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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Irwin Correa,
Fire Fighter (M2554M),
City of Newark

CSC Docket No. 2014-2455

List Removal Appeal

ISSUED: NOV 10 2014 (DASV)

Irwin Correa, represented by Lynsey A. Stehling, Esq., appeals the removal of his name from the Fire Fighter (M2554M), City of Newark, eligible list due to an unsatisfactory background report.

The open-competitive examination for Fire Fighter (M2554M), City of Newark, was announced with a closing date of March 31, 2010 and was open to residents of Newark. The appellant, a nonveteran, passed the subject examination and ranked 146 on the resulting eligible list, which promulgated on December 13, 2011 and expires on December 12, 2014.¹ The second certification of the eligible list was issued on July 23, 2012 containing the names of 126 eligibles. The appellant was listed in the 85th position on the certification. In disposing of the certification, the appointing authority requested the appellant's removal due to an unsatisfactory background report, namely that the appellant did not meet the residency requirement and had an unsatisfactory driving history. It submitted the appellant's Motor Vehicle Services Address Change History, dated March 22, 2013, which revealed that on January 16, 2010, the appellant changed his address from a Belleville, New Jersey, location to a Newark address. On September 15, 2012 and January 8, 2013, the appellant updated his address to two other locations in Newark. However, the appointing authority presented the appellant's 2012 W-2

¹ The Fire Fighter (M2554M), City of Newark eligible list was scheduled to expire on December 12, 2013. However, the list was extended for one year.

statement, which reflected a Belleville address² for the appellant. Moreover, the appointing authority included the appellant's Certified Driver Abstract, dated March 22, 2013, which revealed that from 1996 to 2012, he received numerous traffic violations, several points on his license, and suspensions of his basic driver's license and commercial license on 14 occasions. The appellant appealed to the Division of Classification and Personnel Management (CPM), which referred the matter to the Civil Service Commission (Commission) for direct review.

On appeal, the appellant certifies that he has lived in Newark continuously since January 2010. He submits the certification of two former roommates, Raquel Cepeda and Nadia Sosa, who verify that the appellant resided in Newark with them from January 2010 to September 2012 and September 2012 to December 2012, respectively. The appellant also asserts that he intends to be a resident of Newark regardless of whether he is appointed as a Fire Fighter. He presents the Certification of Alternate Living Arrangement and Affidavit Certifying Residency of his landlord, Ramesh Jagessar, who confirms the appellant's current rental of a studio apartment with utilities included in Newark. Further, the appellant notes that he changed his address on his driver's license every time he moved to another location in Newark. He has lived in three different locations. In support of his appeal, the appellant submits documentation, such as bank statements, tax documents, an automatic benefits deposit from the Department of Labor and Workforce Development, his voter profile, copies of his driver's license, change of address stickers for his driver's license, and credit report, which all reflect his Newark addresses from May 2010 through September 2013. Additionally, he submits an on-line receipt from the Motor Vehicle Commission, dated January 16, 2010, that he changed his address on his driver's license to Newark on that date. Furthermore, the appellant reveals that he has three children, who currently live with their mother, Martha Cepeda, in North Arlington, New Jersey, and attend school there. The appellant and Martha Cepeda are not married. Regarding the 2012 W-2 statement relied upon by the appointing authority, the appellant certifies that his employers³ at the time photocopied the front of his driver's license and not the back, which had a sticker affixed to it with his then current Newark address. Therefore, the W-2 statement mistakenly reflected the appellant's former address in Belleville.

Additionally, the appellant asserts that he was forthright about his driving history. However, he argues that, as a Fire Fighter candidate, he is not held to the same standard as an applicant for law enforcement with respect to an

² The Belleville address on the W-2 statement is the same address on the appellant's license which was issued on June 3, 2008. However, the address on the W-2 statement appears to contain a typographical error. Moreover, the Belleville address reported on the appellant's Motor Vehicle Services Address Change History is different from the address on his license and W-2 statement.

³ The appellant refers to three employers in 2012: Cuenca Coronel Trucking Inc.; Green Earth Solutions, Inc.; and J Cioffi Trucking Inc.

unsatisfactory driving history. The only requirement for the Fire Fighter position is to possess a valid driver's license. Despite his violations and prior suspensions, the appellant states that his driver's license was in good standing at the time of his consideration for appointment and is currently in good standing. He notes that he has been a truck driver for over 15 years and has not been disciplined regarding his driving issues. His position requires that he operate different sizes and types of dump trucks on construction sites. The appellant is also a "very responsible, punctual, and reliable employee," as certified by the appellant's current employer, Mauro Cuenca, President of Cuenca Coronel Trucking Inc., for whom the appellant has worked since 2010. Further, the appellant states that the appointing authority did not provide him with copies of all documentation sent to CPM as required by *N.J.A.C. 4A:4-4.7(b)1* and 2. Rather, CPM provided the documentation. Thus, the appellant maintains that the appointing authority's request to remove his name from the subject eligible list must be denied.⁴ Accordingly, he indicates that his appointment should be "mandated with any back pay, retroactive benefits, including seniority, and attorney's fees to which he is entitled."

In response, the appointing authority, represented by Michael A. Oppici, Assistant Corporation Counsel, indicates that an unsatisfactory driving history has been a basis to remove a Police Officer candidate from an eligible list. It argues that the reasoning for such a removal is also applicable to Fire Fighters. In this regard, the appointing authority maintains that a Fire Fighter must be able to operate apparatus and navigate narrow streets at a potentially high rate of speed. In addition, it is possible that a newly appointed Fire Fighter would be assigned to the Arson Unit of the Newark Fire Department, where he or she will function as an investigator. The appointing authority explains that the Arson Unit has law enforcement powers and its members undergo police training. Further, it emphasizes that a Fire Fighter holds a highly visible and sensitive position within the community and an applicant must possess good character and an image of utmost confidence and trust. The appointing authority asserts that the appellant's driving record clearly shows his "flagrant disregard for the State's motor vehicle

⁴ *N.J.A.C. 4A:4-4.7(b)* provides that "1. Upon request of the eligible or upon the eligible's appeal, the appointing authority shall provide the eligible with copies of all materials sent to the appropriate Commission representative. 2. If the appointing authority fails to provide either the appropriate Commission representative or the eligible with copies of materials, the request for removal **may** be denied." [Emphasis added.] However, the appellant's argument fails since it is clear that *N.J.A.C. 4A:4-4.7(b)2* does not require this agency to automatically deny a request for removal if an appointing authority fails to provide the required material to the candidate or this agency. Rather, it states that the Commission *may* deny such a request. Thus, even though the appointing authority did not submit the requested documentation to the appellant previously, the appellant received the documentation from CPM and the matter is now before the Commission with complete documentation. See *In the Matter of Joseph Branin* (MSB, decided April 6, 2005); *In the Matter of Irving Frederick Grevious* (MSB, decided May 19, 2004); *In the Matter of Michael Rubine, Police Officer (M5507T)*, North Bergen (MSB, decided September 10, 1998).

laws, and clearly demonstrates his questionable judgment." Thus, the appellant's infractions are incompatible with the duties of a Fire Fighter.

Moreover, the appointing authority indicates that the appellant was required to maintain continuous residency from the March 31, 2010 examination closing dates. However, it states that his Motor Vehicle Services Address Change History reveals that the appellant's residential and mailing address was in Belleville on January 16, 2010. He did not change his address to Newark until September 15, 2012, and thereafter, on January 8, 2013, the appellant updated his address to a different location in Newark. Further, the appointing authority underscores that the appellant's 2012 tax records reflect a Belleville address. Thus, based on the foregoing, the appointing authority contends that the appellant did not maintain continuous residency in Newark.

In reply, the appellant reiterates that, although applicable to law enforcement candidates, motor vehicle violations are insufficient to remove candidates for Fire Fighter positions. He emphasizes that the job description for the title does not refer to law enforcement powers. Thus, the appointing authority's argument regarding members of the Arson Unit is without merit. Moreover, the appellant points out that the appointing authority relies on a standard for law enforcement officers. In addition, the appellant contends that the appointing authority failed to demonstrate that he did not meet the residency requirement as he submitted "ample evidence" that he resided in Newark since January 2010.

It is noted that the appellant may be bypassed on the subject certification under the "Rule of Three." See *N.J.A.C. 4A:4-4.8(a)3*.

CONCLUSION

N.J.A.C. 4A:4-2.11(c) provides that where residence requirements have been established in local service in addition to the New Jersey State residency requirement, residence with regard to local service requirements means a single legal residence. The following standards shall be used in determining local legal residence:

1. Whether the locations in question are owned or rented;
2. Whether time actually spent in the claimed residence exceeds that of other locations;
3. Whether the relationship among those persons living in the claimed residence is closer than those with whom the individual lives elsewhere. If an individual claims a parent's residence because of separation from his or her spouse or domestic partner (see section 4

of P.L. 2003, c. 246), a court order or other evidence of separation may be requested;

4. Whether, if the residence requirement of the anticipated or actual appointment was eliminated, the individual would be likely to remain in the claimed residence;
5. Whether the residence recorded on a driver's license, motor vehicle registration, or voter registration card and other documents is the same as the claimed legal residence. Post office box numbers shall not be acceptable; and
6. Whether the school district attended by child(ren) living with the individual is the same as the claimed residence.

See e.g., In the Matter of Roslyn L. Lightfoot (MSB, decided January 12, 1993) (Use of a residence for purposes of employment need and convenience does not make it a primary legal residence when there is a second residence for which there is a greater degree of permanence and attachment). *See also, In the Matter of James W. Beadling* (MSB, decided October 4, 2006). Moreover, *N.J.A.C. 4A:4-2.11(e)1* states that unless otherwise specified, residency requirements shall be met by the announced closing date for the examination. When an appointing authority requires residency as of the date of appointment, residency must be continuously maintained from the closing date up to and including the date of appointment. Additionally, *N.J.A.C. 4A:4-4.7(a)7* provides that discontinuance of an eligible's residence in the jurisdiction to which an examination was limited or for a title for which continuous residence is required is a cause for disqualification from an eligible list. *N.J.A.C. 4A:4-6.3(b)*, in conjunction with *N.J.A.C. 4A:4-4.7(d)*, provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error.

Pursuant to the standards set forth in *N.J.A.C. 4A:4-2.11(c)*, the appellant has presented convincing evidence that he has resided continuously in Newark since the March 31, 2010 examination closing date. He certifies and submits the certification of his former roommate, Raquel Cepeda, that he lived in Newark since January 2010. Moreover, the appellant presents the certification of his other roommate, Sosa, and his current landlord, Jagessar, who verify his Newark residency. It is noted that nothing in the record shows that the appellant has actually spent more time in another residence other than his claimed Newark residences. Further, the appellant maintains that he will remain a Newark resident regardless of whether he is appointed as a Fire Fighter. The appointing authority does not question his current residency. Additionally, the appellant submits various documents listing his Newark addresses from January 2010

through September 2013, including his updated driver's license. The appointing authority incorrectly states that the appellant changed his address on his driver's license to Newark on September 15, 2012. The appellant actually changed his address on January 16, 2010 from Belleville to Newark, as reflected on his Motor Vehicle Services Address Change History and the on-line receipt. He then updated his address on September 15, 2012 and January 8, 2013 to two other locations in Newark. Regarding his 2012 W-2 statement, the appellant provides a sufficient explanation as to why this tax document lists his previous Belleville address. As indicated above, the preponderance of the evidence, namely the appellant's certification and supporting documentation, verify his Newark residency and thus outweigh the discrepancy of the W-2 statement. Further, the appellant's children do not live with him and he is not married to their mother. Thus, the sixth factor set forth in *N.J.A.C. 4A:4-2.11(c)* is not applicable. Therefore, the appointing authority has not presented a sufficient basis to remove the appellant from the subject eligible list based on residency.

With respect to the appellant's driving history, *N.J.A.C. 4A:4-4.7(a)1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)9*, allows the Commission to remove an eligible's name from an eligible list for other sufficient reasons. Removal for other sufficient reasons includes, but is not limited to, a consideration that based on a candidate's background and recognizing the nature of the position at issue, a person should not be eligible for appointment. The Commission has the authority to remove candidates from lists for law enforcement titles based on their driving records since certain motor vehicle violations reflect a disregard for the law and are incompatible with the duties of a law enforcement officer. See *In the Matter of Pedro Rosado v. City of Newark*, Docket No. A-4129-01T1 (App. Div. June 6, 2003); *In the Matter of Yolanda Colson*, Docket No. A-5590-00T3 (App. Div. June 6, 2002); *Brendan W. Joy v. City of Bayonne Police Department*, Docket No. A-6940-96TE (App. Div. June 19, 1998). However, a similar standard does not exist for Fire Fighters. Compare, *In the Matter of John Rispoli*, Docket No. A-6849-97T3 (App. Div. December 2, 1999) (Driving record does not provide evidence of inability to perform the duties of a Fire Fighter in the way a poor driving record may evidence a disrespect for the law adversely affecting a Police Officer's ability to perform his or her duties). The former Merit System Board⁵ has also reversed the suspension and removal of a Fire Fighter where it was determined that possessing a driver's license was not an essential function of the job. See *Whittle v. East Orange Fire Department*, 95 *N.J.A.R. 2d* (CSV) 83 (1994). Compare, *In the Matter of William Bryant, Jr.* (MSB, decided July 25, 2000) (Since possession of a driver's license was essential in Jersey City, the Merit System Board upheld the removal of a Fire Fighter who had his driver's license suspended for a DWI offense and failed to

⁵ On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Commission.

report it to his superiors); *In the Matter of Aivery Walden, City of Paterson*, Docket No. A-2350-09 (App. Div. July 14, 2011) (Appellate Division upheld removal of a Fire Fighter who was convicted of two DWI's finding that the appellant produced no evidence of a disability and that the appointing authority offered him an opportunity for rehabilitation).

In the instant matter, while the appointing authority basically maintains that driving is an essential duty for a Fire Fighter within its jurisdiction, it has not presented substantive evidence to support its claim. In this regard, the appointing authority suggests that the appellant must have a satisfactory driving history, as he may be appointed to the Arson Unit, whose members have law enforcement powers. However, even if the foregoing were true, the assignment to the Arson Unit is only a possibility and the standard is not applicable to all City of Newark Fire Fighter candidates. Consequently, the standard is akin to new or unannounced criteria in the appointment process which is prohibited. *See e.g., In Re Hruska*, 375 N.J. Super. 202 (App. Div. 2005). (The Appellate Division found that the job specification for Fire Fighter did not require applicants to be active volunteer firefighters, and the appointing authority's unannounced selection criterion which required candidates to be active in the volunteer fire department as a prerequisite for employment was unjust and in violation of the pertinent regulatory framework). Therefore, the appellant's driving history does not constitute a basis for his removal from the subject eligible list. *See also In the Matter of James Hines* (MSB, decided February 20, 2002) (Fire Fighter candidate restored to eligible list, finding that his driving record did not constitute a basis for removal). Moreover, despite the appellant's abysmal driving history, he possesses a valid license.

Nevertheless, it is clear that the appointing authority, in its discretion under N.J.A.C. 4A:4-4.8, can take a candidate's background into account in deciding whether or not to bypass the candidate on an eligible list. *See In the Matter of William Oakley* (MSB, decided June 20, 2007). In the present case, the appellant's driving record clearly presents a sufficient basis to bypass his name on the subject eligible list. It is emphasized that, regardless of whether or not the position sought is in law enforcement, having a good driving history is an important function for a position that may require a driver's license.⁶ Further, the Commission notes that the appellant does not possess a vested property interest in the position at issue. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). Accordingly, the appellant's name shall be restored to the eligible list

⁶ The job specification for Fire Fighter states that "[a]ppointees will be required to possess a driver's license valid in New Jersey only if the operation of a vehicle, rather than employee mobility, is necessary to perform the essential duties of the position."

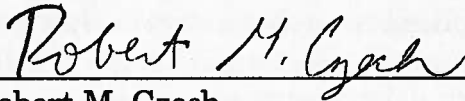
for Fire Fighter (M2554M), City of Newark, but recorded as bypassed on the subject certification.

ORDER

Therefore, it is ordered that this appeal be granted and the appellant's name be restored to the Fire Fighter (M2554M), City of Newark, eligible list, but that his name be reflected as bypassed on the subject certification.

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

**DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF NOVEMBER, 2014**



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

c: Irwin Correa
Lynsey A. Stehling, Esq.
Michael Greene
Michael A. Oppici, Assistant Corporation Counsel
Kenneth Connolly