



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Hendrik Martinez,
Fire Fighter (M1544T), Jersey City

Administrative Appeal

CSC Docket No. 2019-1643

ISSUED: JUNE 14, 2019 (HS)

Hendrik Martinez, represented by Michael L. Prigoff, Esq., appeals his non-appointment from the eligible list for Fire Fighter (M1544T), Jersey City.

The appellant, a non-veteran, took and passed the open-competitive examination for Fire Fighter (M1544T), which had a closing date of August 31, 2015. The resulting eligible list promulgated on March 11, 2016 and expired on March 28, 2019. The appellant's name was certified to the appointing authority on June 21, 2018. In disposing of the certification, the appointing authority requested that the appellant's name be retained on the eligible list for future certifications. In this regard, the appellant had signed a "Withdrawal/Deferral Form" in which he "[d]eferred" from the application process and requested consideration "for any future fire academy classes."

On appeal to the Civil Service Commission (Commission), the appellant contends that the appointing authority forced him to defer. Specifically, he states that the background investigator told him that because income tax records revealed that he and his wife filed joint tax returns from his wife's Cliffwood home address and he claimed that he was living in Jersey City, that meant that he was committing fraud and would be removed from the list unless he deferred his application. The appellant argues that this was false information in that a married couple can live in different homes and still file a joint tax return and it is not fraudulent to do so. In fact, according to the appellant, spouses can even live in different states and do so. He argues that the Internal Revenue Service (IRS) does not care. Rather, all that is required is that the couple was married on the last day

of the year and both spouses consent to file jointly by signing the return. The appellant explains that even though he and his wife reside in different residences, their accountant suggested that they file their tax returns as “married-joint” rather than “married-separate” because it would save money in taxes. As such, they did so, filing their taxes in his wife’s name with the appellant as joint spouse and using the Cliffwood address, chiefly because of the deduction for real property taxes. Thus, the appellant argues, there was nothing fraudulent about his and his wife’s filing joint tax returns listing their address at a home owned by his wife, and the investigator was wrong in claiming that it was so and pressuring him to defer his appointment. The appellant also maintains that there was no violation of the established residency policy in that he has resided continuously in Jersey City since May 2015, prior to the examination closing date. He maintains that upon his July 2015 marriage, his wife brought to the marriage a home in Cliffwood that she had purchased the year before. He states that she has resided from then until the present in Cliffwood. The appellant also states that he has no ownership interest in the Cliffwood home and does not reside there.

Additionally, the appellant urges the Commission to determine that he did not commit fraud and did not violate the established residency policy. Otherwise, he argues, the same issue will arise on the next certification since the appointing authority clearly, but wrongfully, views him as residing elsewhere solely because he filed joint tax returns from his wife’s premarital residence. He states that in evaluating this appeal, the Commission should note that he attempted to resolve this matter by requesting that the appointing authority rescind the deferral and process his appointment, but the appointing authority refused. Thus, in his view, the appointing authority either still believes that its wrong interpretation of tax law is correct or believes that he has not continuously resided in Jersey City. Either way, he asserts, the matter should be decided by the Commission.

In response, the appointing authority, represented by James Johnston, Assistant Corporation Counsel, maintains that the decision to ask the appellant to defer his application was based on sound legitimate concerns related to his purported Jersey City residency, and he was not pressured to defer. Specifically, during the background investigation, it discovered that despite the appellant’s assurances that he resided in Jersey City, the tax records, including the tax returns he filed jointly with his wife, documented his residence to be in Cliffwood. Instead of disqualifying the appellant outright from further consideration, the appointing authority offered him the opportunity to defer his application to provide him with sufficient time to amend his tax return to reflect what the appellant purported to be his true Jersey City address. The appellant agreed to do so “voluntarily” and signed the deferral form. To the appointing authority’s knowledge, the appellant has not filed any amendment to his tax returns.

The appointing authority maintains that the issue here is the recording of untruthful facts on the tax returns and notes that candidates for Fire Fighter positions are held to a higher standard of personal honesty. Here, the appellant states that he and his wife reside in separate residences. His spouse lives in Cliffwood, and the appellant allegedly lives in Jersey City. The appellant claims Jersey City has been his only residence since May 2015 and up to the present. He then claims that his purported Jersey City residency notwithstanding, his accountant suggested that he and his wife file their returns using the Cliffwood residence to pay less in taxes. The appointing authority disagrees with the suggestion that providing untruthful residency information on the tax records because the appellant's accountant suggested he do so is legal and contends that his excuses are not credible. For example, the W-2's generated by his 2015, 2016 and 2017 employers reveal he documented his Cliffwood residency, not Jersey City. As such, the appointing authority argues that the appellant either lives in Jersey City but concealed this information from other parties including the federal government, or he resides in Cliffwood, does not meet the residency requirement and falsified his preemployment application by stating his Jersey City residence therein. Neither option is a positive development for the appellant, in the appointing authority's view. In support, the appointing authority submits copies of the appellant's preemployment application and tax records, among other documents.

In reply, the appellant emphasizes that the appointing authority has wrongfully stated that the appellant's joint tax returns indicate that *he* resided at his wife's premarital home in Cliffwood. Rather, the return only indicates that one of the spouses resides at the Cliffwood address. The appellant states that IRS Form 1040 only provides space for one address, so that if spouses reside at different addresses, they must choose one from which to file. Therefore, in the appellant's view, there should be no presumption that the address listed for a married couple filing jointly is the residence address for both of them. The appellant maintains that there was nothing wrong or dishonest in his filing joint tax returns with his wife from an address where she resides and he does not. Similarly, there was nothing wrong or dishonest in having his W-2 forms mailed to his wife's Cliffwood address, particularly since his employer started using that address in 2014 when he was in fact residing at the Cliffwood address.

A review of the June 21, 2018 certification, the last certification issued from the M1544T eligible list, indicates that 27 eligibles were appointed; 69 eligibles were removed for various reasons; five eligibles, including the appellant at position 16, were recorded as being interested in future certifications only; and one eligible, in position two, was interested and reachable for appointment but not appointed. The last appointment made from the certification was of the eligible in position 94.

CONCLUSION

At the outset, it is noted that the appellant urges the Commission to decide that he did not commit fraud and did not violate the established residency policy. However, it must be emphasized that the appellant was not in fact removed from the eligible list on the basis of residency or any other reason. As such, those issues are not ripe for decision. Rather, the issue in this matter is whether the appellant deferred from the application process under duress. It is noted that the appellant has the burden of proving by a preponderance of the evidence that his deferral was the result of duress or coercion on the appointing authority's part. In New Jersey, the law concerning the concept of duress has been extensively examined. As stated by Administrative Law Judge Robert S. Miller and affirmed by the former Merit System Board in *In the Matter of Dean Fuller* (MSB, decided May 27, 1997):

Duress is a force, threat of force, moral compulsion, or psychological pressure that causes the subject of such pressure to become overborne and deprived of the exercise of free will. *Rubenstein v. Rubenstein*, 20 N.J. 359, 366 (1956) . . . This test is subjective, and looks to the condition of the mind of the person subjected to coercive measures, not to whether the duress is of "such severity as to overcome the will of a person of ordinary firmness." [*Shanley & Fisher, P.C. v. Sisselman*, 215 N.J. Super. 200, 212 (App. Div. 1987)] (citation omitted). Therefore, "the exigencies of the situation in which the alleged victim finds himself must be taken into account." *Id.* at 213, quoting *Ross Systems v. Linden Dari-Delite, Inc.*, 35 N.J. 329, 336 (1961).

However, a party will not be relieved of contractual obligations "in all instances where the pressure used has had its designed effect, in all cases where he has been deprived of the exercise of his free will and constrained by the other to act contrary to his inclination and best interests." *Wolf v. Marlton Corp.*, 57 N.J. Super. 278, 286 (App. Div. 1959). Rather, "the pressure must be wrongful, and not all pressure is wrongful." *Rubenstein, supra* at 367. Further, "it is not enough that the person obtaining the benefit threatened intentionally to injure . . . provided his threatened action was legal . . ." *Wolf, supra* at 286, quoting 5 Williston, Contracts (rev. ed. 1937), § 1618, p. 4523.

It is a "familiar general rule . . . that a threat to do what one has a legal right to do does not constitute duress." *Wolf, supra* at 287. "A 'threat' is a necessary element of duress, and an announced intention to exercise a legal right cannot constitute a threat." *Garsham v. Universal Resources Holding, Inc.*, 641 F. Supp. 1359 (D.N.J. 1986). Thus, as long as the legal right is not exercised oppressively or as a

means of extorting a settlement, the pressure generated by pursuit of that right cannot legally constitute duress. *See generally, Great Bay Hotel & Casino, Inc. v. Tose*, 1991 W.L. 639131 (D.N.J. 1991) (unrep.) and citations therein.

In this matter, the record indicates that the appellant deferred from the application process after the background investigator brought to the appellant's attention that his joint tax returns reflected his wife's Cliffwood address while he also represented that he resided in Jersey City. The appellant maintains that he was informed that he had to defer or, otherwise, the appointing authority would request the removal of his name from the eligible list. However, he does not provide any substantive evidence that establishes that the appointing authority exerted any pressure on him in this regard. The appellant's decision to defer was a personal choice and his belief that his name would have been removed from the eligible list, absent evidence of force or intimidation, does not constitute illegal duress. *See In the Matter of Nyanate Senyon* (CSC, decided September 6, 2017); *In the Matter of Sean Nally* (CSC, decided December 2, 2009); *In the Matter of Claudia Grant* (MSB, decided June 8, 2005). Given that it is clear that the appellant's tax records reflected a Cliffwood address while his preemployment application reflected a Jersey City address, the Commission cannot say that it was unreasonable that the appointing authority was concerned. Moreover, the appointing authority had the right to request that the appellant's name be removed from the eligible list on the basis of residency or another reason, irrespective of whether such a request would ultimately be upheld. *See N.J.A.C. 4A:4-4.7* (providing for, among other things, reasons the name of an eligible may be removed from an eligible list and an eligible's appeal rights). In this matter, the appointing authority chose to allow the appellant to defer rather than request the removal of his name from the eligible list.

In light of the above, the appointing authority had no obligation to rescind the deferral in this case. Even assuming it did, it is not apparent that the appellant could receive a remedy. In this regard, the appellant could have been bypassed, consistent with the "rule of three," on the June 21, 2018 certification even absent the appointing authority's offering him the option to defer. *See N.J.A.C. 4A:4-4.8(a)3*. Further, the June 21, 2018 certification was the last certification issued from the M1544T eligible list before it expired. As such, the appellant does not possess a vested property interest in the position. In this regard, 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).

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF JUNE, 2019



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