



STATE OF NEW JERSEY

In the Matter of Constance Zappella
Fire Officer 4 (PM3382E), Jersey City

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

CSC Docket No. 2024-724

Examination Appeal

ISSUED: November 1, 2023 (ABR)

Constance Zappella appeals the determination of the Division of Agency Services (Agency Services), which found that she lacked the required permanent status in a title to which the examination was open for Fire Officer 4 (PM3382E), Jersey City.

The subject examination was announced on August 1, 2023, with an application deadline of August 21, 2023, and a closing date of October 31, 2023. Applicants were required to possess an aggregate of one year of continuous permanent service in the title of Fire Officer 3 as of the October 31, 2023, closing date. It is noted that seven eligibles applied for and five eligibles were admitted to the subject examination, which is tentatively scheduled to be administered in November 2023.

The appellant was appointed to the title of Fire Officer 3, effective January 24, 2023, and applied for the subject examination prior to the application deadline. Upon review of her application, Agency Services found that she lacked the required one year of permanent service in the Fire Officer 3 title, and therefore, determined that she was ineligible for the subject examination.

It is noted that during the pendency of the subject appeal, the Civil Service Commission (Commission) denied the appointing authority's request to relax the time-in-grade requirement for the subject examination pursuant to *N.J.A.C. 4A:4-*

2.6(g). See *In the Matter of Fire Officer 4 (PM3382E), Jersey City* (CSC, decided October 11, 2023).

On appeal, the appellant argues that denying eligibility to her and three other candidates who fell 29 days short of the time-in-grade requirement for the subject examination is inconsistent with past practice within Jersey City, is contrary to the leniency accorded to other jurisdictions participating in the subject examination cycle and is discriminatory. She asserts that if the PM3382E examination is allowed to proceed, the candidate selection will essentially be limited to four Caucasian males and one Hispanic male, as two other candidates would reach the mandatory retirement age prior to the expiration of the current candidate list. She maintains that extending eligibility by reducing the time-in-grade requirement to completion of the working test period would add four qualified and diverse members to the selection pool, including a female and an African American male. She observes that the job specification for Fire Officer 4 requires five years of supervisory experience involving the extinguishing of fires and she indicates that she possesses more than five years of applicable supervisory experience. She also provides the names of three individuals that she claims were admitted to examinations for the title of Fire Officer 4 despite having only a few months of service in the rank of Fire Officer 3. She further contends that denial of her appeal will disproportionately affect those in a protected class and violate the New Jersey Law Against Discrimination (LAD).

CONCLUSION

N.J.S.A. 11A:4-14 provides that the Commission shall establish the minimum qualifications for promotion and shall provide for the granting of credit for performance and seniority where appropriate.

N.J.A.C. 4A:4-2.6(a)1 provides that applicants for promotional examinations shall have one year of continuous permanent service for an aggregate of one year immediately preceding the closing date in a title or titles to which the examination is open. *N.J.A.C.* 4A:4-2.6(g) states, in relevant part, that an appointing authority may request that the time requirements specified in *N.J.A.C.* 4A:4-2.6(a) be reduced to completion of the working test period if:

1. There is currently an incomplete promotional list and/or the number of employees eligible for examination will result in an incomplete list;
2. It appears that vacancies to be filled within the duration of the promotional list will exceed the maximum number of eligibles that could result from examination; or
3. Other valid reasons as determined by the Chairperson or designee.

The Commission is responsible for the review and determination of denied requests to reduce the one-year service requirement to the completion of the working test period. Such requests are at the discretion of the appointing authority. Nonetheless, while an appointing authority may initiate a request, this request may be denied by the Commission if it does not meet the criteria set forth in *N.J.A.C. 4A:4-2.6(g)*.

Initially, the Commission notes that the appellant did not have standing to make the initial request to reduce the time-in-grade requirement, but is entitled to appeal the Commission's denial of the appointing authority's request to reduce the time-in-grade requirement for the subject examination. In this regard, individuals have standing to appeal any issue wherein their rights were impinged, including appealing that the time-in-grade was not reduced; however, they cannot make the initial request to reduce the time-in-grade. See *In the Matter of Peter Corbo, et al.* (CSC, decided September 15, 2012), *aff'd on reconsideration* (CSC, decided December 19, 2012), *aff'd on appeal, In the Matter of Peter Corbo, Sheriff's Officer Captain (PC0989N) and Sheriff's Officer Lieutenant (PC0993N), Essex County*, A-2275-12T2 (App. Div. October 20, 2014).

In the instant matter, a review of the record demonstrates that the appellant has not met her burden of proof. The appellant acknowledges that she did not meet the time-in-grade requirement for the subject examination¹, but argues that the requirement should be relaxed. As noted above, the Commission denied the appointing authority's request to relax the time-in-grade requirement for the subject examination pursuant to *N.J.A.C. 4A:4-2.6(g)* in *In the Matter of Fire Officer 4 (PM3382E), Jersey City* (CSC, decided October 11, 2023) and the information furnished by the appellant does not establish that the Commission erred in that determination. As noted above, five eligibles were admitted to the subject examination. As discussed, in *In the Matter of Fire Officer 4 (PM3382E), Jersey City*, *supra*, the conditions of *N.J.A.C. 4:4-2.6(g)1* have not been met, as it does not appear that an incomplete list is likely to occur after the administration of the subject examination. Even assuming, *arguendo*, that two of the candidates will reach a mandatory retirement age shortly after the promulgation of a new list, it cannot be said, per *N.J.A.C. 4:4-2.6(g)1* that "the number of employees *eligible for examination* will result in an incomplete list" (emphasis added). Further, since the appointing authority did not provide any information which demonstrated that the number of vacancies will exceed the maximum number of eligibles that could result from the subject examination, it cannot be said that *N.J.A.C. 4:4-2.6(g)2* applies to the subject examination.² As to *N.J.A.C. 4:4-2.6(g)3*, to the extent that the appellant relies on

¹ Although the appellant maintains on appeal that she was 29 days short of the time-in-grade requirement, it is noted that based upon the January 24, 2023, effective date of her appointment shown in the County and Municipal Personnel System, she would only possess 280 days of continuous permanent service in the title of Fire Officer 3 as of the October 31, 2023, closing date for the subject examination and would actually be 85 days short of the time-in-grade requirement.

² Fire Officer 4 is equivalent to the Fire Chief title. As such, there is generally only one vacancy at a time.

prior rule relaxations, the Commission finds that prior rule relaxations cited by the appellant, in and of themselves, do not provide good cause to relax the time-in-grade requirement in this matter.

Similarly, the Commission does not find that the LAD necessitates a relaxation of the time-in-grade requirement for the subject examination or that the composition of the candidate pool for the subject examination otherwise provides good cause pursuant to *N.J.A.C. 4:4-2.6(g)3*. The appellant has alleged that denial of her request would violate the LAD because it disparately impacts members of a protected class or classes. To wit, she maintains that extending eligibility by reducing the time-in-grade requirement to completion of the working test period for the subject examination would add four qualified and diverse members to the selection pool, including one female candidate and an African American male candidate. The appellant's claims do not meet the threshold for establishing a disparate impact claim under the LAD.

The process of proving LAD disparate impact claims under New Jersey law mirrors that of the federal burden-shifting analysis under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17. *Grigoletti v. Ortho Pharm. Corp.*, 118 *N.J.* 89, 97 (1990) (noting that New Jersey courts have traditionally “looked to federal law as a key source of interpretive authority” for the substantive and procedural standards governing LAD claims); *see also Gerety v. Atlantic City Hilton Casino Resort*, 184 *N.J.* at 398; *Esposito v. Twp. of Edison*, 306 *N.J. Super.* 280, 289-90 (App. Div. 1997). Under the federal Title VII framework and analogous LAD cases, a plaintiff must first set forth a *prima facie* case of disparate impact stemming from a defendant-employer's use of a specific employment practice. *Watson v. Fort Worth Bank & Trust*, 487 *U.S.* 977, 994, 108 *S. Ct.* 2777, 2788-89; *United Prop. Owners Ass'n of Belmar v. Borough of Belmar*, 343 *N.J. Super.* 1, 47 (App. Div. 2001), *certif. denied*, 170 *N.J.* 390 (2001). The courts have stated that in doing so, it is insufficient for a plaintiff to merely bring forth evidence that a workplace disparity exists; a plaintiff must also articulate “a particular employment practice that causes a disparate impact.” 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Watson, supra*, 487 *U.S.* at 994, 108 *S. Ct.* at 2788 (“The plaintiff must begin by identifying the specific employment practice that is challenged.”). Second, a plaintiff must show a causal link between the alleged facially-neutral, but unlawful, employment practice and the resulting disparate impact on a protected group. *Watson, supra*, 487 *U.S.* at 994-95, 108 *S. Ct.* at 2789. Frequently, a plaintiff will attempt to show this disparate impact through the use of statistical evidence. Critically, statistical proofs of disparate impact “must be sufficiently substantial that they raise such an inference of causation.” *Id.* at 995, 108 *S. Ct.* at 2789. As set forth by the United States Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 *U.S.* 642, 109 *S. Ct.* 2115 (1989), it is not enough for a plaintiff to simply make a “bottom line” showing of a racial imbalance in the workforce. *Id.* at 656-57, 109 *S. Ct.* at 2124-25. Instead, a plaintiff must illustrate how the particular employment practice led to the ultimate observed

disparity, utilizing, among other things, statistical evidence to support the allegation. Examples of unreliable statistical data “include small or incomplete data sets and inadequate statistical techniques.” *Id.* at 996-97, 108 S. Ct. at 2790. Further, the United States Supreme Court has imposed clear limits on the actions employers can take to avoid or remedy an unintentional disparate impact under Title VII. *See Ricci v. DeStafano* 557 U.S. 557, 129 S. Ct. 2658 (2009) (Holding that the City of New Haven, Connecticut violated Title VII by discarding civil service test results to achieve a more desirable racial distribution of promotion-eligible candidates, since there was no strong basis in evidence that the examination was deficient or that discarding the examination was necessary to avoid disparate impact).

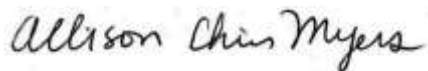
Here, the only data the appellant has provided with respect to her disparate treatment claim is demographic information about the additional candidates who would be deemed eligible for the subject examination, assuming they would apply, if the time-in-grade requirement set forth in *N.J.A.C.* 4A:4-2.6 were relaxed. Given the New Jersey courts’ reliance on federal Title VII jurisprudence in analyzing disparate treatment cases under the LAD and the aforementioned case law, the Commission must conclude that the data set presented by the appellant is too small and incomplete to establish that the application of *N.J.A.C.* 4A:4-2.6 unlawfully perpetuates disparate treatment in examinations in violation of the LAD and that relaxing the time-in-grade requirement for the subject examination based on the limited and incomplete data proffered by the appellant could, in fact, run afoul of Title VII and/or the LAD. Accordingly, the Commission finds that the appellant has not sustained her burden of proof in this matter.

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 1ST DAY OF NOVEMBER, 2023



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