

*In the Matter of Wayne Morrison, Police Officer (Special Re-employment List),  
Paterson*

CSC Docket No. 2013-1581

**(Civil Service Commission, decided November 7, 2013)**

Wayne Morrison, represented by Wolodymyr P. Tyshchenko, Esq., appeals the removal of his name from the special reemployment list for Police Officer, Paterson, for failure to meet the age requirement of the position.

By way of background, the Police Officer (S9999H), Patterson, examination was announced with a closing date of March 31, 2006. In this regard, *N.J.S.A. 40A:14-127* provides that no person shall be over the age of 35 at the closing date. It is noted that a candidate is considered to be over 35 years of age on the candidate's 35<sup>th</sup> birthday. Further, *N.J.A.C. 4A:4-2.3(b)2iii* provides that veterans, who are above a maximum age requirement, may recalculate their age for recording purposes pursuant to *N.J.S.A. 38:23A-2*. The appellant, a veteran, took the open competitive examination for Police Officer, received a passing score, and was appointed as a Police Officer effective May 21, 2007. The appellant was 37 years old at the time of his appointment.<sup>1</sup> The appointing authority evaluated the appellant's eligibility criteria prior to his appointment and determined that his age met the requirements for appointment to Police Officer.<sup>2</sup> In June 2008, the Division of Pensions and Benefits (Pensions and Benefits), Department of the Treasury, subsequently notified the appointing authority that the appellant did not meet the mandatory age requirements for appointment as a municipal police officer and he could not be enrolled in the Police and Firemen's Retirement System (PFRS). As a result, the appellant was reassigned to an in-house administrative position in an effort to safeguard him from any line-of duty injury or death since he had no corresponding pension or death benefits. Effective April 18, 2011, the appellant was laid off for "reasons of economy and efficiency." As a result, his name was placed on a special reemployment list.

The appellant's name was certified from the June 26, 2012 special reemployment list for Police Officer, and he expressed an interest in being appointed. In disposing of the certification, the appointing authority requested the removal of the appellant's name since he did not meet the age requirements for appointment as a Police Officer. In support of its request, the appointing authority asserted that the appellant's initial appointment as a Police Officer was improper due to an administrative error. Further, the appointing authority maintained that

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<sup>1</sup> The appellant was born on May 10, 1970.

<sup>2</sup> The appointing authority admitted that it unintentionally miscalculated the appellant's age before his appointment. In this regard, the appellant would have been rejected from employment as a Police Officer if his age was properly calculated.

it could not appoint the appellant as a Police Officer since he did not meet the age requirements for employment and is ineligible for enrollment in PFRS.

It is noted that, prior to his appointment as a Police Officer, the appellant served in the military and was assigned to an “imminent danger pay area.”<sup>3</sup> In this regard, the appellant served in the military for 14 years and eight months. During that time, he served three years, 11 months and 13 days in active duty service. Further, he served in Operation Iraqi Freedom for one year, five months and 28 days, which included nine months and 17 days in an “imminent danger pay area.” The appellant states that he was also employed as an Emergency Medical Technician (EMT) at the University of Medicine and Dentistry (UMDNJ)<sup>4</sup> where he was enrolled in the Public Employees Retirement System (PERS) prior to his employment as a Police Officer.

The appellant appealed the removal of his name from the special reemployment list 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 asserts that he was not notified at the time of his appointment that he did not meet the age requirements for appointment as a Police Officer. The appellant adds that in September 2008, he was “notified by the Chief’s Office that the [appointing authority] had received notification from [Pensions and Benefits] that he exceeded the mandatory age requirements for municipal police officers.” Further, the appellant states that he continued to serve as a Police Officer until he was laid off from his position in April 2011, and he relied in good faith on the appointing authority’s misrepresentations that he met the age requirements for the position. In this regard, the appointing authority should have notified him that he did not meet the age requirements when he was appointed instead of continuing to employ him as a Police Officer. The appellant adds that in response to an inquiry by Pensions and Benefits, Lieutenant Michael A. Campanello indicated in a memorandum dated May 14, 2008 that the appellant met the age requirements and could participate in PFRS. Moreover, the appellant contends that while Pensions and Benefits notified the appointing authority in June 2008 that the only acceptable portions of the appellant’s military service for the purposes of the age requirement was in specified “areas of conflict,” the appointing authority did not take any action to remove him from employment.

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<sup>3</sup> This is considered an “area of conflict” for the purposes of reducing the appellant’s age as it relates to the mandatory age requirements for municipal police officers.

<sup>4</sup> The appellant does not provide the dates that he was employed at UMDNJ. However, he admits that he was discharged from the military on December 3, 2005 and he resigned from UMDNJ on May 16, 2007. Thus, it appears he was not a long term employee at UMDNJ.

Under these circumstances, the appellant requests the Commission to retroactively waive the age requirement so he can be appointed as a Police Officer. The appellant adds that this “unfortunate set of circumstances” can be adequately addressed by the principles of equitable estoppel since he relied on the appointing authority’s misrepresentations. *See In the Matter of Anthony Ambrose*, 2011 N.J. Super. Unpub. LEXIS 137, citing *O’Malley v. Dep’t of Energy*, 109 N.J. 309, 317, 537 A.2d 647 (1987). Further, the appellant contends that he left his position at UMDNJ in order to accept employment as a Police Officer, despite that he accumulated benefits and seniority while employed at UMDNJ. Thus, the appellant maintains that he relied to his detriment on the appointing authority’s offer of employment. Moreover, the appellant asserts that the appointing authority cannot now decide that it does not want to appoint him since he was previously employed there as a Police Officer for nearly five years.

Additionally, the appellant argues that his case is similar to *Sellers v. Bd. Of Trs.*, 399 N.J. Super. 51 (App. Div. 2008). *In Sellers*, the court found that that it was proper to allow a firefighter to enroll in PFRS despite that he was above the maximum age for initial enrollment. In this regard, the firefighter in that matter had left a previous job in order to take the position as a firefighter. The *Sellers* court also determined the age requirement for entry into PFRS was not undermined if the employee in that matter was permitted to enroll in PFRS. Thus, the appellant contends that his situation is similar to that matter since the age requirements for municipal police officers would not be undermined if he was allowed to return to his position, especially in light of the fact that he is a veteran and his name was placed on a special reemployment list due to a layoff. The appellant indicates that the same equity in the *Sellers* matter applies in his case since the appointing authority initially found that he met the age criteria for enrollment in PFRS. The appellant also states that *Sellers* established that when certain statutes establish eligibility, an applicant should be allowed to rely upon the appointing authority’s determination of eligibility for the position. The appellant explains that compliance with the enrollment criteria can be a complex determination, and applicants accepting public employment should be able to do so without hiring lawyers to assure that they qualify for the position.

Moreover, the appellant notes that the *Sellers* court distinguished as to when the principles of equitable estoppel may be applied to municipalities. Specifically, the court determined that there are acts which are *ultra vires* in the primary sense, which are void, and acts which are “*ultra vires* in the secondary sense,” which are “subject to ratification by estoppel.” *See Sellers, supra*, at 58-59. In this regard, the court concluded that the appointing authority’s act of hiring itself was not *ultra vires* in the primary sense. Rather, the appointing authority’s error of hiring an applicant who exceeded the age requirement was considered *ultra vires* in the secondary sense. Thus, the court concluded that the principles of equitable estoppel could be applied to return the applicant in *Sellers* to employment since the

appointing authority clearly intended to make appointments at the time and the appellant in that matter accepted employment.

Additionally, the appellant asserts that the holding in *Chiarello v. Board of Trustees*, Docket No. A-1199-11T1 (App. Div. December 20, 2012) is also relevant to this matter. In *Chiarello*, the Appellate Division opined that the PERS Board must “turn square corners” and must comport with “due process principles and notions of fundamental fairness” when assessing a public employee’s application for pension benefits. The Appellate Division also interpreted the pension statutes so as to achieve “simple fairness.” Therefore, the appellant states that his name should not be removed from the special reemployment list and he should be returned to employment.

Despite being provided with the opportunity, the appointing authority did not provide any information for the Commission to review in this matter.

It is noted that staff from the Division of Appeals and Regulatory Affairs (DARA), contacted Pensions and Benefits in regard to the appellant’s situation. In response, Pensions and Benefits explained that the appellant’s request to enroll in PFRS was denied in January 2010 based upon the applicable regulations and the law governing the age of Police Officers. *See N.J.S.A. 43:16A-3; N.J.S.A. 40A:14-127; and N.J.A.C. 17:4-2.5.* Further, the Police Benevolent Association (PBA) was notified of the appellant’s ineligibility for PFRS in 2010. Pensions and Benefits also noted that the appellant did not make any pension contributions to PFRS, and he did not appeal his ineligibility for enrollment in PFRS to the PFRS Board of Trustees.

## CONCLUSION

*N.J.A.C. 4A:8-2.3(c)3* states that removal of names from a special reemployment list may be made in accordance with applicable rules. *N.J.A.C. 4A:4-4.7(a) 1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)2*, allows for the removal of an eligible’s name from a list because the eligible is ineligible by law for employment in that 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 name from an eligible list was in error.

Additionally, *N.J.A.C. 4A:4-2.3(b)* provides that applicants shall meet all requirements specified in the open competitive examination announcement by the closing date. Candidates for Police Officer were required to be under the age of 35 at the closing date. *See N.J.S.A. 40A:14-127 and N.J.A.C. 4A:4-2.3(b)2i.* *N.J.S.A. 40A:14-127* also provides that in any municipality operating under Title 11A, the announced closing date of a civil service examination determines the age cut-off

deadline. *N.J.A.C.* 4A:4-2.3(b)2i provides that a former State trooper, sheriff's officer or deputy, or county or municipal police officer who has separated from service voluntarily or involuntarily other than by removal for cause on charges of misconduct or delinquency, shall be deemed to meet the maximum age requirement for appointment established by *N.J.S.A.* 40A:14-127, if his actual age, less the number of years of his previous service as a law enforcement officer, would meet the maximum age requirement. Former law enforcement officers as defined above who were involuntarily separated from service due to a layoff, regardless of age, may adjust their age by subtracting previous years of service from their actual age on the closing date.

Further, *N.J.A.C.* 4A:4-2.3(b)2iii provides that veterans who are above a maximum age requirement, may recalculate their age for recording purposes pursuant to *N.J.S.A.* 38:23A-2. *N.J.S.A.* 38-23A-2 provides that an individual who served on active military duty in time of war "shall be deemed to meet such maximum age requirement, if his actual age, less the period of such service, would meet the maximum age requirement in effect on the date the person entered into such service." The term "in time of war" is interpreted in accordance with *N.J.S.A.* 11A:5-1, which provides an exhaustive list of qualifying conflicts and types of service.

Initially, the appointing authority made an administrative error when it calculated the appellant's age for the purposes of his initial appointment as a Police Officer. In this regard, the appointing authority erroneously determined that the appellant's age was sufficiently reduced to age 35 based on an adjustment for his military service and that he was qualified for appointment. The appellant does not dispute that he was 37 years old at the time of his appointment. Although the appellant's situation is unfortunate, there is no remedy for his situation. In this regard, no vested or other rights are accorded by an administrative error. *See Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div. 1998).

In this matter, the appellant has not shown that he should be appointed from the special reemployment list. As allowed under *N.J.S.A.* 40A:14-127.1(a), a candidate who is over the age of 35, but under the age of 45, may adjust his or her age by subtracting previous years of law enforcement service. A candidate may also deduct from his or her actual age the amount of time served in qualifying military conflicts. However, the appellant does not provide any substantive information to show that his military service at the time of his initial appointment in 2007 sufficiently reduced his age to 35. In this regard, the record reflects that the appellant was 37 years old at the time of his appointment as a Police Officer. Further, his military service only included nine months and 17 days in an "imminent danger pay area." Since the appellant's age at the time of his

appointment in 2007 could only be reduced by nine months and 17 days, his age could not be reduced to 35 at the time of his initial appointment. Thus, as indicated above, he was improperly appointed as a Police Officer as a result of an administrative error.

With regard to the appellant's argument that the appointing authority allowed him to continue serving as a Police Officer for nearly five years despite that it did not notify him that his age would be a disqualifying factor, his arguments are not persuasive. Even if the appellant continued to perform the duties of a Police Officer until the date he was separated from employment, this does not establish that he satisfied the age requirement for initial appointment. In this regard, the announcement and application for the (S9999H) examination, which the appellant completed, clearly advised candidates of the age restrictions for municipal police officers. Specifically, on the first page of the application, applicants were informed:

4. Applicants must be at least 18 years of age as of March 31, 2006. **Applicants for Municipal Police Officer positions cannot be over 35 years of age (one is considered over 35 on the day after his/her 35<sup>th</sup> birthday) as of March 31, 2006, unless they meet the exceptions in "Maximum hiring age requirements for Municipal Police Officer" on page 6. NOTE:** The age 35 maximum hiring requirement applies only to Municipal Police Officers and its bilingual titles.

Further, page 6 of the application entitled "**MAXIMUM HIRING AGE REQUIREMENT FOR MUNICIPAL POLICE OFFICER,**" specified in detail that veterans could deduct from the actual age the amount of time served in the military **only** during conflicts and conditions for which they would qualify for veteran's preference, and listed the qualifying conflicts and conditions. Therefore, the appellant was clearly on notice of the age requirements and what service could be utilized to reduce his age when he filed for the examination in 2006.

Additionally, the appellant admits in his appeal submission that he was notified by the Chief's Office that he exceeded the mandatory age requirements in September 2008. Thus, it is clear that the appointing authority actually notified the appellant regarding his ineligibility for PFRS. Further, the record reflects that the appointing authority reassigned the appellant to an administrative position out of concern for his safety since he did not have any pension or death benefits, and the Police Benevolent Association was notified in 2010 that the appellant was not eligible for PFRS. In addition, the appellant does not rebut the appointing authority's assertion that it attempted to resolve the situation by offering to help the appellant obtain a law enforcement position at the Passaic County Sheriff's Office, which would not require membership in PFRS, but he declined that opportunity. Therefore, it is clear that the appellant was aware from at least

September 2008 that he was not eligible for PFRS but he never filed an appeal with the Division of Pensions and Benefits regarding his ineligibility for enrollment in PFRS. Thus, restoring the appellant's name to the special reemployment list could not provide him the remedy he seeks. A Police Officer is required to be enrolled in PFRS. As such, because there is no evidence that the Division of Pensions and Benefits would permit him to enroll in PFRS, the appointing authority would be unable to appoint the appellant as a Police Officer.

Moreover, the fact that the appellant's position was subject to a layoff does not automatically establish that he should be appointed as a Police Officer from the special reemployment list. Under normal circumstances, employees who are subject to a layoff are placed on a special reemployment list for consideration of future employment. However, the circumstances in this situation are extraordinary given that the appointing authority convincingly established that the appellant should not have been appointed in the first place based on a good faith error in the initial appointment. Therefore, the Commission finds that the appellant's continued employment as a Police Officer until his separation from employment does not now warrant his appointment from the special reemployment list since it is clear that he is ineligible for the position.

With regard to the appellant's arguments that the principle of equitable estoppel applies to his situation, his arguments in that regard are unpersuasive. The appellant correctly notes that the Commission has the authority to waive the age requirement for good cause including equitable estoppel. *See In the Matter of Daniel Cruz, Fire Fighter (M2289E), City of Newark (MSP, decided June 6, 2007)* (Giving up long term employment with excellent benefits to accept employment as a Fire Fighter upheld as reason to restore name to eligible list). Nonetheless, the Commission does not find good cause in this matter to waive the age requirement for Police Officer. Contrary to his assertions, the appellant has not shown any detrimental effect for accepting the appointing authority's offer of employment. In this regard, the appellant did not provide any substantive information to show that he left long term employment to obtain a public service job as a Police Officer. Other than his military career, the appellant did not show that he was a long term employee at UMDNJ. Further, the appellant has not described a resignation from long-term employment nor specified what, if any, missed opportunities he may have had. Additionally, while the appellant was employed as a Police Officer from 2007 to 2011, this fact in and of itself does not demonstrate detrimental reliance since the appellant was aware that he was ineligible for enrollment in PFRS since September 2008 but took no steps at that time to remedy the situation. Moreover, as noted above, the appointing authority attempted to assist the appellant to find an alternative position at the Passaic County Sheriff's Office and he declined that offer. Therefore, there is no reason to apply the principles of equitable estoppel in this matter.

Additionally, the instant case is distinguishable from *Sellers, supra*. In that case, Sellers accepted employment as a firefighter over the age of 35 and was initially approved for enrollment in PFRS. The appellant and the appointing authority believed in good faith that the appellant met the statutory age criteria for appointment. The appellant was later notified that he was not eligible for PFRS benefits and he appealed his ineligibility to the PFRS Board. The PFRS Board decided that he was not eligible for benefits based on his age. However, the Appellate Division determined that the principles of equitable estoppel applied and the PFRS Board had the authority to allow the appellant to enroll in PFRS. In contrast to the *Sellers* decision, the appointing authority and the appellant were never advised by PFRS that he was accepted for membership. Further, the appellant in *Sellers, supra*, filed a timely appeal of his situation with the PFRS Board once he became aware he could not be enrolled. In this case, there is no evidence that the appellant ever formally appealed the denial of his enrollment to the PFRS Board – even after the appointing authority requested his removal from the special reemployment list. Thus, the facts in the instant matter are not similar to those presented in *Sellers*.

Moreover, there are additional reasons why the appellant's reliance on *Sellers* and *Chiarello, supra*, is misplaced. In this regard, the *Sellers* matter does not apply to Civil Service rules or law. In fact, it only directed the **PFRS Board** to apply the principles of equitable estoppel. Similarly, *Chiarello* concerned the actions of the PERS Board. Thus, it is clear that the PFRS Board is the proper forum to present arguments regarding his ineligibility for PFRS. As noted above, he clearly could have appealed the matter to the PFRS Board when he was first notified of his ineligibility in 2008. Since the appellant does not provide a reasonable explanation regarding why he did not appeal to the PFRS Board, it appears that he did not exercise his rights to appeal the matter. Regardless, the Commission does not have jurisdiction to decide the matter regarding the appellant's pension. Thus, given the fact that the appellant did not appeal to the PFRS Board, even if his name was restored to the special reemployment list, he would still be unable to continue with employment as a Police Officer since he is not eligible for PFRS. Accordingly, there is not a sufficient reason for waiving the age requirement and restoring the appellant's name to the eligible list.

Therefore, there is sufficient justification for removing the appellant's name from the special reemployment list for Police Officer.

### **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.