



STATE OF NEW JERSEY

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

In the Matter of Patrick Dugan, Fire
Fighter (M1560T), Ocean City

Bypass Appeal

CSC Docket No. 2019-3123

ISSUED: SEPTEMBER 27, 2019 (HS)

Patrick Dugan, represented by Carl N. Tripician, Esq., appeals the bypass of his name on the Fire Fighter (M1560T), Ocean City eligible list.

The appellant appeared as the sixth ranked non-veteran eligible on the subject eligible list, which promulgated on March 11, 2016 and expired on March 28, 2019. A certification, consisting of the names of non-veteran eligibles only, was issued on February 14, 2019 (OL190154) with the appellant listed in the first position. In disposing of the certification, the appointing authority bypassed the appellant and appointed K.M., the third listed eligible, effective April 1, 2019. The second and sixth listed eligibles were removed from the eligible list, and the fourth, fifth, seventh and eighth listed eligibles were retained.

On appeal to the Civil Service Commission (Commission), the appellant states his belief that he was unfairly bypassed.

In response, the appointing authority, represented by Dorothy F. McCrossan, Solicitor, states that K.M. became affiliated with a volunteer fire department during the summer of 2015, permitting him to enroll in the Atlantic County Fire Academy and achieve the Firefighter I (FF-I) certification. Appointing K.M., according to the appointing authority, relieved it of the obligation to train and send him to a fire academy. It states that K.M. was the only candidate, of the four interviewed, who was both a certified Emergency Medical Technician (EMT) and a New Jersey certified firefighter. The appointing authority maintains that K.M. was appointed because he had the strongest credentials of the four. In support, it submits, among

other documents, a copy of the certificate awarded to K.M. by the Atlantic County Fire Academy for satisfactory completion of the FF-I program.

In reply, the appellant maintains that he is an exceptional candidate who should not have been bypassed. He states that he has been a certified EMT for 10 years and has worked for Ocean City as a Medical Services Supervisor for approximately seven years. He states that he works with several public safety organizations and holds numerous certifications in the public safety field. The appellant alleges that his lack of an FF-I certification was the “unannounced, secret bar” to his appointment as the certification was a “threshold” qualification. In this regard, he states that the appointing authority did not announce that the FF-I certification would be a deciding factor in appointing Fire Fighters or that it would give preference for candidates with the certification. He also states that this agency did not announce that the FF-I certification was a requirement for consideration for the position. This agency’s requirements for the Fire Fighter examination did not mandate that candidates hold FF-I certification.¹ In addition, he argues that the appointing authority has not explained how, in a budget of tens of millions of dollars, a \$150 training seminar that he could attend while still working as an EMT for the fire department, justifies his bypass. The appellant claims that between March 11, 2016 and March 10, 2019, the appointing authority appointed five individuals, who did not hold the FF-I certification but held EMT certification, and assigned them to the ambulance while attending FF-I training. According to the appellant, there would have been a zero dollar impact in appointing him over K.M. In support, he submits his resume, certifications, awards and recommendation letters.

In reply, the appointing authority states that the FF-I certification was so valued in this instance because it “fast-tracked” the indisputably qualified new appointee onto a fire truck as a Fire Fighter at a time when the department is concerned about overtime costs. It states that K.M.’s possession of the certification was a “bonus” as eligibles typically do not already have it and that it is simply untrue that there would have been a zero dollar impact in appointing the appellant given the avoided overtime. The appointing authority maintains that the value of a new appointee who does not require fire academy training is vastly more than the cost of the FF-I certification. Had he been hired, according to the appointing authority, the appellant would have been ready to work as an EMT but not as a Fire Fighter. K.M., by contrast, could work as an EMT and Fire Fighter immediately on appointment. It maintains that there is no dispute that the

¹ The examination announcement did contain a link to the Civil Service job specification for Fire Fighter, which provides that appointees must complete a firefighting training program approved by the New Jersey Department of Community Affairs, Division of Fire Safety, within the timeframe specified by the appointing authority and that appointees are not permitted to participate in firefighting activities prior to completion of this training. The specification also provides that for some jurisdictions, once appointed, employees may be required to successfully complete an approved EMT program and maintain certification while employed as a Fire Fighter.

appellant lacked the FF-I certification and firefighting experience. The appointing authority concedes that the appellant was a “good” candidate, but K.M. was “better qualified” by certification and experience. The appointing authority states that it did not create a threshold, qualifying requirement and deem the appellant “ineligible;” rather, it compared the candidates’ qualifications. In support, the appointing authority submits the Fire Chief’s certified statement.

In reply, the appellant argues that the appointing authority has confused financial justification with merit and fitness as overtime issues do not make one candidate more or less qualified than another. He argues that the appointing authority did not provide any evidence of K.M.’s actual experience fighting fires, his membership in a volunteer fire department notwithstanding. The appellant also claims that the Emergency Medical Services (EMS) division of the fire department is far busier than the firefighting division. The appellant maintains that when comparing merit and fitness and experience with respect to EMS, he is far superior to K.M. He states that the fire department has historically utilized its newest rookies to staff the ambulance, and he would be the best choice in that regard. In support, the appellant submits records received in response to a request under the Open Public Records Act.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-6 and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on an open-competitive list, provided that no veterans are on the list. Moreover, it is noted that the appellant has the burden of proof in this matter. *See N.J.A.C.* 4A:2-1.4(c).

Since only non-veterans were listed on the certification, it was within the appointing authority’s discretion to select any of the top three interested eligibles on the certification. An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate’s history and qualifications to determine the best candidate from a list of three eligibles, any of whom may be selected under *N.J.A.C.* 4A:4-4.8(a)3. In this case, the appointing authority justifies its decision to bypass the appellant and appoint K.M. on the basis that K.M. was a member of a volunteer fire department and held both EMT and FF-I certifications. The appointing authority explains that it was a “bonus” that K.M. already possessed the FF-I certification as it “fast-tracked” him onto a fire truck. The Commission finds this explanation eminently reasonable and finds the appellant’s counterarguments unpersuasive, as discussed below.

The appellant claims that his lack of an FF-I certification was the “unannounced, secret bar” to his appointment as the certification was the

appointing authority's "threshold" requirement. However, the published Civil Service job specification for Fire Fighter provides that *all* appointees must complete a firefighting training program approved by the New Jersey Department of Community Affairs, Division of Fire Safety, and are not permitted to participate in firefighting activities prior to completion of this training. There is no evidence that the appointing authority effectively deemed the appellant "ineligible" because he did not complete the training program. Rather, the appointing authority compared the candidates and, though the appellant was undoubtedly qualified, simply selected the one who had *already* completed it. As to the appellant's claim that others have previously been appointed without already holding the FF-I certification, it is at the appointing authority's discretion to review the *current* list of eligibles and make that determination based on its current needs. The appellant also claims that the fire department's EMS division is far busier than the firefighting division. Even assuming this is true, it is not persuasive evidence that the appellant, instead of K.M., should have been appointed. In this regard, the organization and assignment of work within the organization is a managerial prerogative, and it bears emphasizing that the appointment at issue here was to the title of *Fire Fighter*.²

Additionally, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the "Rule of Three" to appoint a lower-ranked eligible absent any *unlawful* motive. See *N.J.A.C. 4A:4-4.8(a)3*; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, *Ocean City*, 207 *N.J.* 38, 49 (2011). Compare, *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 *N.J. Super.* 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). Moreover, the appellant does not possess a vested property interest in the position. In this regard, 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). The appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "Rule of Three." Moreover, the appointing authority presented a legitimate reason for the appellant's bypass that has not been persuasively refuted. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name was proper, and the appellant has not met his burden of proof in this matter.

² The local classification plan includes separate job titles for EMT and Fire Fighter/EMT. Personnel records indicate that there are two individuals serving in the title of EMT with the appointing authority.

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 25TH DAY OF SEPTEMBER, 2019



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