



STATE OF NEW JERSEY

In the Matter of Robert Pienciak,
Fire Captain (PM1122S), Hillside

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

CSC Docket No. 2018-1935

List Removal Appeal

ISSUED: OCTOBER 19, 2018 (SLK)

Robert Pienciak, represented by Michael L. Prigoff, Esq., appeals his removal from the eligible list for Fire Captain (PM1122S), Hillside on the basis that he possessed an unsatisfactory employment record.

The appellant took the promotional examination for Fire Captain (PM1122S), which had a closing date of August 21, 2014, achieved a passing score, and was ranked on the subsequent eligible list. In seeking his removal, the appointing authority indicated in its background report that the appellant possessed an unsatisfactory employment record.

On appeal, the appellant presents that he was the first ranked candidate on the subject list. He indicates that due to a long term leave of the Fire Captain, he has performed the duties of the subject title on a periodic basis between 2013 to 2015 and a regular basis since February 2016. The appellant contends that, even though his name has been removed from the list, he is still performing the duties of the subject title. He presents that he is also referred to as Fire Captain at work. He states that all the charges concerning his removal from the list came after June 2017 when he won an arbitration case against the Fire Chief and the appointing authority where the arbitrator determined that the appellant needed to be placed in an "acting" Fire Captain position pursuant to a collective negotiations agreement and compensated him for lost pay for not previously being given this long-term assignment. The appellant represents that he also had to go to the Superior Court of

New Jersey to enforce the arbitrator's ruling and he has been paid as a Fire Captain since February 2016. He claims that there have been no disciplinary charges filed against him prior to June 2017. The appellant provides he has filed grievances against the appointing authority that are still pending concerning the charges filed against him after June 2017 and he explains why he believes he did not violate department policy regarding these incidents. The appellant believes that his removal from the list was to enable the appointing authority to promote the son of the Deputy Fire Chief.

In response, the appointing authority relies on its background report. The background report indicates that the appellant was issued 13 oral reprimands between March 22, 2011 and February 6, 2013, five subsequent written reprimands, and several preliminary and/or final notices of disciplinary action through October 2017. The record indicates that the appellant's attorney received a copy of the background report.

Although given the opportunity, the appellant did not submit a further reply in response to the background report.

CONCLUSION

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 Civil Service Commission (Commission) to remove an eligible's name from an eligible list for having a prior employment history which relates adversely to the title.

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.

In the instant matter, the appointing authority had a valid reason for removing the appellant's name from the list. Specifically, the appellant received numerous minor disciplinary actions between March 22, 2011 and October 3, 2017. While minor discipline is generally not sufficient to remove a candidate from a list, the number of disciplinary actions in this matter provides sufficient justification for the removal of the appellant's name. *See In the Matter of Thomas DiOrio* (CSC, decided March 11, 2009). Further, the appellant argues that only charges after June 2017 were used by the appointing authority to justify his removal and he disputes these recent actions as evidenced by his grievances. However, the background report clearly indicates that disciplinary history prior to June 2017 was also part of its reasoning and he has not addressed these prior disciplinary actions in this matter. Moreover, while the appellant may have been an "acting" Fire Chief, as indicated by his arbitration award and subsequent enforcement action, it is noted that there is no such designation as an "acting" appointment under Civil Service rules. *N.J.S.A.* 11A:4-13 and *N.J.A.C.*

4A:4-1 *et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In the Matter of Russell Davis* (MSB, decided August 10, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). As such, there is no right to an appointment due to “acting” experience. *See In the Matter of Jomarie Sacchinelli* (CSC, decided March 22, 2017). Additionally, the fact that the appellant may have been performing the duties of the subject title on an “acting” basis does not mean that the appointing authority did not have sufficient justification to find that the appellant’s disciplinary history was not suitable for a permanent appointment in the subject title. It is noted that the Superior Court of New Jersey’s decision was strictly enforcing an arbitrator’s award, which involved the enforcing of contractual provisions concerning long term Acting Captain assignments. However, it is the Commission which has the sole authority to determine whether it was appropriate for the appointing authority to remove the appellant from the subject list due to his disciplinary history. Additionally, the appellant alleges that the reason for his removal was to enable the appointing authority to promote the son of the Deputy Fire Chief. It is noted that the appellant provides no corroborating evidence to support this allegation. Regardless, even assuming *arguendo* that the appellant’s disciplinary history after June 2017 was not justified, the totality of the appellant’s disciplinary history provides sufficient justification for the appointing authority to remove his name from the subject list.

Accordingly, the appellant has not met his burden of proof in this matter and the appointing authority has shown sufficient cause for removing his name from the Fire Captain (PM1122S), Hillside eligible list.

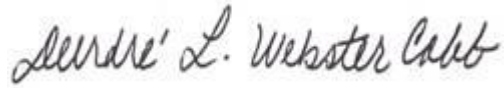
One other matter needs to be addressed. The appellant claims that even though his name has been removed from the list, he continued to perform the duties of the subject title after his removal from the list. It is unclear if the appellant is alleging that he is still performing the duties of the subject title. However, if he is, the appointing authority is directed to remove all Fire Captain duties from the appellant’s responsibility immediately.

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 17th DAY OF OCTOBER, 2018



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