



STATE OF NEW JERSEY

In the Matter of Fire Captain  
(PM0432A) Ewing

CSC Docket No. 2019-2993

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FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

Administrative Appeal

ISSUED: September 27, 2019 (TMG)

The Township of Ewing (Ewing), represented by Maeve E. Cannon, Esq., appeals the denial, by the Division of Agency Services, of its request to have the eligibility requirement for Fire Captain (PM0432A) waived to completion of the working test period.

By way of background, Ewing utilized volunteer fire services which were over time supplemented by paid daytime personnel. Ewing found that it had a problem with volunteer fire company response to calls, it established a more comprehensive 27/7 paid department. In order to expedite training and staffing, Ewing sought trained and experienced personnel in order to timely implement an increase in the staffing to allow a 24/7 paid operation. The goal was to staff a paid daytime firefighting operation in a very short time-frame which required little or no volunteer support. The newly expanded paid firefighting operation was also intended to supplement the volunteer forces at night and on weekends. A SAFER grant from the federal government provided funding for the increased professional staff and required that the new staff be hired by January of 2018.

The subject examination was announced as being open to employees in the competitive division who had an aggregate of three years of continuous permanent service as of the March 31, 2019<sup>1</sup> closing date in the title of Fire Fighter. A total of 12 employees applied for the subject examination, but 10 of the applicants were deemed ineligible because they did not have three years of continuous permanent

<sup>1</sup> The application filing deadline was March 14, 2019.

service as a Fire Fighter. Two applicants were found to be eligible and the examination is in process.

Prior to the issuance of the subject promotional announcement, Ewing requested that Agency Services reduce the three year time-in-grade requirement to the completion of the working test period. Specifically, Ewing based its request on its analysis that there would only be three applicants that would meet the announced requirements and that it anticipated promoting more than three Fire Fighters to Fire Captain during the life of the resulting eligible list. Ewing also presented that it has an insufficient number of Fire Captains to supervise its compliment of paid Fire Fighters. Even the use of overtime would be insufficient to meet the supervisory needs of the Fire Department. The Division of Agency Services denied Ewing's request on the basis that *N.J.S.A. 40A:14-29* requires that no person shall be eligible for promotion to a superior rank unless he served as a permanent fire fighter for at least three years in the department.

In its appeal, Ewing asserts that the Civil Service Commission (Commission) has the authority to relax *N.J.A.C. 4A:4-2.6(b)* because an injustice, unfairness or inconsistency with the overall objectives of the Civil Service system. In this regard, it states that two vacancies are anticipated, and, assuming the two admitted applicants pass the test, Ewing will be left with an inadequate promotional list. Thus, strict adherence to *N.J.S.A. 40A:14-29*, with complete disregard to the relief the Commission can provide under *N.J.A.C. 4A:4-2.6(g)* cannot effect the Legislative intent of *N.J.S.A. 40A:14-29*. Ewing emphasizes that it had to rapidly expand its paid force to address public safety concerns and did so through hiring a mix of experienced Fire Fighters via the Intergovernmental Transfer Program (IGT) and Rice List along with inexperienced new hires. It also notes no other individuals in the paid department would be detrimentally impacted as no other employees would have the three years of service. In support of its appeal, Ewing provides the names of eight potential applicants who transferred either via the IGT or were hired from the Statewide Eligible (Rice) List, and argues that they meet the three years of service requirement as provided for in *N.J.A.C. 4A:4-2.46b)*. A review of Commission records finds:

Torian Perry was appointed RAOC to the title Fire Fighter in Atlantic City on May 13, 2013, and he transferred to Ewing effective January 18, 2018 via the IGT.

Rian Donoher was appointed RAOC to the title Fire Fighter on January 29, 2018 in Ewing<sup>2</sup>.

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<sup>2</sup> Ewing claims that Mr. Donoher has six years of Fire Fighter experience, but his name does not appear in CAMPS or PMIS and Ewing provided no documentation of his prior service.

John Tomasulo was appointed RAOC to the title Fire Fighter on March 30, 2015 in Bordentown, and transferred via IGT on January 15, 2018.

Shawn Vallauri was appointed RAOC to the title Assistant Institutional Fire Chief at Ancora Psychiatric Hospital on November 21, 2009 and transferred via IGT to Ewing on January 15, 2018.

James Wintermute was appointed RAOC to the title Assistant Institutional Fire Chief at Greystone Psychiatric Hospital on May 29, 2007 and transferred to Ewing via IGT on January 15, 2018.

Jason Carty was appointed RAOC to the title Fire Fighter in Willingboro on November 18, 2004 and Resigned in Good Standing on December 16, 2014. He was appointed from the Rice List to Ewing on January 8, 2018.

Michael Nelson was appointed RA to the title Fire Fighter in Ewing on January 8, 2018 from the Rice List<sup>3</sup>.

Christopher Steinmetz was appointed RAOC to the title Assistant Institutional Fire Chief on October 23, 2010 to Greystone Psychiatric Hospital. He transferred via IGT to Ewing on January 15, 2018.

Ewing further argues that *N.J.S.A.* 40A:14-29 does not apply to municipalities under Title 11A as these municipalities are governed by *N.J.S.A.* 40A:14-9.4, that *N.J.A.C.* 4A:4-2.6(b) only requires that applicants for promotion have three years of continuous permanent service, and that a title is a descriptive name that identifies a position or a group of positions with similar duties, responsibilities and qualifications, as provided in *N.J.A.C.* 4A:1-1.3. Accordingly, Ewing maintains that the subject promotional announcement be open to Fire Fighters who completed their working test periods.

## CONCLUSION

*N.J.S.A.* 40A:14-29 provides that:

In any municipality except in cities of the first class a promotion of any member or officer of the paid or part-paid fire department or force to a superior position shall be made from the membership of such department or force. No person shall be eligible for promotion to be a

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<sup>3</sup> Although Ewing indicates that Mr. Nelson has 16 years of continuous firefighting experience, his name does not appear in either the CAMPS or the PMIS system, and Ewing did not document Mr. Nelson's experience.

superior officer unless he shall have previously served as a permanent paid fireman for at least 3 years in such department or force.

*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 when appropriate.

*N.J.S.A.* 11A:5-14 provides that:

**Veteran police officer or fire fighter in city of first class; examination and promotion.** A member of the police or fire department in a city of the first class who is a veteran shall be entitled to be admitted to the examination for promotion to a superior rank and upon successfully passing such examination shall be entitled to appointment in such superior rank, notwithstanding the fact that such person may not have held the position or rank held or occupied by him at the time of taking the examination for a period of two years, if the employee has or shall have held or occupied the same for a period of one year.

***N.J.S.A* 40A:14-9.1. Requirement of residency in municipality; prohibition**

No municipality shall pass any ordinance, resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a paid fire department and force or paid member of a part-paid fire department and force, and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect.

***N.J.S.A* 40A:14-9.4. Promotions; preference to resident**

In any municipality wherein Title 11 (Civil Service) of the Revised Statutes is operative, promotions to positions on the paid or part-paid fire department and force shall be based upon merit as determined by suitable promotion tests for such positions, provided however that a resident shall be appointed rather than a nonresident thereof in any instance in which the resident and nonresident achieved the same final average score in such test. The preference granted by this section shall

in no way diminish, reduce or affect the preferences granted to veterans pursuant to chapter 27 of Title 11 of the Revised Statutes or any other provision of law.

***N.J.S.A. 40A:14-9.6. Municipalities without civil service; promotions; preference to resident***

In any municipality wherein Title 11 (Civil Service) of the Revised Statutes is not in operation but wherein promotions to positions on the paid or part-paid fire department and force are based upon merit as determined by suitable promotion tests for such positions, a resident shall be appointed rather than a nonresident thereof in any instance in which the resident and nonresident achieved the same final average score in such test. The preference granted by this section shall in no way diminish, reduce or affect the preferences granted to veterans pursuant to any other provision of law.

*N.J.A.C. 40A: 6-4* provides:

For legislative purposes, cities shall be classified as follows based upon population as ascertained by the most recent Federal decennial census:

- a. First class--cities having a population of more than 150,000;
- b. Second class--cities having a population of not less than 12,000 but not more than 150,000;
- c. Third class--all cities which are not first- or second-class cities except cities bordering on the Atlantic ocean being seaside or summer resorts;
- d. Fourth class--cities bordering on the Atlantic ocean which are seaside or summer resorts.

***N.J.A.C. 4A:4-2.6(b)*** provides:

**(b)** In local service, applicants for promotion from entry level law enforcement or firefighter titles shall have three years of continuous permanent service in a title to which the examination is open, except as otherwise provided by law.

*N.J.S.A. 40A:14-29* requires that promotion of firefighters in any municipality except cities of the first class, be made from the membership of such

department or force and that no person should be eligible for promotion to a superior officer position unless he shall have served previously as a permanent paid fireman for a period of a least three years in such department or force. *N.J.A.C. 4A:4-2.6(b)* is not inconsistent with *N.J.S.A. 40A:14-29*. The Commission notes that the First Class Cities exception is based on *N.J.S.A. 11A:5-14*, which permits Veterans Fire Fighters in Cities of the First Class to be promoted to a superior officer position with only one year of experience in a Fire Fighter position.

As to Ewing's claim that *N.J.S.A. 40A:14-9.4* rather than *N.J.S.A. 40A:14-29* applies to the eligibility for promotion in jurisdictions operating under Title 11A, the Commission finds this argument unpersuasive. *N.J.S.A. 40A:14-9.4* provides preference to residents of a municipality under Title 11 when a resident and non-resident are otherwise tied in rank. The Commission notes that *N.J.S.A. 40A:14-6* provides for the same preference to residents in municipalities where Title 11 is not in operation, but where promotions are based upon merit. The legislature in 1972 prohibited municipalities from requiring residency for Police and Fire appointees and added residency preference when two promotional appointees were otherwise equal. Moreover, the *N.J.S.A. 11A:5-14* exception to *N.J.S.A. 40A:14-29* applies to cities of the first class, of which Ewing is not, are all municipalities wherein Title 11A is in operation.

Ewing contends that Messrs. Perry, Donoher, Tomasulo, Vallauri, Wintermute, Carty, Nelson and Steinmetz would all meet the *N.J.A.C. 4A:4-2.6(b)* requirement of three years of continuous permanent service. A review of their present CAMPS records shows that none have three years of continuous permanent service in a title to which the examination was opened. Mr. Perry transferred from Atlantic City in the title Fire Fighter but did not transfer his seniority. Mr. Tomasulo transferred from Bordentown but did not transfer his seniority, Messrs Vallauri, Wintermute and Steinmetz transferred from Assistant Institutional Fire Chief, and Messrs. Carty and Nelson were appointed from the Rice List, which specifically prohibits that transfer of seniority. None of these eight Fire Fighters would meet the three- year requirement of continuous permanent service presented in *N.J.A.C. 4A:4-2.6(b)*.

As to rule relaxation, *N.J.A.C. 4A:1-1.2(c)* permits the Commission to relax the rules for good cause in order to effectuate the purposes of Title 11A, but the Commission is not empowered to relax statute. However, the Commission has the right and duty to interpret and apply statutes, including those outside of the Civil Service Act, to resolve disputes before it. *See Matter of Allen*, 262 N.J. Super. 438 (App Div. 1993). In this case, the Commission agrees that the legislative intent of *N.J.S.A. 40A:14-29* is to ensure that only experienced employees can compete for superior ranked positions in the crucial area of public safety. In this case, while

some of its employees may have more than three years of experience as fire fighters, that experience was not gained in the department where the promotions could occur. However, as a recently expanded paid fire department, it is simply not possible for the majority of employees to accrue the required experience in the new department. As it is necessary to devine what the legislature intended when it wrote into *N.J.S.A. 40A:14-29* the requirement that the three years of experience shall be based on permanent service “in such department or force.”

A review of the legislative history of *N.J.S.A. 40A:14-29* does not discuss or provide any insight as to what the legislature intended by requiring the three years of permanent service be accrued *in the department* where the promotion takes place. However, the statutory provision *N.J.S.A 40A:14-29* replaced *N.J.S.A 40:47-27*, provides insight. Specifically, that statute was amended in 1925 to indicate, in pertinent part:

Whenever in any municipality of this State, other than a city of the first class, a police department or fire department[that] *has been in existence* for at least three years prior to the passage of this act, all promotions to superior positions shall be made from the membership of such . . .fire department as constituted at the time of such promotion, provided however, that no person shall be eligible to promotion to a superior position unless such person served at least three years in the grade of . . . firefighter.

The 1925 Legislature explains that the purpose of the Act was to insure that any superior position of command be filled by experienced personnel and not by someone incapable, inefficient or inexperienced. In other words, the intent of the statute is to insure that superior positions are filled with experienced personnel. While it is not in the legislative history why the verbiage changed in 1971, it is illogical to assume that the legislative intent of *N.J.S.A. 40A:14-29* was to make newly established or expanded fire departments wait for three years before they could promote any of their members to superior ranks; especially if such departments were primarily staffed by Fire Fighters who had gained full-time experience in another jurisdiction. Accordingly, the Commission finds that the requirement of three years of permanent service as a paid firefighter in the department where the promotion is to take place as required by *N.J.S.A. 40A:14-29* does not apply to paid fire departments that have substantially not been in existence for three years.

Nevertheless, the Commission agrees that a minimum of three years of fire fighting experience is necessary to be considered for a promotion from an entry level fire fighter title. However, as the expansion of the paid fire department only began

in 2018, it is not possible for a sufficient number of the paid members to have the three years of continuous permanent service required by *N.J.A.C. 4A:4-2.6(b)*.

Therefore, since the Commission has determined that *N.J.S.A. 40A:14-29* cannot logically be said to apply to experience gained in a paid fire department that has not been substantially in existence for three years, and that any eligible list produced from the subject exam for Ewing would be incomplete, good cause exists to relax the provisions of *N.J.A.C. 4A:4-2.6(b)* to permit Fire Fighters who have completed their working test periods with Ewing and have three years of experience in any jurisdiction by the March 31, 2019 closing date be admitted to the examination.

Therefore, the Commission finds good cause to relax *N.J.A.C. 4A:4-2.6(b)* and orders that the announcement for PM0432A be amended to completion of the working test period, that any additional eligibles, who meet the three year experience requirement with experience gained in any jurisdiction, take the oral examination not yet administered, and that they take the next written examination<sup>4</sup>.

The remedy provided in this case is based on the unique facts presented in this matter and shall not be used as precedent in any other matter.

### **ORDER**

Therefore, it is ordered that this appeal be granted, the announcement for Fire Captain (PM0432A), Ewing, be amended to be open to completion of the Working Test Period, and additional eligibles who meet the three year experience requirement with experience from any jurisdiction take the current oral examination and the next written examination. Those who pass shall be added prospectively to the eligible list.

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

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<sup>4</sup> See *In the Matter of Police Sergeant (PM3776V) City of Paterson* 176 N.J. 49 (2003)



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 20<sup>TH</sup> DAY OF SEPTEMBER, 2019

*Deirdre' L. Webster Cobb*

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Deirdré L. Webster Cobb  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

c: Maeve Cannon, Esq.  
James P. McManimon  
Michael Johnson  
Kelly Glenn  
Records Center