

In the Matter of Wilfredo Ruiz, Fire Fighter (M2561M), City of Paterson
CSC Docket No. 2013-519
(Civil Service Commission, decided May 1, 2013)

Wilfredo Ruiz, represented by Diego F. Navas, Esq., appeals the request of the appointing authority to remove his name from the eligible list for Fire Fighter (M2561M), City of Paterson, on the basis of his age.

The appellant, a veteran, applied for and was admitted to the open competitive examination for Fire Fighter (M2561M), which had a closing date of March 31, 2010. The appellant passed the examination and his name was certified from the subject eligible list on December 16, 2011. The appointing authority requested the removal of the appellant's name on the basis that he did not meet the age requirement at the closing date of the examination since he was over 35 years old.

On appeal to the Civil Service Commission (Commission), the appellant asserts that he did meet the age requirement. The appellant notes that his date of birth is July 1, 1972 and therefore, as of the closing date, he was 37 years and nine months of age. However, he maintains that he has served over eight years in the military and his service aboard the U.S.S. Briscoe, a war vessel, for five years while in the United States Navy and his participation in three different military conflicts during that time should be subtracted from his age pursuant to *N.J.A.C. 17:4-2.5(c)*.¹ Specifically, the appellant contends that his participation in Operation Desert Shield/Desert Storm, Operation Restore Hope, and Operation Uphold Democracy sufficiently reduces his age. He submits his Certificate of Release or Discharge from Active Duty (DD-214) form, his Certificate of Reenlistment, and general information about the deployment of the U.S.S. Briscoe in support. The appellant's DD-214 lists the appellant as having received the National Defense Service Medal, the Southwest Asia Service Medal, two Bronze Star Sea Service Deployment Ribbons; the Kuwait Liberation Medal, and the Navy Good Conduct Medal. It is noted that the DD-214 does not list the appellant as having received the Armed Forces Expeditionary Medal. Moreover, the appellant concedes that he is unable to exactly calculate the time he served in each of the aforementioned operations. However, as indicated in his DD-214, the appellant enlisted on September 10, 1990 and then reenlisted on December 15, 1995. The appellant also indicates that he served on the U.S.S. Briscoe from January 1991 until approximately January 1996. The appellant further asserts that, given its equitable powers, there is a "strong likelihood that the Board of [Trustees of the Police and Fireman's Retirement System] will allow [the appellant] to enroll in its

¹ The appellant is referring to the regulation governing the age requirement for the Police and Firemen's Retirement System.

pension system.” Consequently, the appellant requests that the appointing authority’s decision to remove his name from the eligible list be reversed and he be “cleared for hire by the appointing authority.”

Despite the opportunity, the appointing authority did not respond to the appellant’s appeal.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)2, allows the Commission to remove an eligible’s name from a list because the eligible is ineligible by law for employment in that title. In this instance, on September 30, 1996, Congress enacted amendments to the Age Discrimination in Employment Act (ADEA), 29 *U.S.C. sec.* 623, *et seq.*, which restored the maximum hiring age limitation for Fire Fighters. *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.

N.J.S.A. 40A:14-12 provides that no person shall be appointed as a member or officer of a paid fire department or force or as a paid member or officer of a part-paid fire department or force in any municipality, who is under 21 or over 35 years of age. It is noted that a candidate is considered to be over 35 years of age on the candidate’s 35th birthday. *N.J.A.C.* 4A:4-2.3(b)2i provides that applicants for the titles of municipal Fire Fighter must be under the age of 35 on the announced closing date for an open competitive examination to be eligible to take the examination. 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. Specifically, *N.J.S.A.* 11A:5-1(b) provides in pertinent part:

“Veteran” means any honorably discharged soldier, sailor, marine or nurse who served in any army or navy of the allies of the United States in World War I, between July 14, 1914 and November 11, 1918, or who served in any army or navy of the allies of the United States in World War II, between September 1, 1939 and September 2, 1945 and who was inducted into that service through voluntary enlistment, and was a citizen of the United States at the time of the enlistment, and who did not renounce or lose his or her United States citizenship; or any soldier, sailor, marine, airman, nurse or army field clerk, who has served in the active military or naval service of the United States and has been discharged or released under other than dishonorable conditions from that service in any of the following wars or conflicts and who has presented to the Adjutant General of the

Department of Military and Veterans' Affairs sufficient evidence of the record of service and received a determination of status no later than eight days prior to the issuance of an employment list, for which that individual received a passing score on an examination:

* * *

(9) Operation "Desert Shield/Desert Storm" mission in the Arabian peninsula and the Persian Gulf, on or after August 2, 1990 or the date of inception of that operation, as proclaimed by the President of the United States or Congress, whichever date of inception is earliest, who has served in the Arabian peninsula or on board any ship actively engaged in patrolling the Persian Gulf for a period, continuous or in the aggregate, of at least 14 days commencing on or before the date of termination of that mission, as proclaimed by the President of the United States or Congress, whichever date of termination is the latest, in such active service; provided, that any person receiving an actual service-incurred injury or disability shall be classed as a veteran whether or not that person has completed the 14 days' service as herein provided;

* * *

(11) Operation "Restore Hope" in Somalia, on or after December 5, 1992, or the date of inception of that operation as proclaimed by the President of the United States or the Congress, whichever date is earliest, who has served in Somalia or on board any ship actively engaged in patrolling the territorial waters of that nation for a period, continuously or in the aggregate, of at least 14 days in such active service commencing on or before March 31, 1994; provided that any person receiving an actual service-incurred injury or disability shall be classed as a veteran whether or not that person has completed the 14-day service as herein provided;

* * *

(13) Operation "Uphold Democracy" in Haiti, on or after September 19, 1994, who served in Haiti or on board any ship actively engaged in patrolling the territorial waters of that nation for a period, continuously or in the aggregate, of at least 14 days in such active service commencing on or before March 31, 1995, and who received an Armed Forces Expeditionary Medal for such service; provided, that any person receiving an actual service-incurred injury or disability shall be classed as a veteran whether or not that person has completed the 14 days' service as herein provided or received an Armed Forces Expeditionary Medal

N.J.S.A. 11A:5-1(c) provides that “War service” means service by a veteran in any war or conflict described in this chapter during the periods specified.

In the instant matter, the appellant contends that his veteran status in the Navy and the five years he served aboard the U.S.S. *Briscoe* should be used to reduce his age. Initially, it is noted that the appellant was correctly deemed a veteran pursuant to *N.J.S.A.* 38:23A-2 and *N.J.S.A.* 11A:5-1(b), as it appears he served at least 14 days in the territorial waters of the Persian Gulf and/or Somalia. However, the question before the Commission is whether the total amount of the appellant’s sea service aboard the U.S.S. *Briscoe* (five years) or the amount of time he was actively engaged in the Operations Desert Shield/Desert Storm, Restore Hope, and Restore Democracy (undetermined) should be deducted from his age. For a candidate to deduct service time relating to involvement in Operation Uphold Democracy in Haiti, *N.J.S.A.* 11A:5-1(b)(13) requires the candidate to have received an Armed Forces Expeditionary Medal. As the appellant does not indicate he received that medal, *N.J.S.A.* 11A:5-1(b)(13) precludes him from using his involvement in that operation to reduce his age.

In Opinion No. 97-0074 (April 17, 1997), the Attorney General stated that for age reduction purposes, “the period of time to be deducted from an individual’s age, is limited to actual time served during the ‘war.’” Moreover, in *N.J.S.A.* 38:23A-2 and *N.J.S.A.* 11A:5-1(b), the legislature made a distinction between service “in” and “during” a conflict for determining veteran status. Specifically, *N.J.S.A.* 11A:5-1 requires only service “during” the specified years for Vietnam, Korea and World War II for determining veteran status. However, for the Operations in the Persian Gulf and Somalia, *N.J.S.A.* 11A:5-1 requires an individual to have actually served “in” those areas or have been actively engaged “in” patrolling the territorial waters of those during the specified time period for determining veteran status. Since the legislature made the distinction that an individual had to actually serve “in” those areas or their territorial waters to obtain veteran status, only such active service should be deducted from an individual’s age. Consequently, only the time of the appellant’s military service actually spent “on board any ship actively engaged in patrolling the territorial waters” of those areas should be deducted. While the appellant’s certification states that he spent five years in sea service aboard a war vessel and was involved in three separate military actions, it does not state the total amount of time he actually spent in patrolling the Persian Gulf during Operation Desert Shield/Desert Storm and in the territorial waters of Somalia during Operation Restore Hope. Consequently, the appellant’s age cannot be recalculated. The Commission emphasizes that it is the appellant’s burden of proof to demonstrate that he is eligible for employment as a Fire Fighter. After a careful review of the matter, the appellant has failed to meet this burden of proof.

Accordingly, there is sufficient justification for removing the appellant's name from the Fire Fighter (M2561M), City of Paterson eligible list.

ORDER

Therefore, it is ordered that this appeal be denied and the appellant's name be removed from the Fire Fighter (M2561M), City of Paterson eligible list.

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