STATE OF NEW JERSEY

In the Matter of Michael Megara Township of Riverside, Department of Public Safety CSC DKT. NO. 2018-27 OAL DKT. NO. CSR 09622-17	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2018 BW

The appeal of Michael Megara, Police Officer, Township of Riverside, Department of Public Safety, removal effective June 27, 2017, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on August 31, 2018. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 3, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Michael Megara.

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 3RD DAY OF OCTOBER, 2018

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSR 09622-17
AGENCY DKT. NO. N/A
2018-27

IN THE MATTER OF MICHAEL MEGARA,
TOWNSHIP OF RIVERSIDE.

Thomas A. Cushane, Esq., for appellant, Michael Megara (Cushane Law Firm, LLC, attorney)

Armando V. Riccio, Esq., for respondent, Township of Riverside (Armando V. Riccio, LLC, attorney)

Record Closed: August 22, 2018 Decided: August 31, 2019

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Michael Megara (appellant), appeals his removal as a police officer with the Township of Riverside (respondent). Respondent terminated appellant's employment following his denial of enrollment by the Division of Pensions and Benefits (Division) into the Police and Firemen's Retirement System (PFRS) and requirement by law that participation in PFRS was required as a condition of employment.

PROCEDURAL HISTORY

The original Petition of Appeal was filed with the Civil Service Commission (CSC) on June 30, 2017.[1] The matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case where it was received on July 5, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Appellant waived the 180-day hearing requirement on August 3, 2017. Due to ongoing discovery issues, the hearing dates were set for April 11, 2018, April 18, 2018 and April 19, 2018. On February 16, 2018, respondent filed a Motion for Summary Decision. On February 26, 2018, the parties requested that the hearing dates be adjourned and the matter heard on the papers by way of Cross-Motions for Summary Decision. On April 2, 2018, appellant filed a Cross-Motion for Summary Decision. Oral Argument on the motions was held on June 21, 2018. Subsequently, appellant submitted additional documentation for consideration.[2] The record closed on August 22, 2018.

FACTUAL DISCUSSION

The following facts are not in dispute in this matter and as such I **FIND** them as **FACT**:

From December 2009 through August 2010, appellant was a Special Law Enforcement Officer (SLEO) for the City of Cape May located in Cape May County. (Certification of appellant, Exhibit B; respondent's Statement of Facts and Exhibits G, H, I and J.)

[1] Appellant filed an appeal with the Division; however, the Board of PFRS (Board) declined to hear the matter as appellant was not currently employed as a "policeman", therefore, there was no enrollment issue for the Board to consider. (Appellant's Brief in Support of Summary Decision, Exhibit GG.) It is appellant's position that subject to this Tribunal's determination in the instant matter, an appeal of the Board's adverse-enrollment determination is still possible.

[2] Counsel for appellant submitted a copy of a Complaint in Lieu of Prerogative Writ (Complaint) which appellant filed against the Township of Riverside and requested that judicial notice be taken of the filing. This Tribunal does not have jurisdiction over the Complaint and the basis for it are not dispositive or relevant to the issues presented in this matter. As such, the supplemental submission has not been considered in the determination of this matter.

In 2010, appellant successfully completed the Law Enforcement Examination (LEE). As of the "Closing Date" for the 2010 LEE, respondent was under the age of thirty-five. The only municipality for which appellant sought certification as a full-time police officer was Gloucester Township located in Gloucester County. At the time appellant took the LEE, he resided in Camden County. (Second Certification of appellant, ¶ 6; respondent's Statement of Facts and Exhibit M.) Under the 2010 LEE guidelines, residency codes cannot be changed after the Closing Date for acceptance of applications. (Respondent's Brief, Exhibits N, and O.)

By law, no person may be appointed as a member or officer of a police department in any municipality wherein Title 11 (Civil Service) is operative, who is over the age of thirty-five. One exception to this rule is credit for time served in certain law enforcement titles. (Respondent's Brief, Exhibits F, N, O, and P.) Notice of the age requirements is given to LEE applicants as part of the application process. The position of SLEO does not fall within one of the exceptions. (N.J.S.A. 40A:14-146.14.)

From February 2011 through April 2012, appellant was a SLEO for respondent, which is located in Burlington County.

In August 2012, a revised Certification of Eligibles for Appointment List was posted wherein appellant's rank rose to fourth on the List of Eligibles for Gloucester County. (Appellant's Reply Brief, Exhibit L.)

In April 2012 through October 2014, he was employed by the City of Beverly (Beverly) as a SLEO. Beverly is located in Burlington County.[3] (Certification of appellant, Exhibit B; respondent's Statement of Facts and Exhibits G, H, I and J.)

On February 19, 2013, an internal memorandum was sent to the Gloucester Police Department (Gloucester), Chief Harry Earle, requesting that appellant be placed back on the current Certification of Eligibles List for Appointment. (Appellant's Reply Brief, Exhibit M.)

[3] Both Beverly and respondent are jurisdictions where Title 11 is operative.

In May 2013, Beverly, on behalf of appellant, submitted an enrollment application for PFRS. (Respondent's Brief, Exhibit K – Bate Stamp 424.)

By letter dated June 4, 2013, the Division denied appellant's enrollment application as the position/title of SLEO did not fall within one of the eligible titles to qualify for the PFRS. (Respondent's brief, Exhibit K - bate stamp P426 – 429, P-466 – 467.) On June 11, 2013, Beverly passed a resolution to make appellant a "full time police officer". (Respondent's Brief, Exhibit K – bate stamp 468.) By letter dated June 24, 2013, the Division requested additional documentation from Beverly/appellant in the form of a copy of the "Certification of Eligibles For Appointment (CS-10)" and a "copy of the flyer which shows the closing date for the examination and the position for which the applicant is applying." (Second Certification of appellant, ¶ 20; respondent's Brief, Exhibit K – bate stamp 471.) This information was never produced and appellant was not enrolled in the PFRS.

By letter dated July 2, 2013, appellant requested that he be removed from Gloucester's hiring process due to having obtained a full-time position as a police officer in Beverly. (Appellant's Reply Brief, Exhibit N.)

In the fall of 2013, while employed by the City of Beverly, appellant took the LEE. As of the Closing Date of September 4, 2013, appellant was thirty-seven years and twenty-five days old. (Second Certification of appellant ¶ 20; appellant's reply brief, Exhibit O; Respondent's Brief, Exhibits A, C, and E.)

In December 2013, appellant enrolled in the Public Employees Retirement System (PERS). (Respondent's Brief, Exhibits R, S and T.)

In October 2014, respondent resigned his position as a SLEO with Beverly having accepted a position with appellant as a Municipal Police Officer from the active Civil Service list. (Certification of Meghan Jack, ¶ 2; Respondent's Brief, Exhibit W.)

On or about January 8, 2015, respondent submitted an application for enrollment into the PFRS for appellant. On this same date, the Division denied the application for a number of reasons, one of which was appellant's age at the time of enrollment and second his lack of qualifying reductions to reduce and satisfy the age requirements. (Appellant's Cross-Motion for Summary Decision, Exhibit N; Certification of Meghan Jack.)

On March 5, 2015, respondent submitted a "Report of Transfer/Multiple Enrollment Form" with the Division seeking to transfer appellant's PFRS pension from Beverly to Riverside. (Second Certification of Meghan Jack, ¶ 6 and Exhibit B.) On this same date, the Division denied the application due to appellant's age at the time of enrollment and lack of qualifying reductions to reduce and satisfy the age requirements. Additional documentation was requested to satisfy the age requirement. Without the requested information, the "application would be considered an illegal hire". (Appellant's Cross-Motion for Summary Decision, Exhibit O.)

On March 6, 2015, respondent submitted additional information for consideration by the Division. (Appellant's Cross-Motion for Summary Decision, Exhibit P.)

On April 6, 2015, the Division notified respondent that an enrollment application for PFRS was required along with an Interfund Transfer Form (if eligible). Thereafter, on May 26, 2015, the Division also requested additional documentation in the form of "a copy of the Certification of Eligible for Appointment (CS-10)" and a copy of the "flyer which shows the closing date of the examination and the position for which the applicant is applying". (Appellant's Cross-Motion for Summary Decision, Exhibits Q and R.)

On June 4, 2015, appellant submitted to the Division, an Enrollment Application for appellant into the PFRS and an application for Interfund Transfer to the Division seeking to transfer his PERS pension into the PFRS. (Appellant's Cross-Motion for Summary Decision, Exhibit R; respondent's Brief, Exhibit V.)

By letter dated January 11, 2016, the Division advised respondent that as a result of appellant having no former qualifying membership service time and due to his age, he

would be considered an "illegal hire". (Appellant's Brief in Support of Summary Decision, Exhibit U; respondent's Brief, Exhibit A.) Even after receipt of this correspondence, over the ensuing months, respondent continued to seek enrollment of appellant into the PFRS. (Appellant's Brief in Support of Summary Decision, Exhibits V – AA; First Certification of Meghan Jack.)

By letter dated March 10, 2017, the Division again advised respondent that appellant's application for admission into the PFRS was denied because appellant was overaged and did not have any qualifying reductions to reduce and satisfy the age requirements. Through this letter, respondent was reminded that enrollment in the PFRS was a condition of employment, absent which, the individual could not be hired. (Appellant's Brief in Support of Summary Decision, Exhibit BB; respondent's Brief, Exhibit C.)

On June 7, 2017, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) containing the following charges: 1) Unfit as it pertains to meeting legal requirements for the position; 2) Inability to perform job duties; and 3) Other sufficient cause. The disciplinary action sought was removal. The basis for the charges alleged *inter alia* that on January 11, 2016, the Division advised respondent that appellant was not eligible to become a member of the PFRS as he did not meet the age requirements. Based upon appellant's ongoing representation that he had been hired by Beverly from a list of "Eligibles", respondent continued to pursue enrollment in the PFRS on his behalf. On March 10, 2017, the Division reiterated its determination that appellant was overaged and therefore ineligible to enroll in the PFRS. (Appellant's Brief in Support of Summary Decision, Exhibit CC.)

On June 28, 2017, appellant was served with a Final Notice of Disciplinary Action (FNDA) wherein the sustained charges determined that appellant was: 1) Unfit as it pertains to meeting legal requirements for the position; 2) Inability to perform job duties; 3) Other sufficient cause. The disciplinary action sought was removal effective June 27, 2017. The sustained charges stated *inter alia* that on January 11, 2016, the Division advised respondent that appellant was not eligible to become a member of the PFRS as

he did not meet the age requirements. Based upon appellant's ongoing representation that he had been hired by Beverly from a "List of Eligibles", respondent continued to pursue enrollment in the PFRS on his behalf. On March 10, 2017, the Division reiterated it's determination that appellant was overaged and there ineligible to enroll in the PFRS. (Appellant's Brief in Support of Summary Decision, Exhibit DD.)

After review of the documentary evidence submitted, in addition to the findings of **FACT** above, I **FIND** as **FACT** that as early as May/June 2013, while employed with Beverly, appellant was placed on notice that as a SLEO, he would not be eligible to participate in PFRS.

I further **FIND** that appellant voluntarily removed himself from consideration for a position with Gloucester: before he took the 2013 LEE; before he received the results of the 2013 LEE; and over a year before he applied for a job with respondent.

In **FIND** that appellant was cognizant of the fact that he had already "aged-out" when he took the 2013 LEE; that he did not have qualifying time as a law enforcement officer to reduce his age; and that he was ineligible for enrollment into the PFRS and to hold the position of Municipal Police Officer.

I further **FIND** that when he resigned from Beverly, he held the position of SLEO. (Appellant's Motion for Summary Judgment, Exhibit M.) I **FIND** that respondent, appellant provided a resume indicating that he was a police officer with Beverly and credentials which identified him as a patrolman with Beverly. (Appellant's Reply Brief, Exhibit Q; Second Certification of Michael Megara ¶ 35 and 37; Second Certification of Meghan Jack, Exhibit A.)

I **FIND** that at the time of hire, respondent believed that appellant was eligible for enrollment into the PFRS based upon his prior law enforcement experience and actively sought membership on his behalf. (Appellant's Second Certification, ¶ 28; First and Second Certification of Meghan Jack.)

I **FIND** that there was no knowing and intentional misrepresentation on the part of respondent to appellant regarding the hiring process or respondent's ability to enroll respondent in the PFRS.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

In the instant matter, the sustained charges against appellant were:

1. Unfit as it pertains to meeting legal requirements for the position;
2. Inability to perform job duties
3. Other sufficient cause.

The incident giving rise to the sustained charges state in part:

> "The Township of Riverside has relied upon your representations that you met all requirements, including but not limited to prior service and age requirements imposed by law and subject to State regulations, which would enable the Township to appoint you to the Civil Service title of police officer..."

Appellant concedes that at the time he took the 2013 LEE, he was over the age of thirty-five and had no prior creditable full-time law enforcement services that would reduce his age at the time of the Closing Date for the examination. Appellant argues however, that the principal of estoppel is applicable in this matter because: 1) The Civil Service Commission permitted him to sit for the 2013 LEE and placed him on the "Certified List of Eligibles"; 2) Respondent hired him off of the civil service list despite knowing his age at the time he was hired; 3) From the date of hire to the date of termination, his employment record was impeccable; and 4) he turned down an offer of employment with Gloucester based upon assurances from respondent's representatives of that he would be hired.[4]

Respondent argues: 1) As a matter of law, appellant is over the statutory age limit and therefore is ineligible for admission into the PFRS and appointment as a Municipal Police Officer; 2) Appellant's failure to avidly pursue review by the Division renders the instant appeal "moot" as this Tribunal lacks jurisdiction to render a decision pertaining to his enrollment in PFRS; 3) Equitable estoppel is an extraordinary relief for which appellant has failed to establish each element.

New Jersey statutory law prohibits the appointment of a full-time Police Officer whose age exceeds thirty-five years. N.J.S.A. 40A:14-127. Further, all full-time Municipal Police Officers must be enrolled in PFRS, which requires that a full-time

[4] Appellant asserts that he was offered a full-time position with the Gloucester County Police Department which he turned down based upon assurances from respondent's former and current Chief(s) of Police (Chief Tursi and Chief Earle – respectively) respondent would hire him as a full-time police officer if he got on the List of Eligibles. Respondent denies that any such promise of future employment was made and that appellant's claim of both a future job offer and reliance on appellant's part is a fabrication.

Municipal Police Officer may not be over the age of thirty-five at the time of enrollment. N.J.S.A. 43:16A-3; N.J.A.C. 17:4-2.2; N.J.A.C. 17:4-2.5. In a civil service municipality, a person's age is calculated from the announced closing date of the civil service examination for the position. N.J.S.A. 40A:14-127, N.J.A.C. 17:4-2.5(b). However, "An applicant may be permitted to reduce their actual age in order to meet the maximum age requirement of thirty-five years for the position of Municipal Police Officer, if in accordance with N.J.S.A. 40A:14-127.1, they have previous service as a former State trooper, sheriff's officer, or deputy or municipal police officer." N.J.A.C. 17:4-2.5

It is undisputed that appellant was over the age of thirty-five as of the closing date of the 2013 LEE and did not have qualifying prior service that could count towards a reduction to his actual age in order to meet the age requirement. Therefore, as a matter of law, he was ineligible for admission into PFRS. As enrollment in PFRS is mandated to hold the position of a Municipal Police Officer respondent could not retain him in that position.

With regard to appellant's assertion that this Tribunal should invoke the doctrine of equitable estoppel, such extraordinary relief does not fit the facts of this case.

The doctrine of equitable estoppel is "rarely invoked against a governmental entity." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000) (quoting Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656, (App.Div.1999)). The doctrine can be invoked "where interests of justice, morality and common fairness clearly dictate that course." Ibid. (quoting Gruber v. Mayor & Twp. Comm. of Raritan, 39 N.J. 1, 13, 186 A.2d 489 (1962)). See also, John Welsh v Board of Trustees, Police and Firemen's Retirement System, 443, N.J. Super. 367 (2016). In Middletown, the Supreme Court explained:

> The essential principle of the policy of estoppel here invoked is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct. An estoppel . . . may arise by silence or omission where one is under a duty to speak or act. It has to do with the inducement of conduct to action or nonaction. . . . The repudiation of one's

> act done or position assumed is not permissible where that course would work injustice to another who, having the right to do so, has relied thereon.
>
> [Ibid. (quoting Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503-04 (1955)).]

"The essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." Dennis O'Malley v. Department of Energy and Department of Civil Service, 109 N.J. 309 (1987) (citing Horsemen's Benevolent & Protective Ass'n v. Atlantic City Racing Ass'n, 98 N.J. 445 (1985) (quoting Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979)); Miller v. Miller, 97 N.J. 154, 163 (1984)).

Appellant relies upon Sellers v. Board of Trustees of the Police and Firemen's Retirement System, 399 N.J. Super. 51 (App.Div.2008), and Juliano v. Borough of Ocean Gate, 214 N.J. Super 503 (Law Div. 1986) in support of his argument. In both Sellers and Juliano, equitable estoppel was considered and in one case, Juliano, applied. However, contrary to appellant's arguments, both cases are significantly distinguishable from the instant matter.

In Sellers, a thirty-eight-year old dispatcher with Essex County College left his job in order to take a position as a firefighter with Bloomfield Township. Both Sellers and the Township were under the mistaken belief that credit for prior service as a police officer and in the military would exempt him from the prohibitions in N.J.S.A. 43:16A-3, N.J.A.C. 17:4-2.5, and the prohibition against hiring and enrolling in PFRS any officer over thirty-five years old. (Quoting John Welsh v Board of Trustees, Police and Firemen's Retirement System, 443, N.J. Super. 367, 377 (2016)).

The Appellate Division reversed and remanded the matter to the Board of Trustees of PFRS to determine "whether the facts warrant application of equitable principles." Id.

at 63. The Court went on to define the "relevant public and private interests" in that case that would "inform" the Board's analysis stating:

> [The Board] should look at the equities from Sellers' point of view, considering whether the government failed to "turn square corners" with him, whether he acted in good faith and reasonably, the degree of harm he will sustain if the age requirement is strictly enforced, and other factors that go to the fairness of applying the age restriction to him after he was hired and left a previous job to take the position. The Board must then consider the purposes of the age restrictions from the perspective of the municipal firefighter position and the pension system and determine whether or to what extent those purposes will be thwarted if relief is provided to Mr. Sellers, taking into account the extent to which he fails to meet the age criteria and the overall pension scheme.
>
> Id. at 62-63.

In Petry v. Board of Trs., Police & Fireman's Ret. Sys., 2015 N.J. Super. Unpub. LEXIS 3011 the Appellate Court clarified its determination in Sellers stating:

> Despite our careful instruction, we did not compel the Board to conclude that Sellers was entitled to equitable relief. Nor did we hold that the Board is required to undertake this balancing analysis in every case where a municipality hires a police officer or firefighter whose age exceeds the statutory maximum.
>
> We stressed that the Board's equitable power is to be used "rarely and sparingly." Id. at 62. We acknowledged that granting equitable relief in such cases did not follow neatly from application of principles of equitable estoppel, because Sellers was "seeking to bind the Board, a State entity, for action taken by a municipality." Id. at 59; see also Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349, 364-65, 113 A.3d 764 (2015) (refusing to bind school board to superintendent's representations regarding tenure eligibility, stating, "[i]n an application of estoppel the focus must be on the conduct of the person or entity who had the authority to act," which was the school board) (internal quotation marks and citation omitted).

In Juliano, a seventeen-year veteran and acting chief in a non-civil service municipality sued the municipality when she was passed over for appointment as chief. In defense, the Borough raised the argument that Juliano's original appointment should

be declared illegal as she was over the age of thirty-five when appointed by the Borough. Citing to O'Malley v. Dept. of Energy, 212 N.J. Super. 114 (App. Div. 1986), the court found that the Borough could not assert that Juliano's appointment that had occurred seventeen years prior, was defective. In determining that estoppel was a proper remedy, the court stated:

> It is a disturbing prospect that a public employer could make an innocent mistake which could jeopardize an employee's job. In certain situations the employee might have to suffer the consequences. However, when the mistake is belatedly raised by the employer only in response to the employee's suit to enforce perceived employment rights, the mistake can be unforgivable and the employee should not suffer.
>
> Juliano at 510 – 511.

Here, appellant has failed to meet the essential elements of equitable estoppel. As early as April/May 2013, he was aware that he did not have qualifying law enforcement experience to reduce his age in accordance with N.J.S.A. 40A:14-127. When he sat for the 2013 LEE, he had already aged out and knew that his experience as a SLEO could not be counted towards the prior law enforcement experience required to reduce his age. As such, he was aware, long before he was hired by respondent and when he accepted the position with respondent, that he was over-aged and did not have any qualifying time to enable membership in the PFRS.

Appellant further argues that to his detriment, he turned down a job offer with Gloucester in reliance upon a future job opportunity with respondent. Assuming arguendo that that in fact was the case, any offer of future employment with respondent was speculative at best and fraught with a number of contingencies and intervening factors which included: appellant taking the 2013 LEE and scoring high enough to get placed on the List of Eligibles; respondent having a future job opening; appellant getting recommended and hired by respondent; and appellant qualifying for membership in the PFRS. As noted above, this last factor was the biggest hurdle and one which appellant, not respondent, was well aware of before he withdrew his name from Gloucester's consideration.

With regard to appellant's argument that he detrimentally relied upon the fact that he was allowed to sit for the 2013 LEE; that he was placed on the List of Eligibles from which respondent hired him; and that respondent was aware of his age at the time of hiring yet still hired him - this too lacks merit. As noted above, appellant was fully aware at the time he sat for the 2013 LEE, that he was overaged and had no qualifying law enforcement experience to reduce his age - yet he still sat for the exam. While it is undisputed that respondent hired petitioner off of the List of Eligibles and was aware of his age at the time of hire, it is equally undisputed that respondent was operating under the mistaken belief that appellant had sufficient qualifying law enforcement experience that would reduce his age to allow enrollment into PFRS. No credible facts have been presented in this matter to substantiate the assertion that respondent knowingly and/or intentionally misrepresented to appellant that it was aware that he did not have qualifying time and/or could overcome the age and enrollment requirements under N.J.S.A. 40A:14-127 and N.J.S.A. 43:16A-3 which induced him to turn down a job offer from another jurisdiction over a year earlier.

In a disciplinary action, the burden of proof is on the appointing authority, which must prove its case by a preponderance of the believable evidence. In re Polk, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In order for evidence to meet that threshold, it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). That is to say, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re: Perrone, 5 N.J. 14, 522 (1950).

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, including inability to perform duties, N.J.A.C.

4A:2-2.3(a), and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). N.J.S.A. 11A:2-6; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. On appeal from the imposition of such discipline, the appointing authority has the burden of proving justification for the action and the employee's guilt by a preponderance of competent, credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson, 37 N.J. 143; Polk, 90 N.J. 550.

In this matter, the sustained charges against appellant were: 1) Unfit as it pertains to meeting legal requirements for the position; 2) Inability to perform job responsibilities; and 3) Other sufficient cause.

At the time of hire, appellant was over the age of thirty-five and did not have the requisite law enforcement experience to reduce his actual age to meet the maximum age requirement of thirty-five years of age. As such, he was ineligible to hold such a position and ineligible for membership in the PFRS as required by law.

With the above in mind, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant was is ineligible for appointment to the position of Municipal Police Officer. Therefore, he is unfit as it pertains to meeting the legal requirements for the position.

Under the second count, Inability to Perform Job Duties (N.J.A.C. 4A:2-2.3(a)(3)), as more fully set forth above, it is clear that appellant, by operation of law, is ineligible for appointment to the position of Municipal Police Officer and therefore unable to perform the functions thereunder.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence that appellant is ineligible for appointment and unable to perform the job duties of Municipal Police Officer.

Under the third count, Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a) (12)), appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause." Other sufficient cause is conduct that violates the implicit standard of good behavior that

devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Asbury Park v. Dep't of Civil Serv., 17 N.J. 419 (1955).

As to this charge, appellant was aware, long before he took the position with respondent that his prior law enforcement experience did not qualify to reduce his age to thirty-five. He was also aware that without this, he would not be eligible for membership into the PFRS. No credible evidence was presented that this very important piece of information was ever conveyed to respondent who was operating under the belief that appellant's prior law enforcement experience would properly reduce his actual age to qualify him for appointment and membership into the PFRS.

For the foregoing reasons and ones cited above, I **CONCLUDE** that respondent has demonstrated by a preponderance of the credible evidence the charge of Other Sufficient Cause.

PENALTY

With regard to penalty, consideration must generally be given to the concept of progressive discipline, involving penalties of increasing severity. W. New York v. Bock, 38 N.J. 500 (1962). However, progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). It is well-established that when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest, progressive discipline need not apply. In re Herrmann, 192 N.J. 19, 28 (2007); In re Stallworth, 208 N.J. 182 (2011).

Here, by law, appellant is ineligible for employment as a Municipal Police Officer and he is not entitled to equitable relief. Accordingly, I **CONCLUDE** that removal is the appropriate discipline for violations of: Unfit as it pertains to meeting legal requirements for the position; Inability to Perform Job Duties (N.J.A.C. 4A:2-2.3(a)(3)); and Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a) (12)).

ORDER

Based upon the foregoing, it is **ORDERED** that:

Respondent's motion for summary decision is **GRANTED**; and the disciplinary action entered in the Final Notice of Disciplinary Action of the Riverside Township Police Department against appellant Michael Megara is hereby **AFFIRMED**.

It is further **ORDERED** that appellant's motion for summary decision is **DENIED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 31, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 8/31/18
Date Mailed to Parties: 8/31/18

tat/lam

EXHIBITS

For Appellant:

1) Appellant's Cross-Motion for summary Decision/Opposition to Respondent's Motion for Summary Decision – Exhibits A through UU

2) Certification of Michael Megara

3) Certification of Counsel

4) Appellant's Reply Brief – Exhibits A through R

5) Second Certification of Michael Megara

For Respondent:

1) Respondent's Motion for Summary Judgment - Exhibits A through W

2) Certification of Meghan Jack

3) Certification of Counsel

4) Respondent's Opposition to Cross-Motion for Summary Dismissal and Reply Brief – Exhibits A through E

5) Second Certification of Meghan Jack

6) Second Certification of Counsel

7) Certification of Chief W. Earle

8) Certification of Chief (Ret.) P. Tursi

9) Certification of Chief W. Eliason