

## DECISION OF THE CIVIL SERVICE COMMISSION

## Request for Stay

CSC Docket No. 2019-3554

The City of Plainfield (Plainfield), represented Little E. Rau, Esq., petitions the Civil Service Commission (Commission) for a stay of the Commission's May 9, 2019 decision (attached), pending the outcome of its appeal to the Appellate Division.

By way of background, during the pre-employment process in May 2017, D'Amico, then a Fire Fighter candidate, provided a roller hockey alliance insurance card (Document) which he modified by adding his actual Plainfield address and identification number. He modified the document because he felt "pressured" because he did not have any further proof of his Plainfield residence. The hiring committee recommended that D'Amico should not be hired due to the altered document and his initial concealment about it during the pre-employment process. However, the Fire Chief decided to give D'Amico a second chance, just as the Chief had been given as a recruit, and hired him. Thereafter, D'Amico started the fire academy on June 9, 2017. Subsequently, after an e-mail was received from a citizen questioning the residency of some of the cadets, D'Amico's residency was re-investigated in July 2017 and the allegation concerning D'Amico's residency was found to be not true. He graduated the fire academy on September 8, 2017 without incident. However, as D'Amico admitted during the July investigation that he had modified the Document, the Director of Public Safety informed the Fire Chief that D'Amico was to be terminated on September 11, 2017, his first day of work. D'Amico appealed his termination, the matter was transmitted to the Office of Administrative Law as contested case, and the Administrative Law Judge (ALJ) recommended reversing the removal. Thereafter, the Commission adopted the

ALJ's recommendation as it found that D'Amico's modifying the Document by providing his actual address and identification number on it did not indicate that he lacks the character and morals to be a Fire Fighter. Further, even assuming, *arguendo*, that his actions were considered sufficient grounds to be removed for falsification, the time to remove D'Amico was in May 2017 before he was hired and entered the fire academy in June 2017. Therefore, the Commission ordered that D'Amico receive mitigated back pay from September 8, 2017 to June 9, 2018. Additionally, D'Amico needed to complete the remaining nine months of his Working Test Period (WTP) upon reinstatement, and upon successful completion of his new WTP, he would receive mitigated back pay from the end of his original WTP, June 9, 2018, until the date of his reinstatement. Additionally, D'Amico was awarded counsel fees.

In its request for a stay, Plainfield indicates that it is amenable to post a bond (or deposit in lieu of bond) to cover D'Amico's mitigated back pay and counsel fees. It argues that D'Amico's immediate reinstatement presents immediate and irreparable harm as its appeal to the Appellate Division will not be resolved before the court's next term (2019-20). Plainfield contends that D'Amico's conduct that led to his termination, altering a document and lying about it to the Fire Division personnel, casts a pall during the pendency of the appeal for Plainfield, the Fire Division and arguably for D'Amico, as his perceived lack of trustworthiness poses a legitimate concern. If he is reinstated, Plainfield will have to invest resources to train D'Amico and have him work with other Fire Fighters in a public safety position. Further, if Plainfield wins the appeal, it will have no viable way to recoup the back pay and other compensation paid to him, which is a financial burden to the taxpayers. Additionally, if Plainfield wins its appeal and D'Amico is then terminated, this will demoralize fellow Fire Fighters. Moreover, there is not substantial injury to D'Amico in delaying his reinstatement until the appeal is decided as his back pay award will increase. Plainfield presents that it calculates D'Amico's pay from September 8, 2017 to June 9, 2018 would have been \$79,321.94, his mitigation offset is \$50,285 based on documentation that D'Amico provided, and, therefore, he would be owed \$29,036.04. Similarly, D'Amico's attorney indicated that his fees were approximately \$15,000, which would be secured by Plainfield posting a bond. Plainfield believes that the public interest is furthered by a stay pending appeal as a cloud hangs over D'Amico's character and judgment until this matter is resolved.

Finally, Plainfield argues it is likely to win its appeal. It contends that the Commission's decision is not supported by the record. Plainfield emphasizes that it did not know about D'Amico's alteration of the Document as the Fire Chief never communicated D'Amico's falsification or the hiring committee's recommendation to remove him because of his falsification and attempt to conceal it. When Plainfield first learned of the Fire Chief's role and his rogue decision, it leveled charges against him. It believes that the Fire Chief cannot be deemed Plainfield's agent

when he acted beyond his authority. Plainfield's argues that the Commission's decision was arbitrary, capricious or unreasonable.

In response, D'Amico, represented by Nicholas J. Palma, Esq., summarizes the background of this matter. He asserts that he is entitled to back pay and counsel fees as ordered and indicates that he has already suffered a financial hardship. D'Amico argues that it is highly unlikely that Plainfield will win its appeal as the bar from an administrative agency's decision to be considered an abuse of discretion, arbitrary or capricious is extremely high. He submits his Affidavit of Mitigation and proof of income earned with supporting documentation.

### CONCLUSION

*N.J.A.C. 4A:2-1.2(c)* provides the following factors for consideration in evaluating a petition for a stay:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm;
3. Absence of substantial injury to other parties; and
4. The public interest.

Initially, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. In the Commission's prior decision, it found that even if Plainfield had attempted to remove D'Amico's name from the list during the pre-employment process, he did not commit falsification. Specifically, D'Amico's modifying the Document by providing his actual address and identification number on it is not falsification as such action does not indicate that he lacks the character and morals to be a Fire Fighter. Moreover, even if D'Amico concealed the modification during the pre-employment process, since the modification of the Document was not a falsification, the concealment of the modification was immaterial and not grounds for removal. See *N.J.A.C. 4A:4-4.7(a)1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)6*. Further, the Commission noted that the time to attempt to remove D'Amico was prior to entering the Fire Academy and why it was inequitable to hold him liable for Plainfield's failure to follow its internal procedures by terminating him after he successfully completed the Fire Academy. Additionally, while every party who appeals to the Appellate Division believes that they have a clear likelihood of success on the merits and Plainfield may disagree with the Commission's decision, the Commission has explained why it determined that D'Amico has not committed falsification and has already rejected Plainfield's arguments.

Concerning the other factors for consideration in evaluating a petition for a stay and Plainfield's offer to post a bond to secure D'Amico back pay and counsel fee awards while awaiting the Appellant Division's decision, it is D'Amico who is

suffering immediate or irreparable harm as the Commission has already reversed his termination, and he has unjustifiably undergone several years without being able to work or be paid as a Fire Fighter, and the Commission has ordered that he be immediately be reinstated and awarded back pay and counsel fees, but this has not been done. Further, Plainfield's argument that it would be unable to recoup back pay and counsel fee awards should it be successful in the Appellate Division is specious at best. There is no record in the evidence that indicates that if Plainfield were ultimately to win in the Appellate Division that D'Amico will not pay his debts. Moreover, there is no cloud hanging over D'Amico's character and judgment as the Commission already determined that he did not engage in falsification. Finally, it is in the public's best interest that Plainfield follow the Commission's order and the Commission has no reason to stay its decision.

### ORDER

Therefore, it is ordered that this petition for a stay be denied. Moreover, the Commission warns Plainfield that the Commission may also award interest on the back pay award in accordance with *N.J.A.C. 4A:2-2.11* if it determines that it has unreasonably delayed compliance during an enforcement action.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 14<sup>th</sup> DAY OF AUGUST, 2019

*Deirdre L. Webster Cobb*

Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

c: Christopher D'Amico  
Nicholas J. Palma, Esq.  
Littie E. Rau, Esq.  
Carlos Sanchez  
Records Center

Attachment



# STATE OF NEW JERSEY

## DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Christopher D'Amico  
City of Plainfield, Fire Department

CSC DKT. NO. 2018-944  
OAL DKT. NO. CSV 00226-18

ISSUED: May 22, 2019

(SLK)

The appeal of Christopher D'Amico, Fire Fighter, City of Plainfield, Fire Department, removal effective September 8, 2017, on charges, was heard by Administrative Law Judge Danielle Pasquale, who rendered her initial decision on April 2, 2019 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on May 9, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

### DISCUSSION

The appellant was terminated via a release letter dated September 8, 2017, based upon a letter from the City Administrator that he was not of the moral character to be a Fire Fighter due to manipulating a document used for his application to the academy. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of the Administrative Law (OAL) for a hearing as a contested case.

In her decision, the ALJ found that it was undisputed that the appellant met the Plainfield Fire Department's residency requirement. Initially, as part of the

pre-employment process in May 2017, the appellant provided six documents to prove his residency at two separate addresses in Plainfield. However, when asked for more documentation, he provided a roller hockey alliance insurance card (Document), from a roller hockey league where both the appellant and another cadet participated, which he modified by adding his actual Plainfield address and identification number. The original Document did not have any address or identification number on it. Upon being questioned about the Document, the appellant admitted to the Investigator that he added his actual address and identification number. Additionally, the appellant testified that he did so because he felt “pressured” because he did not have any further proof of his Plainfield residence. The hiring committee recommended that the appellant should not be hired due to the altered document. However, the Fire Chief decided to give the appellant a second chance, just as the Chief had been given as a recruit, and hired the appellant. The Fire Chief explained that he was impressed by the appellant’s dedication to build camaraderie with his fellow cadets as the appellant chose to attend the fire academy a second time and was not required to do so because he had previously graduated a fire academy and achieved a Level 2 Fire Certificate, when only a Level 1 Fire Certificate was required.

The appellant started the fire academy on June 9, 2017. Subsequently, after an e-mail was received from a citizen questioning the residency of some of the cadets, the appellant’s residency was re-investigated in July 2017. The ALJ found that the allegation concerning the appellant’s residency was not true. The appellant graduated the fire academy on September 8, 2017 without incident. However, as the appellant admitted during the July investigation that he had modified the Document, the Director of Public Safety informed the Fire Chief that the appellant was to be terminated on September 11, 2017, his first day of work. Despite protest, the Fire Chief followed through and terminated the appellant and two other cadets after only working three or four hours. The ALJ concluded that the appointing authority’s termination was not proper as the appellant’s actions did not significantly impinge upon the character and morals of being a Fire Fighter when he simply inserted truthful information, his accurate address and identification number, on the Document, which was the seventh document he submitted to prove his Plainfield residency. Specifically, the ALJ concluded that the appellant did not alter the Document in a material way that would speak to his character or morals. Accordingly, the ALJ reversed the removal and ordered that the appellant to be reinstated and receive back pay and other benefits.

In the appointing authority’s exceptions, it asserts that it was not the appointing authority’s burden to prove that the appellant altered the Document in a material way, but it was the appellant’s burden to prove that he did not falsify the Document under *N.J.A.C. 4A:4-6.1(a)6*. The appointing authority argues that not only was the appellant removed for altering the document, but he was also removed for lying to investigators. Specifically, the appellant told the hiring committee in

May 2017 he could not produce the Document on the fire headquarters' computer because "it's only on the home computer." However, the appellant testified that he could have pulled up the document on the computer, but he did not do so because the Document would not have his address on it. Additionally, the ALJ concluded that the appellant altered the document out of "laziness." However, laziness is antithetical to being a Fire Fighter. Additionally, Fire Fighters are held to a higher standard than others who serve in public office and the appellant's actions are contrary to this standard. Moreover, the appointing authority presents prior Commission decisions where the Commission denied the appeals of eligibles from their removals from eligible lists for falsification where the appellants did not accurately or completely fill out their employment applications. Additionally, it indicates that the Fire Chief did not have the authority to give the appellant "a second chance." Instead, the Fire Chief should have notified the City Administrator and the Director of Public Safety concerning the appellant's situation as it was only the Director of Public Safety who had the authority to hire. Therefore, the appointing authority was not acting in bad faith in terminating the appellant as neither the City Administrator nor the Director of Public Safety were aware of the appellant's actions until the July investigation and it was only then could they have pursued the appellant's termination.

In the appellant's reply to exceptions, the appellant asserts that the appointing authority continues to change its rationale for terminating the appellant. Initially, it indicated that the appellant was terminated for altering the Document which it claimed was given to the appellant from another cadet.<sup>1</sup> However, the Director of Public Safety was unable to testify as to which document was falsified. Further, the Director of Public Safety admitted that the July investigation did not reveal any new information and was just a rehashing as to what was already known. The appellant argues that this proves that the appointing authority acted in bad faith as it already knew in May 2017, a month before the appellant attended the fire academy, about the modification of the Document, and the appellant was not fired until September 2017, on his first day of work. Further, no one testified that the Document was a forgery and the ALJ was correct when she concluded that the simple addition of his correct address to a legitimate document verified and supplied by an independent agency was not a forgery and not a cause for termination. Additionally, the ALJ found that the appellant had sufficiently proved his residency and did not need this additional document, but was pressured to provide it. Further, the Fire Chief testified as to why he wanted to give the appellant and the other cadets a second chance. Moreover, as the appellant had only been working for the appointing authority for three or four hours, he could not be terminated based on his performance during his working test period (WTP), which is further evidence of the appointing authority's bad faith.

---

<sup>1</sup> The appellant and the other cadet both denied during their testimony that the Document was the other cadet's. Instead, the appellant testified that the modified Document was his own.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. The Commission finds that the appellant's modifying the Document by providing his actual address and identification number on it does not indicate that he lacks the character and morals to be a Fire Fighter. Further, even assuming, *arguendo*, that the appellant's actions were considered sufficient grounds to be removed for falsification, the time to remove the appellant was in May 2017 before he was hired and entered the fire academy in June 2017. This is consistent with the list removal appeals that the appointing authority cites. Further, while the appointing authority argues that the Fire Chief did not have the authority to hire the appellant and he should have consulted with the Director of Public Safety and the City Administrator before making the decision to give the appellant "a second chance," it is not the appellant who should be held liable for any failure on the appointing authority's part to follow its internal procedures as it would be inequitable to remove him after having successfully completed the fire academy for something that was known to it prior to hiring him and authorizing him to enter the fire academy with the other cadets.

Additionally, the Commission notes that the appellant's WTP is not at issue. When major discipline is taken against an employee undergoing a WTP, the provisions of *N.J.A.C. 4A:2-2.1, et seq.* apply. Thus, issues of bad faith are not germane and, as in all such matters, it is the appointing authority's burden of proof to provide evidence that the employee is guilty of the charges.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*. However, regarding back pay, the record reveals that the appellant was removed while still in his WTP. See *N.J.A.C. 4A:4-5.2(d)*. Specifically, the appellant only served three months of his one-year WTP. In *In the Matter of Rosalind Candelaria* (MSB, decided November 10, 1998), where the Commission reversed the termination of an employee who was in her WTP, the Commission found that the appellant was only entitled to receive back pay, benefits and seniority from the date of termination until the remainder of the WTP as it could not be assumed that she would have passed the WTP. See also, *In the Matter of Jennifer Mortimer* (MSB, decided April 26, 2006). In these cases, the charges were related to the appellants' performance. However, this matter is distinguishable from those cases as the appellant had just completed the academy and had only worked for the appointing authority for three to four hours before being terminated and the allegations were not related to his work performance. Therefore, the same concerns about the appellant's performance and the ability to successfully complete his WTP do not exist. Considering this background, the Commission finds that the appellant is entitled to receive back pay, benefits and seniority for the remainder of the original WTP, from September 8, 2017 to June 9, 2018. Further, the appellant must complete the remaining nine months of his WTP upon reinstatement. Upon successful completion of his new WTP, the appellant



shall additionally receive mitigated back pay from the end of his original WTP, June 9, 2018, until the date of his reinstatement.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his position.

### ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Christopher D'Amico. The Commission further orders that appellant be granted back pay, benefits, and seniority from September 8, 2017 to June 9, 2018. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Further, the appellant must complete the remaining nine months of his WTP upon reinstatement. Additionally, upon successful completion of his new WTP, the appellant shall receive mitigated back pay from the end of his original WTP, June 9, 2018, until the date of his reinstatement.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 9th DAY OF MAY, 2019



Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

Attachment