B-13

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jacob Garcia-Torres,
Fire Fighter (M2554M),
City of Newark

CSC Docket No. 2014-2009

List Removal Appeal

ISSUED: OCT 24 2014 (DASV)

Jacob Garcia-Torres, represented by Bette R. Grayson, Esq., appeals the attached decision of the Division of Classification and Personnel Management (CPM), which upheld the removal of his name from the Fire Fighter (M2554M), City of Newark, eligible list due to his failure to meet the residency requirement.

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. Applicants were required to maintain continuous residency up to the date of appointment. *See N.J.A.C.* 4A:4-2.11(e)1. The appellant, a nonveteran, passed the subject examination and ranked 139 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 79th position on the certification. In disposing of the certification, the appointing authority requested the appellant's removal for his failure to meet the residency requirement. It submitted the appellant's Motor Vehicle Services Address Change History, dated March 22, 2013, indicating that on October 12, 2010, the appellant changed his address from a Belleville, New Jersey, location to a Newark address, which is listed as the appellant's current address. The appellant appealed the removal of his name to CPM, asserting that he has lived in Newark since before the examination closing date. The appellant presented copies of documents, such as his 2010, 2011, and

[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.

2012 income tax returns, 2012 W-2 statement, bank account statements, voter registration information, his driver's license and motor vehicle records, a 2012 police report, health insurance records, credit card statements, and bills, which list his Newark address. However, CPM found that the appellant did not maintain continuous residency in Newark and his documents did not indicate that he was a resident of Newark at the time of the examination closing date. Therefore, CPM determined that the appointing authority presented a sufficient basis to remove the appellant's name from the subject eligible list.

On appeal to the Civil Service Commission (Commission), the appellant indicates that he was already admitted to the Newark Fire Academy in late November 2013, assigned a training number, and completed approximately 95% of the program. However, he was removed from the academy once CPM's decision was issued due to his alleged failure to be a Newark resident. Moreover, the appellant states that he purchased clothing and equipment and paid for and successfully completed medical and psychological examinations, which were at a cost exceeding $1,700. Thus, he contends that his appeal should be treated as a "removal case" and notes that he never received a Preliminary or Final Notice of Disciplinary Action. Further, the appellant maintains that he has continuously lived in Newark "since several months prior to the required time period of November 2010" and provided numerous documents to CPM reflecting his Newark address. He also submits on appeal a list of his unemployment payments that he received in 2009, which notes that his last day of work was February 23, 2009; a 2010 1099-G Unemployment Insurance statement; and a purchase invoice from Dekora Furniture, dated March 21, 2010. The appellant explains that he was laid off from employment until 2011 and these unemployment documents and the purchase invoice indicate his Newark address. Additionally, he includes a letter from his personal physician, Dr. Saurabh Patel, dated April 3, 2014, verifying that the appellant was a resident of Newark in 2010.

Regarding his Motor Vehicle Services Address Change History, the appellant admits that he failed to change his address from his former marital address in Belleville to his parents' Newark address until October 12, 2010 because "[h]e did not think about his driver's license" or "think to go to the Department of Motor Vehicles" since he did not own nor was he operating a motor vehicle at the time. Further, the appellant claims that he "had very limited funds" when he moved back to his parents' home and explains that the loss of his job and the inability to find comparable employment caused his "wife to kick him out" "due to financial stresses." The appellant also indicates that he frequently served as his two children's babysitter when they were sick and/or unable to attend daycare. His wife would bring the children to his Newark residence so she could work. Furthermore, the appellant states that in late 2009 "his wife and children moved to her parents' home as they were forced to rent their apartment out."

In response, the appointing authority, represented by Emily Truman, Assistant Corporation Counsel, submits the certification of the investigator, who indicates that the investigation of the appellant's background revealed that from March 31, 2010 to October 12, 2010, the appellant resided in Belleville. This was evidenced by his change of address on his driver's license on October 12, 2010 from Belleville to Newark. Further, the appointing authority states that the appellant owns the property in Belleville, and he did not provide an explanation in that regard. In addition, it contends that the appellant did not change his address to Newark on his voter registration until March 28, 2012. The appellant also did not provide an explanation as to the long delay. It is noted that a review of the appellant's voter profile reveals that he voted in general elections on November 4, 2008 and November 3, 2009 in Belleville. He did not vote again until November 6, 2012. On that date, he voted in a general election in Newark. Thus, the appointing authority maintains that the appellant has not demonstrated that he was a resident of Newark as of the March 31, 2010 examination closing date. It emphasizes that the appellant has not provided proof of payment at the Newark address, such as rental receipts or cancelled checks. It also claims that the appellant does not certify on appeal that he lived in Newark and his statements are contradictory and lack credibility. Regarding the latter, the appointing authority indicates that although the appellant "didn't think about his driver's license," he also states that he had "very little funds" to change his address on his driver's license. The appointing authority questions the appellant's ability to pay for clothing and equipment in the amount of $1,700 if he were "truly cash strapped." It also notes that the appellant is in violation of *N.J.S.A.* 39:3-36, which requires that the Motor Vehicle Commission be notified of a change of address within one week of the change.

Moreover, the appointing authority argues that the appellant's "loose usage" of his parents' address provides him with the convenience of claiming a "flexible date" as to when he moved to Newark. It notes that the tax preparer of the appellant's tax returns has the same Newark address that he claims residence. Additionally, the appointing authority questions why the appellant's unemployment documents are dated in 2009 when he states that he began residing in Newark "since several months prior to the required time period of November 2010." Furthermore, the appointing authority responds that Dr. Patel's verification of the appellant's Newark residency in 2010 is irrelevant, as Dr. Patel did not provide a specific date in 2010. Regarding the furniture invoice, the appointing authority states that there is no indication that the furniture is for the appellant or it is being purchased for his move to Newark. Given the foregoing inconsistencies and lack of definitive documentation as to when the appellant actually moved to Newark, the appointing authority submits that the appellant's appeal should be denied.

In reply, the appellant questions the veracity of the investigator's certification given that the appellant was admitted to the Newark Fire Academy five months after the investigation was concluded. Moreover, he contends that the appointing authority failed to address the fact that he was admitted to the academy.

The appellant also submits a certification stating that he has "continuously lived and currently reside[s] at . . . Newark, New Jersey since December 26, 2009." It is noted that this was the only statement in the appellant's certification. The appellant later elaborates that he has not spent one night at the Belleville property since December 25, 2009, as he left the next morning. Additionally, he asserts that there is no proof that he spent time at any residence other than his Newark residence, which is an eight-bedroom, single family home. Further, the appellant clarifies that he does not pay rent to his mother, although he buys his own food and pays for many household supplies. He notes that his mother and her husband are able to pay for the mortgage themselves. Moreover, the appellant indicates that only his "estranged wife and their children have resided in the [Belleville] condominium since December 26, 2009." He also indicates that his wife still pays for the mortgage on the Belleville property and she would not qualify on her own. Thus, he maintains that the appointing authority "ignores the problem that would be created if the deed was conveyed to [his] estranged wife." Regarding his 2009 tax return, the appellant states that he filed the tax return on February 10, 2010 and appropriately listed his address at the time, which was in Newark. Further, he and his estranged wife were advised to file joint tax returns as it would be beneficial to do so. Further, the appellant states that his "financial status in 2013 was vastly improved from 2010." Nonetheless, he borrowed money from his mother for the costs associated with his admission to the Newark Fire Academy. He stresses that the appointing authority did not consider that he could borrow the money for these expenses. Additionally, he states that since he did not vote between November 9, 2009 and November 6, 2012, "why would he change his address?" Regarding the furniture invoice, the appellant claims that he purchased furniture for his bedroom to provide accommodations for his children. In support of his appeal, the appellant submits additional documentation dated in 2013 as further proof of his continued residency in Newark.

In response to the appellant's admission to the Newark Fire Academy, the appointing authority maintains that the appellant was removed from the subject eligible list for failure to meet the Newark residency requirement, but this "does not necessarily preclude his ability" to become a Fire Fighter elsewhere. Regarding the appellant borrowing money, the appointing authority states that it considered that as an option for the appellant and questions why he did not borrow the $11 to change his address on his driver's license. With respect to the appellant's additional documents, the appointing authority argues that these documents are irrelevant as to whether the appellant resided in Newark as of the examination closing date.

The appellant replies that the fact that his name remains on the mortgaged Belleville property is not an indication of his residency. Thus, he argues that the issue of whether he owns or rents property "is really not applicable to this case in determining residency." Lastly, the appellant reiterates his previous arguments

and maintains that the appointing authority has failed to address that he was admitted to the Newark Fire Academy.

CONCLUSION

N.J.A.C. 4A:4-2.11(c) provides in pertinent part that where residence requirements have been established in local service, residence 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.

In the instant matter, the appellant certifies that he has lived and currently resides in Newark since December 2009. The appointing authority disputes that the appellant's residency was continuous as of the examination closing date, given that he owns property in Belleville and he did not change his address on his driver's license or voter registration until after the examination closing date. The appointing authority also cites alleged inconsistencies in the appellant's documentation and statements.

N.J.A.C. 4A:4-2.11(e)1 requires the appellant to maintain continuous residency from March 31, 2010 up to and including the date of appointment. Considering the factors set forth in *N.J.A.C.* 4A:4-2.11(c), the Commission finds that the appellant has not presented convincing evidence of his Newark residency. Initially, the Commission is troubled by the appellant's certification. While it is true that the main issue in this case is whether the appellant continuously resided in Newark as of the March 31, 2010 examination closing date, which he attests to, the appellant does not swear to the truth of his other statements, such as the reasons he left his marital home in Belleville and the continued ownership of the Belleville property. Further, there are inconsistent statements in the record. The appellant claims that in late 2009, "his wife and children moved to her parents' home as they were forced to rent their apartment out." However, in another submission, he asserts that his wife and children have lived in the Belleville property since December 26, 2009. Furthermore, the appellant remains an owner of the Belleville property and has not provided a court order or other evidence of separation from his wife apart from his unsworn assertions.[2] It is emphasized that the appellant and his wife continue to file joint tax returns, albeit utilizing the Newark address, which is also the tax preparer's address. Moreover, notwithstanding the documentation in the record that reflect a Newark address since 2009, there remains the Motor Vehicle Services Address Change History and voter registration which shows that the appellant did not update his address to Newark until after the examination closing date. *See e.g., In the Matter of Patrick O'Hara* (CSC, decided January 13, 2010) (Commission found appellant who claimed he leased a Newark address on April 12, 2006, but did not change his motor vehicle record until November 7, 2007 was not a resident since *N.J.S.A.* 39:3-36 requires a motorist to report an address change within one week of move). Given the totality of the circumstances, the documentation the appellant submits on appeal does not provide convincing evidence that his primary legal residence has continuously been

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[2] The appellant also does not submit any statements, whether sworn or unsworn, from other individuals, such as his wife or parents, which would corroborate his residency.

located in Newark since the examination closing date. As indicated in *Lightfoot*, *supra*, use of a residence for purposes of employment need does not make it a primary legal residence. *See also, In the Matter of Chad Batiuk,* Docket No. A-5593-05T5 (App. Div. September 28, 2007) (Appellant's convoluted residency saga was less than plausible and his use of a claimed township address was found to be utilized to deceive the appointing authority).

Therefore, under these circumstances, the appointing authority has presented a sufficient basis to remove the appellant's name from the Fire Fighter (M2554M), City of Newark, eligible list due to his failure to meet the residency requirement. Accordingly, the appellant has failed to meet his burden of proof in this matter.

Turning to other issues in this case, the appellant asserts that this matter should be treated as a removal from employment. However, although he was admitted to the Newark Fire Academy, his appointment was not yet approved by this agency. In this regard, *N.J.A.C.* 4A:4-1.10(a) provides that all appointments, promotions, and related personnel actions in the career, unclassified or senior executive service are subject to the review and approval by this agency. It is settled that an appointment is not valid or final until it is approved by this agency. *See Thomas v. McGrath*, 145 *N.J. Super.* 288 (App. Div. 1976) (Morgan, J.A.D. dissenting), *rev'd based on dissent*, 75 *N.J.* 372 (1978); *Adams v. Goldner*, 79 *N.J.* 78 (1979); *In the Matter of Donald Gates* (MSB, decided June 6, 2007). *See also*, *See In the Matter of Asa Paris* (MSB, decided February 13, 2008), *aff'd on reconsideration* (CSC, decided September 10, 2008) (Internal documentation indicating that the appellant was promoted to County Correction Sergeant did not establish that he was permanently appointed since the promotion was not approved by the appointing authority or this agency). Accordingly, the Commission does not consider this an appeal of the appellant's removal from employment.

At best, the appellant's admission to the Newark Fire Academy *could* be characterized as an improperly made provisional appointment. As such, absent a valid regular appointment recognized by this agency, the Commission would be without jurisdiction to entertain an appeal of the termination of a provisional appointment. *See e.g., In the Matter of Gary Thacker* (MSB, decided March 10, 2004). It is noted that the method by which an individual can achieve permanent appointment is if the individual applies for and passes an examination, is appointed from an eligible list, and satisfactorily completes a working test period. The steps necessary to perfect a regular appointment include, but are not limited to, this agency's review and approval of a certification disposition proposed by an appointing authority and the employee's completion of a mandatory working test period. *See In the Matter of Joseph S. Herzberg* (MSB, decided June 25, 2003).

Additionally, although the appellant claims that he was subject to medical and psychological examinations, there is insufficient information in the record to determine whether there was a violation of the Americans with Disabilities Act (ADA), 42 *U.S.C.A.* sec. 12112(d)(3). In this regard, an appointing authority may only require a medical and/or psychological examination after an offer of employment has been made and prior to appointment. *See N.J.A.C.* 4A:4-6.5(b). The Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995) state, in pertinent part, that in order for a conditional offer of employment to be "real," the employer is presumed to have evaluated all information that is known or should have reasonably been known prior to rendering the conditional offer of employment. This requirement is intended to ensure that the candidate's possible hidden disability or prior history of disability is not considered before the employer examines all of the relevant non-medical information. In the instant matter, assuming, *arguendo*, that the appointing authority did not strictly conform with the precise requirements of the ADA, the appellant's residency, as indicated above, justifies his removal from the subject eligible list. *See In the Matter of Curtis L. Dorch* (MSB, decided September 25, 2002); *In the Matter of Scott Gordon* (MSB, decided December 18, 2002) (Despite technical violations of the ADA, the appellants in each case had both an adverse driving record and adverse employment history which warranted the removal of their names from Police Officer eligible lists). Furthermore, the Commission emphasizes that the appellant does not possess a vested property interest in a 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 appeal is denied.

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 22ND DAY OF OCTOBER, 2014

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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Attachment

c: Jacob Garcia-Torres
Bette R. Grayson, Esq.
Emily Truman, Assistant Corporation Counsel
Michael Greene
Kenneth Connolly

Chris Christie
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
DIVISION OF CLASSIFICATION AND PERSONNEL MANAGEMENT
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Robert M. Czech
Chair/Chief Executive Officer

February 6, 2014

Alan Kamel, Esq.
Glazer and Kamel Attorneys At Law
1207 East Grand Street, 3rd Floor
Elizabeth, NJ 07201

RE: Jacob Garcia - Title: Firefighter - Jurisdiction: City of Newark
Symbol: M2554M - Certification No: OL130280

Dear Mr. Kamel:

This is in response to your correspondence contesting the removal of your client's name from the above-referenced eligible list.

The Appointing Authority requested removal of your client's name in accordance with *N.J.A.C. 4A:4-2.11(e)1* and *N.J.A.C. 4A:4-4.7(a)7*, which permits the removal of an eligible candidate's name from the eligible list for failure to continuously maintain residency from the closing date of the examination announcement up to and including the date of appointment.

In support of its decision, the Appointing Authority provided a copy of a Candidate Investigation Report and Motor Vehicle Address History Report which indicates your client resided at [redacted], Belleville, N.J. in December of 2010. Based on this information, your client failed to continuously maintain residency in the City of Newark from the examination announcement closing date of March 31, 2010, up to the date he was considered for appointment.

In your letter of appeal, you argue that your client's removal was not warranted. To support your claim, you provided several documents which all reflect your client's address as [redacted] Newark, NJ. Although these documents clearly show that your client currently resides in the City of Newark, there is no indication that he was a resident at the time of the examination announcement closing in March of 2010.

After a thorough review of our records and all the relevant material submitted, we find that there is not a sufficient basis to restore your client's name to the eligible list. Therefore, the Appointing Authority's decision to remove your client's name has been sustained and your appeal is denied.

In accordance with Merit System Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs (DARA) within 20 days of receipt of this letter. You must submit all proofs, arguments and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Please be advised that pursuant to P.L. 2010 C.26, effective July 1, 2010, there shall be a $20 fee for appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, C. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees. Address all appeals to:

Henry Maurer, Director
Division of Appeals and Regulatory Affairs
Written Appeals Record Unit
PO Box 312
Trenton, NJ 08625-0312

Sincerely,
For the Director,

Scott Nance, Supervisor
Local Placement Services

c: Julien X. Neals