



STATE OF NEW JERSEY

In the Matter of A.O.,
Fire Fighter (M1862W), City of
Passaic

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

CSC Docket No. 2021-266

Bypass Appeal

ISSUED: JANUARY 22, 2021 (JET)

A. O., represented by Michael L. Prigoff, Esq., appeals the bypass of his name on the Fire Fighter (M1862W), City of Passaic, eligible list.

The appellant took the open competitive examination for Fire Fighter (M1862W), achieved a passing score, and was ranked on the subsequent eligible list. The appellant’s name was certified on August 20, 2019 (OL190994). In disposing of the certification, the appointing authority bypassed the appellant, who was the second ranked eligible in first position on the certification, and recorded him as “retained, interested others appointed.” The appointing authority appointed Nelson Gonzalez, Jr., who was the 15th ranked eligible in 16th position on the certification, effective October 14, 2019. It is noted that the M1862W list was certified two times and 12 appointments were made.¹

The appointing authority provided the appellant’s employment application for review, where he listed that he was arrested in Seaside Heights on April 24, 2008 as a juvenile and found guilty of Underage Possession of Alcohol; on September 24, 2008 in Clifton as a juvenile charged and found guilty of Loitering While Intoxicated; on February 4, 2009 in Clifton charged and found guilty of Possession of Marijuana; on April 8, 2009 in Leonia Boro charged and found guilty of Possession of Marijuana; on April 7, 2012 charged and found guilty of Disorderly Conduct; on October 4, 2012 in Passaic charged and found guilty of Possession of Marijuana; and on March 20, 2016 charged and found guilty of Causing a Disturbance. The appellant also listed that he

¹ The appellant was also certified on the October 14, 2020 OL200792 list. No appointments have been made from that certification.

was investigated for an April 5, 2018 Simple Assault/Road Rage incident. Additionally, the appointing authority provided the appellant's driving abstract, which indicates that he was involved in the following infractions: Operation of a Motor Vehicle While in Possession of Narcotics on August 31, 2009; Vehicle in Unsafe Condition on September 22, 2009; Tinted Windows on December 14, 2011; Failure to Wear Seatbelt on June 11, 2013; Failure to Obey Traffic Control Device on March 9, 2016; Unregistered Motor Vehicle on April 18, 2018; and Improper Parking within 50 Feet of Stop Sign on November 11, 2018.

On appeal, the appellant asserts that he underwent a background investigation and was informed that he would be provided with a conditional offer of employment prior to undergoing a psychological and medical examination. The appellant explains that for 11 months he did not have any further contact from the appointing authority, despite that other candidates had been appointed to the subject position in October 2019. Moreover, the appellant states that he was not informed that he was bypassed from the list until August 2020.

In response, the appointing authority, represented by Joseph P. Horan, Esq., asserts that the appellant's employment application listed that he was involved in eight arrests between 2009 and 2018, which were expunged on April 24, 2019. The appointing authority states that the appellant's driving record revealed that he was involved in six motor vehicle infractions between August 2009 and November 2018. The appointing authority adds that the appellant was investigated for his involvement in an alleged incident of road rage in April 2018. The appointing authority explains that the appellant's numerous arrests and motor vehicle infractions demonstrates his lack of respect for the law, which shows that he likely would be unable to follow the appointing authority's policies and procedures. The appointing authority states that Fire Fighter duties are demanding, and as such, it is likely that the appellant would be unable to adequately perform the duties of the subject position. As such, the appointing authority maintains that the bypass was appropriate.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper.

In this matter, the appellant has provided no substantial evidence to show that the bypass was improper. Initially, the appointing authority provided a legitimate basis for not selecting the appellant, as a review of the appellant's record reveals six

motor vehicle infractions and seven arrests between 2009 and 2018, the most recent occurring less than three years prior to when he was certified on the subject list. 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 regard, it is clear that the appellant's background, including his arrests and motor vehicle infractions, could be considered in determining whether he could be bypassed on the subject list. In this matter, it clear that the appellant's arrests clearly adversely relates to the employment sought. It is noted that the removal of eligibles from Fire Fighter lists on the basis of adverse criminal records have been upheld. *See In the Matter of James Alessio* (MSB, decided March 9, 1999). Moreover, in *In Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998) the Supreme Court stated:

Firefighters are not only entrusted with the duty to fight fire; they must also be able to work with the general public and other municipal employees, especially police officers, because the police department responds to every emergency fire call. Any conduct jeopardizing an excellent working relationship places at risk the citizens of the municipality as well as the men and women of those departments who place their lives on the line on a daily basis. An almost symbiotic relationship exists between the fire and police departments at a fire.

In this matter, although some of the charges occurred some time ago when he was a juvenile, the last interactions in 2016 and 2018 were more recent. Such conduct is indicative of the appellant's exercise of poor judgment, which is not conducive to the performance of the duties of a Fire Fighter. As noted above, the public expects Fire Fighters to present a personal background that exhibits respect for the law and the rules. Accordingly, the appointing authority has presented sufficient cause to bypass the appellant from the subject list.

Accordingly, the appellant has not sustained his burden of proof in this matter.

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 20^H DAY OF JANUARY 2021

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