

B-2



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Craig Cavagnaro,
Fire Fighter (M2576M),
City of Vineland

CSC Docket Nos. 2014-1199 and
2014-1984

Request for Reconsideration
and List Removal

ISSUED: AUG 01 2014 (DASV)

Craig Cavagnaro requests reconsideration of the attached Civil Service Commission (Commission) decision, rendered on June 10, 2009, acknowledging the settlement agreement between the appellant and the City of Vineland. Additionally, the appellant appeals the removal of his name from the September 5, 2013 certification of the Fire Fighter (M2576M), City of Vineland, eligible list for failure to respond to the Notice of Certification (Notice). Since the matters involve similar issues, they have been consolidated herein.

By way of background, the appellant, a nonveteran, appeared as the sixth ranked eligible on the eligible list for Fire Fighter (M2576M), City of Vineland, which promulgated on December 13, 2011 and expires on December 12, 2014. The appellant's name was certified on September 12, 2012 (fourth position), March 26, 2013 (second position), and September 5, 2013 (second position). Although reachable for appointment, the appellant was not appointed from the September 12, 2012 certification as two higher ranked eligibles were appointed. Moreover, the appellant responded that he wished to be considered only for future certifications. With respect to the March 26, 2013 certification, no appointments were made and the appellant was notified that the appointing authority "bypassed" his name due to a settlement agreement reached by the parties.¹ In that regard, as indicated in the attached decision, the Commission acknowledged a clarified settlement agreement between the parties, whereby the appointing authority rescinded the appellant's

¹ The appellant was not actually bypassed since no appointments were made among the three certified individuals.

discipline and the appellant's personnel record was amended to reflect a voluntary resignation effective August 14, 2008.² The agreement also stated that "[t]he employee will not seek employment with the City of Vineland at any time thereafter." The appellant was an Emergency Medication Technician with the City of Vineland and the rescinded discipline was a suspension of five tours of duty, which was major discipline. See *In the Matter of Craig Cavagnaro* (CSC, decided June 10, 2009). Regarding the September 5, 2013 certification, the appointing authority disposed of that certification by removing the appellant's name from the subject eligible list for failure to respond to the Notice.

In the instant matter, the appellant requests reconsideration of the settlement agreement since it "took place without [his] knowledge" and his "signature is not located on any of the paper work." He indicates that he first became aware of the settlement when the appointing authority "bypassed" him on the March 26, 2013 certification.³ He states that it was "the first attempt" he made to seek employment with the City of Vineland since his resignation in August 2008 to become a Correction Officer Recruit with the State Department of Corrections. It is noted that personnel records indicate that the appellant was appointed as a Correction Officer Recruit, effective December 13, 2008, and is currently serving as a Senior Correction Officer. The appellant submits that he began four months of academy training in September 2008. Moreover, the appellant explains that he appealed the major discipline imposed by the City of Vineland and was granted a hearing on July 22, 2008 at the Office of Administrative Law (OAL). Upon arrival at the OAL, he was informed by the security guard that his hearing was cancelled. He immediately called his attorney, who allegedly stated that since the appellant was resigning, "there was no need to fight the discipline" and the matter was resolved. In addition, the appellant claims that he did not hire the attorney to represent him in the matter and did not pay the attorney for the OAL hearing because the hearing was cancelled. In support of his contentions, the appellant presents his letter of resignation, dated July 17, 2008; an attorney retainer agreement which the appellant underscores that he did not sign or initial, dated July 3, 2008, requesting payment by the July 22, 2008 OAL hearing; and the Commission's prior decision in which the appellant highlights the fact that only the attorney signed the settlement agreement on October 8, 2008.⁴ Finally, regarding

² It was clarified that the period of time the appellant was on suspension would be treated as a leave of absence.

³ In his appeal letter, postmarked November 2, 2013, the appellant does not specifically appeal his non-appointment from the March 26, 2013 certification. The disposition notice of that certification was dated September 3, 2013.

⁴ It is unclear as to whether the appellant received the prior Commission decision with the settlement agreement attached at the time of issuance or after his "bypass." However, it is the normal practice of this agency to provide appellants with copies of Commission decisions upon their issuance regardless of whether the appellants are represented by counsel. The file in the disciplinary matter reveals that the appellant was on the mailing list and there is no record that his attorney had withdrawn his representation.

the September 5, 2013 certification, the appellant presents a notarized statement under oath indicating that he did not receive the Notice. He also submits copies of his letters in response to the Notices for the September 12, 2012 and March 26, 2013 certifications.

In response, the appointing authority, represented by Richard P. Tonetta, Esq., City Solicitor, maintains that the appellant's appeal is untimely and should not be considered. It emphasizes that the appellant was represented by an attorney at OAL. Any issue regarding the attorney's representation should be a matter for the appellant to handle with his attorney and not for the appointing authority to address. The appointing authority submits that "re-opening" the settlement agreement would amount to prejudice to the City of Vineland and "is self-serving." It notes that had the appellant's appeal proceeded and his suspension been upheld, he would not have had the ability to obtain his subsequent positions.⁵ Further, the appointing authority maintains that, according to its records, the appellant did not respond to the Notice for the September 5, 2013 certification. Therefore, it contends that its request to remove the appellant's name should be sustained.

It is noted that if the appellant is restored to the subject eligible list, an appointment is not mandated from the September 5, 2013 certification, since he is a nonveteran and ranked in the second position. In that regard, the September 5, 2013 certification consisted of three names. Pursuant to the "Rule of Three," *N.J.A.C.* 4A:4-4.8, the appointing authority appointed only the first ranked eligible.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Commission 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.

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-6, and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on an open-competitive list, provided that disabled veterans and then veterans shall be appointed in their order of ranking ("Rule of Three"). *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-6.3(b), 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 on an eligible list was improper.

⁵ Under certain circumstances, a candidate's name may be removed from an eligible list on the basis of one major discipline alone. See e.g., *In the Matter of Frank R. Jackson, Correction Lieutenant, Department of Corrections (PS6320I)*, Docket No. A-1617-00T2 (App. Div., March 28, 2002); *In the Matter of Lloyd Vessels, Correction Lieutenant, Department of Corrections (PS6320I)*, Docket No. A-944-01T3 (App. Div., January 31, 2003).

N.J.A.C. 4A:4-4.7(a)6 provides that an eligible's name may be removed from a list for "non-compliance with the instructions listed on the notice of certification." *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.

Initially, the Commission accepts the appellant's claim that he did not receive the Notice when he was certified on September 5, 2013. In this regard, there is a presumption that mail correctly addressed, stamped and mailed was received by the party to whom it was addressed. See *SSI Medical Services, Inc. v. State Department of Human Services*, 146 *N.J.* 614 (1996); *Szczesny v. Vasquez*, 71 *N.J. Super.* 347, 354 (App. Div. 1962); *In the Matter of Joseph Bahun*, Docket No. A-1132-00T5F (App. Div. May 21, 2001). However, in submitting a notarized statement under oath that he did not receive the Notice, the appellant has rebutted this presumption. Accordingly, there is not a sufficient basis to remove the appellant from the Fire Fighter (M2576M), City of Vineland, eligible list. Nevertheless, it is clear that the appointing authority, in its discretion under *N.J.A.C.* 4A:4-4.8, was not required to appoint the appellant as he was not a veteran and ranked in second position. The appointing authority chose to appoint the first ranked eligible. Therefore, it is proper to restore the appellant to the subject eligible list for future certifications and his name will be recorded as reachable, but not appointed, on the September 5, 2013 certification.

With respect to the March 26, 2013 certification, the appellant did not specifically appeal his non-appointment.⁶ Rather, in response to the "bypass" notification, he requested reconsideration of the settlement agreement acknowledged by the Commission on June 10, 2009 which formed the basis for his bypass. It is initially noted that the appellant's request for reconsideration is far beyond the 45 days within which an appellant may petition for reconsideration of a prior Commission decision. See *N.J.A.C.* 4A:2-1.6(a). However, the appellant maintains that he only became aware of the acknowledged settlement agreement upon notice of his "bypass." Even accepting the appellant's explanation for his delay, there are no grounds on which to grant reconsideration since the Commission finds that the settlement agreement was valid.

The policy of the judicial system strongly favors settlement. See *Nolan v. Lee Ho*, 120 *N.J.* 465 (1990); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472 (App. Div. 1961), *cert. denied*, 35 *N.J.* 61 (1961). This policy is equally applicable in the administrative area. A settlement will be set aside only where there is fraud or other compelling circumstances. See

⁶ An appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. See *N.J.A.C.* 4A:2-1.1(b).

Nolan, supra. Such circumstances are not present in this matter. The Administrative Law Judge at the OAL and the Commission already reviewed the settlement and found it to be in compliance with Civil Service law upon clarification of the terms of the agreement. Moreover, a settlement agreement should be enforced where a party has competent representation of his or her choosing and entered into the agreement knowingly and voluntarily. *See e.g., In the Matter of Barbara Knier* (MSB, decided January 12, 1999) and *In the Matter of William Munoz* (MSB, decided June 16, 1998). In this case, although the appellant indicates that he was not aware of the settlement agreement and his attorney did not represent him in the matter, there is no indication in the record that his attorney was incompetent or withdrew his representation of the appellant despite that he may not have been paid. Further, the Commission is not convinced that the appellant had absolutely no knowledge of the disposition of his case. The file in the disciplinary matter reveals that the appellant was on the mailing list. The appellant should have received a copy of the Administrative Law Judge's initial decision and the Commission's decision acknowledging the settlement agreement. It would be prejudicial to the appointing authority to permit the appellant to reopen his disciplinary appeal over five years later when he was represented by a seemingly competent attorney who settled the matter. It is noted that the Commission does not have jurisdiction to review alleged attorney misconduct or malpractice. *See e.g., In the Matter of William J. Bowen* (MSB, decided September 26, 2007) (Appellant's argument that his settlement was legally invalid was essentially a claim of legal malpractice, not reviewable by the former Merit System Board, and since the settlement agreement complied with Civil Service law and rules, no basis existed to invalidate the settlement).

Therefore, the Commission finds that the settlement agreement is valid and the terms should be enforced. In that regard, if a term of an agreement is later violated by either party, the Commission has jurisdiction to enforce the term. *See e.g., In the Matter of Donald Hickerson* (MSB, decided September 10, 2002). *See also, In the Matter of Police Officer and Superior Officer, Essex County* (1991 Layoffs), Docket No. A-5755-94T5 (App. Div. April 22, 1996). In the present matter, the appellant agreed that he "will not seek employment with the City of Vineland at any time thereafter." Thus, there is a sufficient basis not to have appointed the appellant from the subject certification. It is noted that the appellant's name could have been removed from the subject eligible list since the settlement agreement clearly indicated that the appellant would not seek future employment. However, the appointing authority sought only to "bypass" the appellant. Accordingly, the Commission upholds that determination. *See e.g., In the Matter of Amy Harrison* (MSB, decided April 9, 2008) (Appellant who entered into a settlement agreement whereby she resigned in good standing in lieu of a release at the end of her working test period and a 12-day suspension, where appointing authority withdrew the charges, constituted a basis to bypass her name from the list for adverse

employment history).⁷ See also, *In the Matter of Jerry Fisher* (MSB, decided April 11, 2007) (The request for reinstatement was denied from a former Police Officer who was deemed fit to return from an ordinary disability retirement, based on the terms of a settlement agreement that preceded his retirement which stipulated that the appellant would not apply for any position of employment with the township).

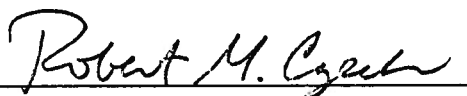
Nonetheless, even if the appellant was not afforded notice of the acknowledged settlement agreement and the agreement were to be set aside, he would only have received, *at best*, a remedy which he has already received, *i.e.*, placement on the eligible list, since no appointments were made on the March 26, 2013 certification.⁸ It is noted that the appellant does not possess a vested property interest in the position. 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 request for reconsideration is denied.

ORDER

Therefore, it is ordered that the appellant's request for reconsideration be denied, but the appeal of his removal from the Fire Fighter (M2576M), City of Vineland, eligible list be granted, consistent with this decision.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 30TH DAY OF JULY, 2014



Robert M. Czech
Chairperson
Civil Service Commission

⁷ The Commission has also removed candidates from eligible lists under circumstances where the candidate, in his or her prior employment, resigned while disciplinary charges were pending or resigned in good standing in lieu of discipline and had a prior disciplinary history. *Strasser v. Camden County* (MSB, decided May 28, 1992); *In the Matter of Darren Grossman* (MSB, decided January 17, 2001); *In the Matter of Ralph Lubin* (MSB, decided May 8, 2001). Compare, *In the Matter of Dennis Alba* (MSB, decided January 17, 2001).

⁸ The Commission notes that, had the settlement been set aside, then the disciplinary action imposed would still be part of the appellant's official record and could have been used to bypass, or even remove, as noted previously, his name from the subject list.

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

Attachment

c: Craig Cavagnaro
Ruben Bermudez
Richard P. Tonetta, Esq.
Kenneth Connolly
Joseph Gambino



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10467-07

AGENCY DKT. NO. 2008-1895-I

Cross
IN THE MATTER OF ~~CARL~~
CAVAGNARO, CITY OF VINELAND,

John D. Feeley, Esq., for appellant (LaRocca, Feeley & Associates, attorneys)

Edward F. Duffy, Esquire, Assistant City Solicitor, for respondent (Alfred
Verderose, Solicitor, attorney)

Record Closed: October 9, 2008

Decided: October 14, 2008

BEFORE W. TODD MILLER, ALJ:

This matter was transmitted to the Office of Administrative Law on December 21, 2007, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I FIND:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 14, 2008
DATE

Date Received at Agency:

SEP 23 2008
DATE

/sd

W. J. Miller

W. TODD MILLER, ALJ

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

EDWARD F. DUFFY, ESQUIRE
2630 E. CHESTNUT AVENUE, SUITE C3
VINELAND, NJ 08361-8400
(856) 692-0960/FAX (856) 692-2317
Attorney For City of Vineland

9 P 1:30

CRAIG CAVAGNARO

v.

CITY OF VINBLAND

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket # [REDACTED]


Agency Reference No. 2008-1895-I

STIPULATION OF SETTLEMENT
BETWEEN THE PARTIES

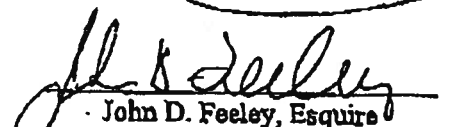
The above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that this matter is settled as follows:

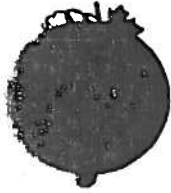
1. The subject disciplinary action resulting in the suspension of the employee is hereby rescinded by the City of Vineland, as Employer, and the Preliminary and Final Notices of Disciplinary Action previously filed will be removed from the employee's personnel records.
2. Personnel records of the City of Vineland will be amended to reflect a voluntary resignation of the employee effective August 14, 2008.
3. Response to any inquiry regarding employment will be limited to said voluntary resignation and dates of employment. No other information including any disciplinary history will be disclosed.
4. The employee will not seek employment with the City of Vineland at anytime hereafter.
5. The entry of the Settlement Agreement constitutes a resolution of all issues under the subject OAL appeal and filing of the within Stipulation will constitute a dismissal of said proceeding.

Dated: 9/10/2008


Edward F. Duffy, Esquire
Assistant City Solicitor, City of Vineland

Dated: 10-8-08


John D. Feeley, Esquire
La Rocca, Feeley & Associates, L.L.C.
Attorneys For Craig Cavagnaro



City of

Vineland

New Jersey

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FAX: (856) 692-2317
http: www.ci.vineland.nj.us
E-mail: efduffy@verizon.net

Please refer to file no. 5604

May 20, 2009

Bernadette Hartman, Supervisor, Hearing Unit
State of NJ Civil Service Commission
Merit System Practices and Labor Relations
Post Office Box 312
Trenton, New Jersey 08625

RE: Craig Cavagnaro adv. City of Vineland
OAL Docket No. CSVLN 10467-2007S/Agency Reference No. 2008-1895-I

Dear Ms. Hartman:

In response to your correspondence dated April 24, 2009, enclosed herewith please find a copy of the City of Vineland Leave of Absence Form for Craig S. Cavagnaro.

If I can be of any further assistance please do not hesitate to contact me.

Thanking you for your cooperation, I remain

Very truly yours,

Edward F. Duffy, Esquire
Assistant Solicitor

EFD/alw

enc.

Sent via fax transmittal to (609)-984-0442 & regular mail



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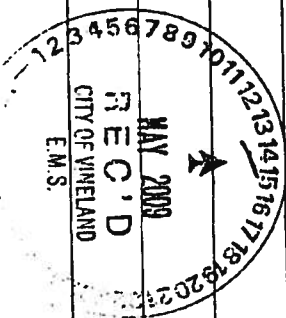
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	M	D	Y	M	D	Y
RE-HIRE	NEW	DELETE	CHANGE	TRANS. DATE			EFFECT. DATE		
				02	11	09	11	02	07

City of Vineland

VINELAND, NEW JERSEY 08360

EMP. NO.	SOCIAL SECURITY NO.
----------	---------------------

NAME <i>Amis, Dyan G Harris</i>		ADDRESS		CITY, STATE, ZIP	
PHONE NO.	DATE OF BIRTH	RACE	DRIVER'S NO.	CIVIL SERV. NO.	DEPARTMENT
JOB TITLE					EMP STATUS
TERMINATION DATE	LEAVE OF ABSENCE	FROM	TO	WITH PAY	WITHOUT PAY
BUDGET 1				%	
BUDGET 2		PROJECT #		%	
BUDGET 3				%	
COMMENTS					
<p><i>Special assistance. The spouse of the following days to leave of absence window. Project: November 2, November 3, November 4, November 7, and November 8, 2007. AUTHORIZATION [Signature]</i></p>					
COMMENTS					
<p><i>Department of...</i></p>					



DEPARTMENT