullivan were not available until September 13, 2002. The Board has recently concluded that a request for extension of a certification disposition due date beyond the expiration date of a list should only be granted to fill current vacancies. *See In the Matter of William J. Brennan and Fire Lieutenant (PM1201T) and Fire Captain (PM1191T), Township of Teaneck* (MSB, decided April 9, 2003); *In the Matter of Police Lieutenant (PM1356W), City of Hoboken* (Commissioner of Personnel, decided December 17, 2002). In *Brennan, supra*, extensions of the certification disposition due dates were granted beyond the life of the eligible lists for Fire Lieutenant (PM1201T) and Fire Captain (PM1191T) in order to fill anticipated vacancies in the titles due to retirements. On remand from the Superior Court of New Jersey, Appellate Division, the Board determined that genuine vacancies did not yet exist at the time the subject eligible lists were certified and the certification disposition due dates were extended. In the meantime, new lists for Fire Lieutenant and Fire Captain were being promulgated. Thus, the Board concluded that vacancies must actually exist to justify revival of eligible lists or extend certification disposition due dates. The Board stated that this approach would accommodate the policy of avoiding stale lists and the principle of merit and fitness. It is noted that the Board did not rescind the appointments of eligibles who were appointed from the certifications with the extended disposition due dates since they had a legitimate expectation that their appointments were permanent and final consistent with the then-current regulatory practices. Similarly, in *In the Matter of Police Lieutenant (PM1356W), supra,* the Commissioner of Personnel determined that although it was permissible to revive and extend an eligible list to effectuate appointments to newly-created positions, good cause did not exist to extend a list due to anticipated future retirements. The Commissioner of Personnel observed that an intention to retire does not necessarily result in a vacancy, and hence, is not sufficient good cause to extend an eligible list. Thus, the City of Hoboken was permitted to fill three existing vacancies from the list that was revived and extended, but was also directed to fill all future vacancies, including those created through retirements, from a new list for Police Lieutenant.

In this case, the Board finds that because the appointing authority was unable to compensate Smith and Sullivan at the time the eligible list expired on June 19, 2002, it did not have genuine vacant positions which Smith and Sullivan could fill. As such, good cause has not been shown by the appointing authority to revive and extend the subject eligible list or to extend the certification disposition due date beyond July 27, 2002 to effectuate the appointments of Smith and Sullivan. Accordingly, the appointing authority's appeal is denied.

ORDER

Therefore, it is ordered that this appeal be denied.

OF PERSONNEL INTEREST

RULES UPDATE

By: Elizabeth J. Rosenthal
Personnel and Labor Analyst

Until July 1, 2001, when the Administrative Procedure Act (APA) was amended to provide for a five-year sunset provision, Executive Order No. 66 (1978) was in effect and required that all rules include an expiration or sunset date that is no later than five years from the effective date of the rule. *See, e.g., N.J.S.A.* 52:14B-5.1. Several merit system rule chapters in effect prior to the APA amendments had five-year sunset dates pursuant to the Executive Order. These recently came up for readoption. Accordingly, the Merit System Board readopted the following rule chapters without change:

- ***N.J.A.C.* 4A:1, concerning general rules and department organization.** These rules provide definitions of common terms used throughout *N.J.A.C.* 4A, the organizational structure of the Department of Personnel, access to public records, and procedures for the adoption of pilot programs and for delegation of Department functions.

- ***N.J.A.C.* 4A:2, regarding appeals, discipline and separations.** These rules concern the appeal process in general, major and minor discipline, grievances, and appeals regarding reprisals.

- ***N.J.A.C.* 4A:7, regarding equal employment opportunity and affirmative action.** These rules concern prohibited employment discrimination and the procedures for appealing such adverse actions.

- ***N.J.A.C.* 4A:9, regarding political subdivisions.** These rules concern the adoption of Title 11A by local jurisdictions and the impact that this action has on the rights of existing and future employees.

- ***N.J.A.C.* 4A:10, regarding violations and penalties.** These rules concern enforcement of merit system law and rules and penalties that may be imposed for violations. The rules also include prohibitions against certain political activities and specific retirement incentives.

The New Jersey Employee Awards Committee, which oversees and regulates the State employee awards program, is responsible for the rules at *N.J.A.C.* 4A:6-6. Awards are presented to employees for longevity, suggestions that would save the State money, heroism, professional achievement, and other areas of recognition. As these rules were due to expire, the Committee readopted them, also without change.

The Board readopted the following rule chapters with some changes:

- ***N.J.A.C.* 4A:5, regarding veterans preference.** These rules govern eligibility for veterans and disabled veterans preference for merit system job applicants and provide procedures for the applicability of veterans preference in open competitive and promotional situations. The amendments, adopted effective March 17, 2003, reflect recently enacted legislation placing the responsibility of veterans preference determinations with the Adjutant General and provide procedures to be followed when a promotional certification is used to fill multiple vacancies.

- ***N.J.A.C.* 4A:6-1 through 5, regarding leaves, hours of work and employee development.** The Board proposed amendments to *N.J.A.C.* 4A:6-1.13 to make the convention leave provisions consistent with recent statutory enactments limiting the types of organizations for which an employee may take convention leave and the circumstances under which the leave may be taken. Whereas the governing law at *N.J.S.A.* 11A:6-10 and 40A:14-177 used to permit certain employees to take convention leave for a wide variety of organizations, the law was invalidated in *New Jersey State Firemen's Mut. Benev. Ass'n v. North Hudson Regional Fire & Rescue*, 340 *N.J.Super.* 577 (App.Div. 2001). In declaring the statutes unconstitutional, the court held that the laws' inclusion of some ethnic organizations and their exclusion of others had no rational basis and constituted special legislation. *Id.* at 588-89. The court also held that the statutes improperly delegated to private organizations such as unions the power to determine how many could attend their conventions without regard to appointing authority staffing needs. *Id.* at 591-92. (It is noted that the court did not address another statute regarding convention leave, *N.J.S.A* 38:23-2, so it remains in effect as originally enacted.)

  The Legislature amended the two statutes to address the court's concerns. Therefore, these laws now permit convention leave for only the following organizations: New Jersey Policemen's Benevolent Association, the Fraternal Order of Police, the Firemen's Mutual Benevolent Association and the Professional Fire Fighter's Association. The statutes also limit the number of authorized representatives entitled to paid leave to no more than 10 percent of the organization's membership, subject to some caveats. The amendments to the rule on convention leave, which took effect on July 7, 2003, codify the statutes' new provisions.

  The Board had also proposed amendments to *N.J.A.C.* 4A:6-1.11, the military leave rules. However, a review of the comments received indicated that further substantive changes to the rule were needed, requiring additional public notice and comment. The Board expects to repropose the military leave amendment in the near future.

- ***N.J.A.C.* 4A:8, regarding layoffs.** These rules govern the manner in which layoffs for reasons of economy or efficiency are handled in State and local service. The Merit System Board proposed the rules' readoption with amendments to codify recent legislation requiring that the order of layoff be conducted in the "inverse order of seniority." The legislation defines seniority as being free of any job performance or merit point factors. Therefore, all language in the rules regarding the use of "merit points" in determining the order of layoff was proposed for deletion. Following adoption, the amendments were effective on August 4, 2003.

- ***N.J.A.C.* 4A:4, regarding selection and appointment.** These rules govern the merit system appointment process. The Board proposed their readoption with amendments concerning promotional title scopes in local service. The proposed amendments were intended to address a common problem faced by local appointing authorities, namely, that a local appointing authority could use, for example, the titles of Police Chief and Police Sergeant, but not Police Captain and Police Lieutenant but, due to existing language in *N.J.A.C.* 4A:4-2.4, a promotional test could not be opened to Police Sergeant. Thus, a rule relaxation would have had to be approved by the Commissioner to permit the opening of a Police Chief exam to the title of Police Sergeant. Accordingly, the proposed amendments to *N.J.A.C.* 4A:4-2.4 were intended to eliminate the need for frequent rule relaxations by allowing the opening of a promotional exam in local service to the titles actually used in the jurisdiction. The amendments were effective October 6, 2003.

Contact the Legal Liaison Unit at (609) 984-7140 if you would like copies of any of these rule adoptions.

FROM THE COURT

Following are recent Supreme Court and Appellate Division decisions in Merit System cases. As the Appellate Division opinions have not been approved for publication, their use is limited in accordance with R.1:36-3 of the N.J. Court Rules.

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Violations of Last Chance Agreement Sufficient Basis for Removal

Horace Watson v. City of East Orange
175 NJ 442 (2003)

The issue in this appeal is whether the Merit System Board properly removed petitioner from his position as a police officer with the East Orange Police Department.

While under the influence of alcohol, petitioner fired his service revolver in the direction of a residence on the campus of then-existing Upsala College. Investigators found nine spent shell casings traceable to petitioner. No one was injured.

The City of East Orange (respondent) decided to suspend petitioner with conditions, rather than discharge him. The parties memorialized the terms of petitioner's suspension in a "last chance" agreement (LCA). The LCA attached three conditions to petitioner's suspension in lieu of discharge. Condition A required that petitioner would enroll in a program for alcohol recovery and that the program selected would be mutually acceptable to the parties. Conditions B and C required that petitioner satisfactorily complete the program and that, following his release from the program, he would be counseled by a licensed substance abuse counselor. The LCA also stated that the respondent would determine in its sole discretion when the conditions were met. Consistent with that agreement, respondent suspended petitioner for ninety working days, beginning January 5, 1997 and ending May 20, 1997. Although the LCA reflected that petitioner could return to work only when he completed the program for alcohol recovery, he did not begin attending such a program until May 5, 1997, fifteen days before his suspension was scheduled to end. Following a departmental hearing, respondent discharged petitioner.

Petitioner appealed to the Merit System Board (Board), which transmitted the matter as a contested case to an administrative law judge. The administrative law judge upheld the discharge, finding that petitioner had not complied with his supervisor's previous directive to inform the department by January 10, 1997 of the specific recovery program that he had selected. Although petitioner did enroll in a program late in the suspension period, the administrative law judge found that he did not complete it within the period of suspension or within a reasonable time from the date of enrollment. The Board adopted the findings of the administrative law judge that petitioner violated the LCA and that dismissal was appropriate.

The Appellate Division affirmed. 358 *N.J. Super.* 1 (App. Div. 2001). The court noted the standard of review for administrative agency decisions, *i.e.*, that reversal is appropriate only if the decision is arbitrary, capricious or unreasonable or is not supported by substantial credible evidence in the record as a whole. The court explained that the record contains no evidence that petitioner ever successfully completed an alcohol recovery program. The court also explained that although the LCA did not specifically provide a time limitation for completion

of the alcohol recovery program, it was reasonably inferable from all of the circumstances that petitioner was required to enroll as soon as possible after signing the agreement and to complete the program before he could return to work. Based on those facts, the Appellate Division saw no basis to reject the Board's determination.

***HELD*:** The judgment of the Appellate Division is **AFFIRMED** substantially for the reasons expressed in the Appellate Division's opinion. Under the limited standard of review applicable to administrative agency decisions, there is no basis to overturn the decision of the Merit System Board that petitioner violated the last chance agreement and that dismissal was appropriate.

1. Given the dangerousness of petitioner's initial conduct, respondent acted in the public interest by requiring him to comply with both the letter and spirit of the LCA. Respondent obviously was not satisfied with the slowness by which petitioner identified and enrolled in a suitable program, his failure to keep respondent abreast of his progress, and his failure to complete the program itself. The LCA grants respondent the discretion to deem petitioner in breach of the agreement, justifying his dismissal.

2. Even if the LCA did not afford respondent that degree of discretion, the Court's disposition would be the same. Petitioner was expected to enroll in and complete a recovery program in a timely fashion, as the LCA's text and its surrounding circumstances make clear. Petitioner simply did not perform as contemplated by the parties, warranting his discharge. A contrary conclusion likely would chill employers from entering into last chance agreements to the detriment of future employees.

The judgment of the Appellate Division is **AFFIRMED**.

JUSTICE LONG, dissenting, joined by **JUSTICES ZAZZALI and ALBIN,** believes that the terms of the LCA were not ambiguous and required that petitioner enroll in an alcohol rehabilitation program within the suspension period, but did not require that he complete it within that time. She contends that because petitioner enrolled in a program within the suspension period, he therefore complied with the provisions of the LCA and is entitled to a remedy.

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Supreme Court Rescinds Appointments Based on Security Breach of Make-up Examinations

In the Matter of Police Sergeant (PM3776V) City of Paterson
176 N.J. 49 (2003)

This appeal involves a civil service examination administered by the Department of Personnel (DOP) for promotional consideration for nine sergeant positions in the City of Paterson Police Department. The Court considers whether the DOP's practice of administering identical exams to original and

make-up candidates in the same testing cycle is a per se violation of a candidate's state constitutional right to a fair and competitive civil service examination. The Court further considers whether the make-up exams, as administered, violate the State Constitution when there is evidence that unknown persons disseminated test questions and answers throughout the Paterson Police Department immediately following the original exam and before the make-up exam, but no evidence that any make-up candidates had advance knowledge of the test's content.

In October 1997, the DOP administered a statewide civil service promotional exam for the position of police sergeant. A total of 182 candidates from the City of Paterson Police Department took the exam. One hundred thirty-five of those candidates were successful. Petitioners, consisting of numerous candidates for the position, claimed that immediately following the exam, candidates congregated outside of the testing area and discussed the content of the exam with one another. In addition, there was evidence that questions appearing on the exam, along with answers to them, were later typed out by some of the candidates who sat for the exam and distributed them within the police department. Furthermore, petitioners claimed that various unidentified members of the police department discussed the October exam, making its content "common knowledge" throughout the Department prior to the administration of any make-up exams.

Shortly after the exam, petitioners filed a petition with the DOP requesting that it prohibit any candidate from taking a make-up exam for the October 1997 test, claiming that they had been disadvantaged by the dissemination of information contained on the exam. In support of their request, petitioners provided the DOP with copies of a substantial portion of the questions and answers from the October 1997 exam as proof that exam security had been breached. The make-up exam nevertheless was administered to three candidates on different occasions after the candidates signed a "Security Pledge" certifying that they had no knowledge of the contents of the original exam.

In total, eight officers in the Paterson Police Department were promoted to sergeant: five out of the 135 candidates who passed the original exam and three out of the three candidates who took a make-up exam. In July 1998, petitioners filed a petition with the DOP and the Merit System Board (Board) asserting that the DOP's practice of administering identical exams to original and make-up candidates violated their right to a fair and competitive civil service examination under the New Jersey Constitution. Petitioners also sought the removal of two of the three successful make-up candidates (Durkin and Catania), alleging that they had advance knowledge of the exam's content. Again, petitioners provided copies of questions and answers to the October 1997 exam, which they found at roll call in the Paterson Police Department shortly after the original exam but before the make-up exams.

The Board rejected the petitioners' constitutional challenges to the DOP's practice of administering identical exams to original and make-up candidates. Rather, the Board viewed the practice as the only mechanism it had to provide candidates with a fair and competitive examination and to provide the statistically valid means to compare the performance of the original candidates and the make-up candidates fairly and accurately. The Board referred the petitioners' specific allegations against Durkin and Catania to the Office of Administrative Law for a hearing to determine whether they had knowledge of the exam's content prior to their make-up exams.

In July 2000, an administrative law judge granted Catania's and Durkin's motion for summary judgment, concluding that there was no evidence that they had advance knowledge of the contents of the exam. Petitioners appealed the ALJ's decision, and the Board affirmed in October 2000.

In an unreported *per curiam* opinion, the Appellate Division affirmed the Board's decision, rejecting petitioners' general challenge to the DOP's practice of using identical questions on original and make-up exams and affirming the Board's finding that there was no evidence to support the conclusion that the exam, as held, was unfair.

The Supreme Court granted the petitioners' petition for certification.

HELD: Although the Department of Personnel's practice of administering identical exams to original and make-up candidates in the same testing cycle was not a per se violation of a candidate's constitutional right to a fair and competitive civil service examination, in light of the undisputed evidence of a breach in security following the original exam but before the administration of the make-up exam and the DOP's failure to make adjustments to the make-up exams to address that breach, the make-up exams as administered in Paterson, violated the New Jersey State Constitution.

1. The New Jersey Constitution and the New Jersey Civil Service Act require appointments and promotions in the civil service of the State to be based on considerations of merit and relative knowledge, skill, and ability. To implement those constitutional and statutory requirements, the Legislature has vested the DOP, the Board, and the DOP Commissioner with broad power to devise a fair, secure, merit-based testing process by which candidates are selected for employment and promotion. Among other things, the Commissioner must provide for the security of the examination process and appropriate sanctions for breach of security.

2. In the past, the Court has sanctioned the DOP's practice of reusing a substantial number of exam questions from test to test, in identical or similar form, recognizing that the DOP's decision to reuse exam questions was clearly within the range of responsibilities that the Legislature has delegated to the DOP to implement the most effective and efficient procedure to assure public hiring and promotion based on merit.

3. Noting its limited role in reviewing the DOP's administration of the civil-service system and its determination regarding civil-service testing processes, the Court declines to bar outright the DOP's practice of administering identical exams in the same testing cycle.

4. To effectuate the goal of devising a fair, secure, merit-based testing process by which candidates are selected for employment and promotion, the DOP Commissioner must provide for the security of the examination process and appropriate sanctions for breach of security. To that end, the Board specifically prohibits copying, recording, or transcribing any examination question or answer, and/or the removal from any exam room of any question sheet, answer sheet, notes, or other papers or materials related to the content of an examination.

5. Other jurisdictions also have recognized the importance of a fair, secure, and competitive civil service examination process.

6. Although there is no evidence indicating that any of the three make-up candidates had access to exam materials prior to sitting for their make-up exams, it is undisputed that exam security was breached prior to the administration of the make-up exams. Once the DOP discovered that breach in exam security, the make-up exams should have been cancelled and an appropriate remedy fashioned to ensure all candidates a fair and competitive exam. Its failure to do so undermined the integrity of the examination process and impaired the candidates' ability to demonstrate their relative merit and fitness. Thus, the make-up exams, as administered in Paterson, violated article VII, section 1, paragraph 2 of the State Constitution.

7. Although security can and must be improved, it may be that no procedural safeguards can prevent the type of irregularities that occurred in this appeal, where identical exams were given to both original and make-up candidates. Therefore, going forward, the DOP and the Board should administer make-up exams that contain substantially different or entirely different questions from those used in the original examination. Moreover, exam participants must honor their legal and ethical obligations.

8. Since the Court is voiding the results of the make-up exam and thereby prohibiting any permanent appointments to police sergeant from those candidates who sat for the make-up exams, three police sergeant positions, currently held by Officers Catania, Durkin, and Mejia, are open. Until a new annual exam is given, the Court leaves to the discretion of the DOP the question of who, if anyone, should fill the open sergeant positions, as well as the procedures for those appointments. This remedy is confined to the October 1997 sergeant's exam administered to the members of the Paterson Police Department.

Judgment of the Appellate Division is **AFFIRMED** in part in respect of its holding that identical exams for original and make-up candidates is not per se unconstitutional, **REVERSED** in part in respect of its holding that the make-up exams as administered were fair and competitive, and **REMANDED** for appropriate relief consistent with the Court's decision.

NOTE: On remand from the Court, the Merit System Board determined that the three Police Sergeant positions vacated by Officers Catania, Durkin and Mejia not be filled by permanent appointments until the new Police Sergeant eligible list promulgated in the Spring of 2004. The Board found that, in this way, these officers would have as fair an opportunity as anyone else to compete for the vacated positions. However, recognizing the City of Paterson's obligations to its citizens, the Board determined that the City may continue to permanently appoint candidates from the existing Police Sergeant eligible list, so long as the three court-vacated positions are not permanently filled until the new eligible list promulgates. The Board also noted that, if the City required these specific positions to be filled, it could do so provisionally from the existing special reemployment or promotional list. *See In the Matter of Police Sergeant (PM3776), City of Paterson* (MSB, decided August 12, 2003).

As a result of the Court's decision, on August 19, 2003, Commissioner of Personnel Ida L. Castro signed an Order establishing a one-year Pilot Program, incorporating a new make-up policy for all public safety announcements. The Pilot Program is designed to address concerns regarding test security. A make-up examination will no longer be identical to the test that was administered on the original test date. Rather, the make-up examination will match the content specifications of the original examination as closely as possible. Additionally, the make-up examination will be administered when the next regularly scheduled examination for the title in question is administered. The examination will only be administered by the DOP if the make-up candidate agrees to accept the examination as a valid substitute for the original examination. The candidate, however, may still challenge the answer key or the validity of the actual test items. If a candidate does not agree to take the alternate form of the examination and accept the content of that examination as appropriate, no make-up test will be administered to that candidate.

Non-disclosure of Arrest Record Grounds for Removal
In the Matter of Anthony Dillard v. South Woods State Prison and the Juvenile Justice System
A-4369-01T2 (App. Div. May 19, 2003)

Appellant, Anthony Dillard, was discharged effective May 24, 1999, by the New Jersey Department of Corrections as a senior corrections officer with the South Woods State Prison on the grounds that he made an intentional misstatement of material fact on his employment application with the Department of Corrections, which he certified on December 4, 1995. Dillard appealed his discharge and the matter was heard and considered by the Office of Administrative Law. On December 5, 2001, the Administrative Law Judge (ALJ) filed his initial decision with the Merit System Board recommending and ordering Dillard's removal "on charges of falsification involving an alleged intentional misstatement of material fact" in connection with his application for employment. On April 8, 2002, the Merit System Board, having considered the ALJ's initial decision and having made its own independent evaluation of the record, accepted and adopted the findings of fact and conclusions contained in the ALJ's initial decision and determined that the dismissal of Dillard by the appointing authority was justified. Dillard's appeal to the Merit System Board was dismissed and Dillard now appeals to this court.

It appears that on September 1, 1995, Dillard was stopped while traveling on Route 95 in Maryland by a state trooper and found to be in possession of an automatic pistol in the trunk of his car. The trooper transported Dillard to the local police barracks. Ultimately, but not on that day, Dillard was issued a summons for his arrest and charged with a weapons violation. On March 3, 1996, Dillard, after having initially pleaded not guilty, was nevertheless placed on unsupervised probation before final judgment by a Maryland District Court judge on a procedure that appears somewhat analogous to the New Jersey Pretrial Intervention Program. *N.J.S.A.* 2C:43-12.

Significantly, Dillard failed to disclose that on November 1, 1995 he had been arrested on firearm possession charges in the State of Maryland when he signed and filed his employment certification with the Department of Corrections on December 4, 1995. The Department discovered Dillard's falsification by failure to report his Maryland arrest when, in 1999, it conducted a criminal history background in connection with a domestic violence incident involving a co-worker at South Woods State Prison. Dillard's dismissal and the subsequent proceedings as aforesaid then transpired.

In his brief on appeal, Dillard contends:

POINT I

THE MERIT SYSTEM BOARD ARBITRARILY AND CAPRICIOUSLY INVALIDATED A REASONABLE SETTLEMENT AGREEMENT BETWEEN MR. DILLARD AND RESPONDENT.

POINT II

THE MERIT SYSTEM BOARD'S SUMMARY JUDGMENT WAS IMPROPER BECAUSE IT DENIED MR. DILLARD THE OPPORTUNITY TO PRESENT SCIENTIFIC DATA WHICH CREATED A GENUINE DISPUTED ISSUE OF FACT.

POINT III

THE ADMINISTRATIVE LAW JUDGE OMITS A CRUCIAL FINDING OF FACT THAT MR. DILLARD "INTENTIONALLY" OMITTED INFORMATION FROM HIS APPLICATION.

POINT IV

THE EXTRAORDINARY FACTS AND CIRCUMSTANCES OF THE MARYLAND INCIDENT QUALIFY MR. DILLARD FOR PROGRESSIVE DISCIPLINE.

We have considered these contentions and all supporting arguments advanced by Dillard and find they are without merit. *R.* 2:11-3(e)(1)(E). We briefly note, as observed by the Merit System Board, that Dillard, as a member of the law enforcement community, is held to a higher standard of conduct than that of other public employees. Dillard's dishonesty cannot be safely tolerated by the correction system. *See Township of Moorestown v. Armstrong*, 89 *N.J. Super.* 560, 566 (App. Div. 1965), *cert. denied*, 47 *N.J.* 80 (1966).

Whether or not the Maryland automobile stop was the result of racial profiling as Dillard sought to prove does not create a genuine disputed issue of fact because such circumstance did not excuse Dillard from disclosing that he had been arrested.

Likewise, the further fact that the Merit System Board rejected an alleged settlement agreement with the Department of Corrections which would have permitted Dillard to resign in good standing and transfer to the Juvenile Justice Commission was not improper. There was no proof that the Juvenile Justice Commission nor any subordinate thereof had authority to consent to Dillard's transfer had been a party to the alleged settlement agreement.

> Our role in review of an agency head decision is carefully circumscribed. That role is to survey the record to determine whether there is sufficient competent, credible evidence to support the agency decision.... It is not our function to substitute our judgment for that of the agency where there may exist a difference of opinion concerning the evidential persuasiveness of relevant proofs.... We do not weigh the evidence, determine the credibility of the witnesses, draw inferences and conclusions from the evidence or resolve conflicts therein. Issues of credibility are for the fact triers. Morever, should there be substantial evidence in the record to support more than one result, it is the agency's choice which governs.
>
> [*Jamison v. Rockaway Township Bd. of Educ.*, 242 *N.J. Super.* 436, 448 (App. Div. 1990) (citation omitted)].

Based upon our thorough review of the record, we are satisfied that the ALJ's findings and conclusion as well as the independent evaluation by the Merit System Board could have been reasonably reached in light of the record taken as a whole. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

Affirmed.

Court Agrees with Board's Interpretation of 45-day Rule
In the Matter of Joseph McCormick v. Lawrence Township
A-2811-01T3 (App. Div. April 23, 2003)

Appellant Joseph McCormick appeals from a final determination of the Merit System Board dated December 27, 2001, finding that he violated numerous departmental rules and regulations by failing to properly investigate a missing persons complaint involving a potentially suicidal young woman. The Board upheld the ten-day suspension imposed by the appointing authority, Lawrence Township. On appeal, appellant essentially contends the Board erred in failing to dismiss the charges pursuant to *N.J.S.A.* 40:14-147. We disagree and affirm.

The undisputed facts are these. Appellant is a police officer for Lawrence Township. On December 2, 1999, at approximately 4:30 p.m., TM reported to appellant the disappearance of her daughter from her psychiatrist's office about ten minutes prior. She explained that her daughter was being treated for depression. Appellant notified the police dispatcher of the report and initiated a search in his patrol car of the local roads. He then went to the doctor's office, spoke with the doctor, and checked the path behind the office. He abandoned the search in that area when he observed two large, unfriendly dogs. Appellant called police headquarters about the status of the case and started to prepare a missing person's report. He completed the paper work, responded to another incident, and then took his meal break from 7:09 to 7:46 p.m. He took no other action to pursue the search for the missing person and completed his tour of duty at 11:00 p.m.

The next day, December 3, 1999, Lieutenant Mark Boyd learned of the incident and realized that reports on the incident were incomplete. It also appeared that no search had been conducted by investigating officers, appellant, Sergeant Gerasimowicz, and Sergeant David Buxton. Lieutenant Boyd notified Captain Posluszny and undertook an intensive search for the missing person. The young woman was found later that day in relatively good health.

Captain Posluszny conducted an investigation into these events on December 8, 1999. He read the reports on the incident and spoke to Lieutenant Boyd and Sergeant Gerasimowicz. On December 14, 1999, Captain Posluszny filed a report of his investigation and concluded that General Order No. 94-2 and three Lawrence Township Rules and Regulations were not followed. However, he did not specify which officer violated which rules. Regarding appellant, Captain Posluszny stated:

> 3. McCormick's report had no investigation. No follow up was completed such as checking the area, checking with friends, her residence, etc. In addition, the report was not completed at the end of shift. This could have allowed Lieutenant Boyd to obtain more information in a timely manner.
> 4. No superior officer was contacted. This needed to be completed so that a detective could be assigned as well as keeping superiors informed.
> 6. Officer McCormick received the initial call for the missing person at 1628 hrs, 12/2/99. A true search of the area was not conducted until the morning of 12/3/99, approximately 16 hours after being reported missing. This is unacceptable.

Captain Posluszny found that only appellant was assigned to the missing person investigation, and he was listed at the scene from 1628 hours until 1754 hours. Captain Posluszny recommended an internal affairs investigation of the matter.

Captain Thomas Weber, who was the Acting Police Chief in December 1999 and early

January 2000, received Captain Posluszny's report on December 20, 1999, and on January 4, 2000, assigned Lieutenant Joseph Prettyman, an Internal Affairs officer, to conduct an investigation. After conducting his investigation, Lieutenant Prettyman concluded that appellant, Sergeant Gerasimowicz, and Sergeant Buxton were inattentive and neglectful of duty. In his February 11, 2000 report, Lieutenant Prettyman concluded that:

> [Appellant] failed to conduct his investigation in accordance with General Order No. 94-2 and with the Attorney General's Guidelines on missing persons. [Appellant] failed to provide correct service, was inattentive to duty and was neglectful of duty. [Appellant's] actions were not consistent with the required provisions of General Order No. 94-2.

On February 17, 2000, Chief John Prettyman, who had returned to duty, issued a Preliminary Notice of Disciplinary Action against appellant. Following a local hearing, the Township Manger sustained the charges and suspended appellant for ten days. Appellant appealed, and a *de novo* hearing was held before an Administrative Law Judge (ALJ). The ALJ concluded that appellant violated General Order No. 94-2 governing missing persons investigations, but dismissed the charges because they were not filed within the forty five day requirement contained in *N.J.S.A.* 40A:14-147.

The Township filed exceptions. On December 27, 2001, the Board rejected the ALJ's finding that the complaint was not timely filed. The Board explained:

> *N.J.S.A.* 40A:14-147 is designed to protect police officers from an appointing authority unduly and prejudicially delaying the imposition of disciplinary action. However, the statute does not prohibit an appointing authority from doing a proper investigation into a matter to determine whether disciplinary charges are necessary and appropriate. The fact that such normal and necessary investigation may span a period of time, which may exceed 45 days, does not automatically call for the dismissal of such charges. Rather, for the purposes of *N.J.S.A.* 40A:14-147, the charges must be brought within 45 days of the "person filing the complaint" obtaining sufficient information to bring such charges. The "person filing the complaint" is generally acknowledged to the Chief of Police. *See N.J.S.A.* 40A:14-118. Therefore, the 45 days start when the Chief of Police has sufficient knowledge to bring the charges against an officer. However, the Board does not interpret this provision to allow an appointing authority to unnecessarily delay the bringing of charges by not promptly attempting to obtain sufficient information to bring charges and promptly forwarding such information to the person responsible for filing the complaint. Under such circumstances, it would be appropriate to dismiss charges against a police officer based on the 45-day rule. Conversely, the statute is undoubtedly not designed to force an appointing authority, at the risk of being estopped, to prospectively bring ultimately valid, but unripe, disciplinary charges within 45 days of an incident without properly investigating the matter to ensure that sufficient information to bring such charges is obtained.
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> In this case, the record shows that while possible Boyd, on December 3, 1999, and Posluszny, on December 14, 1999, had knowledge that departmental rules had been violated, they had not specifically identified which individuals should be charged with which violations. Additionally, it is clear that Boyd did not do an investigation into the matter and while Posluszny did an investigation, it was preliminary in nature and did not include interviews or other necessary detail. Moreover,

neither individual was in a position to bring disciplinary charges against the appellant. Further, when Weber received Posluszny's report and request for an IA investigation on December 20, 1999, he was Acting Chief and had the authority to bring charges. Nevertheless, he determined that there was insufficient information to do so, ordered a full IA investigation into the matter and assigned the matter to Lieutenant Prettyman, who testified that he believed that there was insufficient information at that juncture to specifically bring charges. The Board finds no reason to doubt Weber's judgment in this matter calling for an in-depth IA investigation upon receipt of this information. The record clearly shows that a further detailed investigation into the incident was necessary to determine the culpability of the officers involved. This investigation included many interviews and produced a detailed report including specific recommendations for charges against specific officers. Upon receipt of the report on February 11, 2000, Weber, no longer Acting Police Chief, forwarded the report to Police Chief Prettyman, who promptly brought charges against the appellant on February 17, 2000. Based on these facts, there is no evidence that the appointing authority unduly delayed in conducting its investigation, or that the chronology of the events leading to the charges were somehow a ruse to delay the matter and prejudice the appellant. Accordingly, the Board finds that the appointing authority did not violate the 45-day rule in bringing the charges against the appellant.

We are satisfied from our study of the record and the arguments presented that there is substantial credible evidence in the record to support the Board's final determination. *In re Taylor*, 158 *N.J.* 644, 656 (1999). The arguments raised by appellant are without merit, not warranting discussion in a written opinion. *R.* 2:11-3(e)(1)(D) and (E). We add only that we are in substantial agreement with the bases for decision articulated by the Board in its written decision and order dated December 27, 2001. *N.J.S.A.* 40A:14-147 provides that the complaint must be filed "no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter." The investigation of the charges was undertaken in a timely fashion. We find no fault in the effort of the authority to fully investigate the charges before filing a complaint. Chief Prettyman, the person filing the complaint, had sufficient information to file the complaint on February 11, 2000, and filed the complaint against appellant on February 17, 2000, clearly within the forty-five day time limit.

Affirmed.

Court Overturns Absolute Volunteer Firefighter Preferance
In the Matter of Richard Dreyer, II, and James Hammond, Firefighters
356 N.J. Super 159 (App. Div. 2002)

This case concerns the appointment of firefighters to a paid fire department in a municipality that also has a volunteer fire company or force. Statutory preferences for appointment to the paid department are granted to members of such a municipality's volunteer fire company. The question to be resolved is the precise nature of the preferences.

The case comes to us on appeal from a determination of the Merit System Board ("Board"). Our task is to review the Board's interpretation of the applicable legislation. Since we believe the Board's interpretation is plainly unreasonable, we reverse.

The dispute arose after a 1994 civil service examination for the appointment of paid firefighters in the City of Asbury Park. The individual parties all satisfy the statutory qualifications for appointment. Appellants, James Hammond and Richard Dreyer, II, who were not members of Asbury Park's volunteer fire company, placed substantially higher on the appointment list than Garrett M. Giberson, who had served as a volunteer firefighter in the city since 1991. All three were appointed, but Giberson, who placed thirty-fourth, was given seniority over Hammond and Dreyer, who placed third and fifth, respectively.

Although Hammond and Dreyer are only concerned with seniority, the importance of which is not denied by Asbury Park or the Board, we recognize that our resolution of this case will also adversely affect the opportunity of volunteer firefighters to gain appointment to their municipality's paid fire companies. Our interpretation of the legislation, however, does not eliminate entirely a volunteer's advantage; rather, it enforces the preferences granted to volunteers by the Legislature in a manner consistent with the goals of our civil service laws and Article VII, § 1, ¶ 2 of the New Jersey Constitution.

The preferences, originally granted by *L.* 1938, *c.* 131, and later reworded without substantial change by *L.* 1971, *c.* 197, § 1, are now codified in *N.J.S.A.* 40A:14-42 through 14-45, which read as follows:

> In any municipality where there is a volunteer fire company or force, maintained and controlled by the municipality, having no paid fireman and thereafter a paid position therein is created or established by the governing body of said municipality, such position shall be filled by a member of the volunteer fire company or force who shall have served as an active fireman for at least 2 years next preceding said appointment or by an exempt fireman of the company or force. If no such member or exempt fireman is available for such appointment, the appointment may be made to any qualified person. Said appointee shall not be under 21 or over 40 years of age at the time of the appointment.
>
> [*N.J.S.A.* 40A:14-42 (emphasis added).]
>
> In any municipality where there is a volunteer fire company or force, maintained and controlled by the municipality, and the governing body of the municipality, by ordinance, shall provide for the establishment of a paid fire department, the appointments thereto shall be made from the members of the volunteer fire company or force who shall have served as active firemen for at least 2 years next preceding said appointment or from among the exempt firemen of the company or force. If no such member or exempt fireman is available for such appointment, any qualified person may be appointed thereto. Said appointees shall not be under 21 or over 40 years of age at the

time of the appointment.

[*N.J.S.A.* 40A:14-43 (emphasis added).]

In any municipality where there is a volunteer fire company or force, maintained and controlled by the municipality and a part-paid fire department composed of both paid and volunteer firemen, any appointment to such part-paid fire department shall be made from the members of the volunteer fire company or force, who shall have served as active firemen for at least 2 years next preceding such appointment or from among the exempt firemen of the company or force. If no such member or exempt fireman is available for such appointment, any qualified person may be appointed thereto. Said appointees shall not be under 21 or over 40 years of age at the time of the appointment.

[*N.J.S.A.* 40A:14-44 (emphasis added).]

In any municipality where an examination is scheduled to determine appointments to the paid or part-paid fire department and force, any qualified fireman having served in the volunteer fire company or force of the municipality for at least 2 years next preceding such appointment shall be entitled, in addition to his earned rating, to service credits of not less than 3 nor more than 10 points as may be determined by the governing body of the municipality or the authority in charge. Said appointee shall be over 21 but not more than 40 years of age at the time of the appointment.

Nothing herein contained shall establish a preference over a paid fireman temporarily dismissed or on leave of absence for reasons of economy, or the appointment of a paid fireman to a superior position at the time of promotion in said fire department or force.

[*N.J.S.A.* 40A:14-45 (emphasis added).]

The only legislative history is a "Statement" for the 1938 law, which reads as follows:

The purpose of this act is to provide for appointments to paid fire departments from the membership of volunteer fire companies in those municipalities in which volunteer fire companies or departments [are] in existence.

[Statement to *L.* 1938, *c.* 131.]

The first three sections provide the same preference to volunteer firefighters who are between twenty-one and forty years old: appointments to a paid position must be made from those members of their force who shall have served as active firefighters for at least two years before the date of appointment. We conclude that those sections govern appointments in non-civil service communities. The fourth section, *N.J.S.A.* 40A:14-45, governs appointments in civil service communities that have paid or part-paid fire departments and a volunteer force. Unlike the first three sections, which grant volunteers an absolute preference, it grants credits based on years of voluntary service. [1]

[1]The service credits are more specifically explained in *N.J.A.C.* 4A:4-2.15(g), which reads as follows:

When a municipality has a volunteer fire company and paid positions are created, any volunteer firefighter who has actively served for at least two years is entitled to service credits in addition to his or her earned examination score. The highest possible score for examination performance shall be 90 percent to which the service credit shall be added. Service credits shall be not less than three nor more than 10, and shall be added only to a passing score. The service credit shall be calculated by adding one point to the number of years of service: for example, add three points for two years of service, four points for three years of service, and so on. Any service time in excess of nine years shall be awarded the 10 point maximum.

All four sections address municipalities where a volunteer fire company or department exists and is supervised by the municipality. There is no difference in meaning between the phrase which appears in the first three sections "a volunteer fire company or force, maintained and controlled by the municipality" and the phrase in section 45, "the volunteer fire company or force of the municipality." The only substantial difference among the first three sections is that section 42 concerns appointment to a paid position by a municipality which previously had no paid positions in its fire company, while section 43 concerns appointments when a municipality creates or has a paid fire department, and section 44 concerns appointments when a municipality has a part-paid department.

The Board interpreted the legislation to mean that volunteer firefighters in a civil service community were always entitled to an absolute preference over non-volunteers who had placed higher on the civil service examination. In its view, the credits for years of service established by section 45 would only come in to play in distinguishing among volunteers who had applied for appointment on the paid force. The entirety of the Board's reasoning was this:

> Regarding appellants' contention that *N.J.S.A.* 40A:14-45 is the proper statute because an examination was administered, it is noted that there is nothing in the language of *N.J.S.A.* 40A:14-44 which would limit its operation in the case of an appointment to a part-paid fire department of a municipality meeting the requirements of the statute. The operative language of *N.J.S.A.* 40A:14-44 is unqualified and as such it pertains to: "*any* appointments to such part-paid fire department." Whereas *N.J.S.A.* 40A:14-45 applies generally to appointments to paid or part-paid fire departments or forces, *N.J.S.A.* 40A:14-44 applies more narrowly to appointments to part-paid fire departments of municipalities which have both volunteer fire companies and part-paid fire departments.

There is no evidence that the Board has previously been called on to interpret the relevant legislation on the point at issue. Consequently, we cannot be guided by the principle that in reviewing an agency's interpretation of its governing statutes "resort may be had to long usage and practical interpretation . . . to explain a doubtful phrase or to illuminate any obscurity." *Lane v. Holderman*, 23 *N.J.* 304, 322 (1957). Although we generally defer to an administrative agency's interpretation of its governing legislation, deference stops when the interpretation is "plainly unreasonable." *Merin v. Maglaki*, 126 *N.J.* 430, 437 (1992). Moreover, "[a]n appellate tribunal is . . . in no way bound by the agency's interpretation of a statute . . . ." *Mayflower Sec. v. Bureau of Sec.*, 64 *N.J.* 85, 93 (1973).

Despite the Board's contrary suggestion, all four statutory sections unquestionably concern municipalities that have volunteer fire companies and paid positions to be filled. The only substantial difference among the first three sections, as noted above, is that section 42 deals with creation of a paid position on an otherwise voluntary force, while sections 43 and 44 address, respectively, appointments to paid and part-paid fire companies. While the first three sections express an unqualified preference, indeed mandate, for appointments from the voluntary force, the language of section 45 is no less unqualified; it requires that volunteers only get service credits "[i]n any municipality where an examination is scheduled . . . ." *N.J.S.A.* 40A:14-45. No one suggests that this is a reference to anything other than examinations conducted under the Civil Service Act, *N.J.S.A.* 11A:1-1 to 12-6.

Municipalities may choose whether they wish to be governed by the Civil Service Act. *N.J.S.A.* 11A:9-1 to -10. Section 45 plainly provides the methodology for giving preferences to volunteer firefighters among themselves and

against non-volunteers in municipalities which have chosen that course. Sections 42 through 44, on the other hand, set the policy for non-civil service municipalities. Implicit in the Board's interpretation of section 45 is that its preferences are to be used solely for determining the rating of volunteer firefighters among themselves, but nothing in the wording of that section supports that view. Furthermore, if that had been the Legislature's intent one would expect that the credits for years served would have been made applicable to non-civil service municipalities, and yet nothing in the language of the statute would justify that interpretation.

The Board's brief argues that our interpretation "would have the anomalous result of penalizing volunteer [firefighters] in all municipalities covered by the Civil Service Act." But that is not true. We have simply enforced the legislative determination that volunteers in non-civil service municipalities will have a mandatory advantage over non-volunteers, while in civil service municipalities their advantage will be limited to the service credits provided by law.

The Board's brief also suggests that no policy reason exists which would justify the distinction we draw. In our view the policy reason is expressed by the Civil Service Act, which declares that "the public policy of this State [is] to select and advance employees on the basis of their relative knowledge, skills and abilities." *N.J.S.A.* 11A:1-2(a). Moreover, although the legislation at issue was initially enacted in 1938, it was re-enacted in 1971 without substantial change. By then the people of this state had expressed their view on the importance and nature of civil service in the constitution:

> Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preferences in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.
>
> [N.J. Const., art. VII, § 1, ¶ 2.]

The parties have not briefed the question of whether the preferences authorized by the legislation under review run afoul of that provision of our constitution. Consequently, we deem it best to avoid comment. However, it seems obvious that our construction of the legislation, rather than the Board's, best serves the constitutional principles embraced by the people of this state because it maximizes the circumstances in which merit, fairly tested, will prevail.

Asbury Park concedes that the service credits to which Giberson is entitled under section 45 are insufficient to advance him over appellants. Therefore, we reverse and remand for entry of an administrative order directing that Hammond and Dreyer have seniority over Giberson in the Asbury Park Fire Department.

Reversed and remanded for further proceedings consistent with this opinion.

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