



STATE OF NEW JERSEY

In the Matters of Gremier Alemany
and Lucas Zarate, Fire Captain
(PM1051V), Paterson

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2018-3600, 2018-
3506 and 2018-1581
OAL Docket No. CSV 13150-18

(Consolidated)

ISSUED: AUGUST 3, 2022 (NFA)

The appeals of Gremier Alemany and Lucas Zarate, of their disqualification from the examination for Fire Captain (PM1051V), Paterson¹ for cheating were heard by Acting Director and Chief Administrative Law Judge Barry E. Moscowitz (ALJ), who rendered his initial decision on June 24, 2022. Exceptions were filed on behalf of the respondent agency and replies were filed on the appellants' behalf.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and replies, the Civil Service Commission (Commission), at its meeting on August 3, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

DISCUSSION

Initially, it is noted that Civil Service examination development, scheduling, administration and scoring are functions of the Commission as provided for in Title 11A of the New Jersey Statutes and Title 4A of the New Jersey Administrative Code.² This matter arises from allegations that the appellants cheated on the Civil Service promotional examination for Fire Captain (PM1051V), Paterson. These allegations were based on observations of irregularities by the examination administration staff. Upon review, it was alleged by staff that the appellants did, indeed, cheat on the examination and they should be disqualified from appearing on the PM1051V eligible

¹ It is noted that the respondent in this matter is the Civil Service Commission, which made the initial determinations to disqualify the appellants and from which determinations the appellants' appeals stem. Paterson, as the appellants' employer, had no hand in the determination to disqualify the appellants.

² These functions are performed by various Divisions in the Commission, all of which are separate from the appeal process and independent of the members of the panel deciding this matter.

list. Upon the appellants' appeals of their disqualification, the Commission, rather than decide the matter on the written record, granted hearings based on the materially disputed facts in the record. *See In the Matter of Gremier Alemany and Lucas Zarate, Fire Captain (PM1051V), Paterson* (CSC, decided September 5, 2018).

In his initial decision, the ALJ determined that the credible evidence in the record did not support that the appellants had cheated on the examination. In this regard, the ALJ found the appellants' explanations of the circumstances as to the events that occurred credible, and coupled with the ALJ's finding that no other preponderating evidence was presented to establish that the appellants were cheating, he recommended granting the appellants' appeals. As to remedy, the ALJ ordered that the appellants be restored to the eligible list and be awarded "back pay, seniority, counsel fees, and costs."³

In its exceptions, the respondent argues that the ALJ shifted the burden of proof from the appellants in making his determination. It also argues that the ALJ's credibility determinations were in error as he ignored inconsistencies in the appellants' testimony. It further argues that even if the ALJ's substantive determination is upheld, the remedies provided were inappropriate.

In reply, the appellants argues that the ALJ's decision is proper in all respects. They also provides reasons as to why the ALJ's granting of the remedies of back pay, seniority, counsel fees and costs was correct.

Upon its *de novo* review of the entire record, including the exceptions filed, which the Commission finds unpersuasive, the Commission adopts the ALJ's findings and conclusions and agrees that the appellants' appeals should be granted. The Commission makes the following comments. The ALJ's determination in this matter is based significantly on his assessment of the credibility of the witnesses' testimony and his conclusions made therefrom. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c)*;

³ In *In the Matter of Gremier Alemany and Lucas Zarate, supra*, the Commission did not specifically authorize the ALJ to provide a remedy upon the appellants' successful appeals. In this regard, any such remedies are solely to be provided by the Commission under the appropriate statutes and regulations.

Cavalieri v. Public Employees Retirement System, 368 N.J. Super. 527 (App. Div. 2004). In this matter, the exceptions filed are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations and the other evidence in the record, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom. Further, the argument that the ALJ shifted the burden of proof is misplaced as the ALJ essentially found that the preponderance of the evidence in the record, namely, the appellants' credible testimony that they had not cheated, satisfied *their* burden of proof.

However, the Commission disagrees with the ALJ regarding the remedies provided. In this regard, N.J.A.C. 4A:2-1.5(b) provides:

Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. See N.J.A.C. 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Civil Service Commission or where the Commission sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

The instant matter is not a disciplinary appeal, nor is it one where the appointing authority has failed or delayed carrying out a Commission order. Thus, back pay and counsel fees may only be awarded if the Commission finds sufficient cause. No such cause is present in these matters. Initially, as the appellants were merely *candidates* for appointment to Fire Captain and were removed from a promotional list, they cannot be awarded back pay as no such pay was initially lost. Moreover, individuals whose names merely appear on a list do not have a vested right to appointment. See *In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984), *Schroder v. Kiss*, 74 N.J. Super. 229 (App. Div. 1962). 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).

Moreover, there is no entitlement to counsel fees or costs in this matter. In this case, the allegations were that the appellants, Civil Service employees, cheated on a Civil Service examination. If proven true, not only would that conduct warrant disqualification from the list, but likely disciplinary action up to and including removal from employment by their employer. Such allegations must be taken seriously as the integrity of the Civil Service examination system and the tenet that appointments are being made based on *actual* merit must be protected. The fact that the appellants ultimately were found not to have cheated does not entitle them to counsel fees under the above rule. Further, it is clear that the initial actions taken by this agency in investigating the matter and bringing forth the disqualifications were done in good faith and based on the best information it had at that time. There

can be no question that the sole goal of bringing forth the disqualifications was to protect the efficacy of the Civil Service system. As such, there is not sufficient cause in this particular case to award counsel fees.⁴

However, appropriate remedies must be provided. The record indicates that based on his score on the examination, Gremier Alemany would have been ranked ninth on the PM1051V list. Additionally, he has Civil Service veterans preference. *See N.J.A.C. 4A:5-1.1*. A review of the certifications of the list indicate that he would have been the number one ranked veteran eligible on the May 21, 2019, PL190702 certification of the list. Absent a reason for his removal from the list, as the highest ranked eligible, his appointment from that certification would have been required at that time.⁵ *See N.J.A.C. 4A:4-4.8(a)ii and N.J.A.C. 4A:5-2.2*. Accordingly, the Commission orders that Alemany receive an appointment from that certification, effective June 11, 2019, the date of the other appointments from that certification, which date shall be conferred upon his successful completion of a working test period. This appointment is for salary step placement and seniority-based programs only.⁶

Lucas Zarate is a non-veteran and the record indicates that based on his examination score he would have been ranked 26TH on the PM1051V list. As a non-veteran he was not entitled under any regulation to an appointment and a review of all of the certifications of the list indicate that his name could have been bypassed for appointment on all of those certifications pursuant to the "Rule of Three." *See N.J.A.C. 4A:4-4.8(a)3*. Accordingly, the Commission orders that Zarate's name be restored to the list and reflected as bypassed on all those certifications. However, Zarate's name is to be certified until the expiration of the PM1051V list. That list is set to expire on January 16, 2023. As such, if it is not certified prior to its expiration, the Commission orders that it be revived at the time of the first certification of the new eligible list,⁷ so that his name can be certified on that first certification only, for prospective employment opportunity.⁸

⁴ The Commission notes that if it had granted counsel fees, it would be this agency's responsibility to provide those fees, as it was the respondent. Paterson, as the appellants' employers, would have no liability for such fees.

⁵ The Commission sees no major discipline in the appellant's official personnel record. In most circumstances, such discipline would be the most likely reason for the removal of a veteran from a promotional list. Absent such discipline, the Commission finds no other reasons that he would have been removed from the certification by the appointing authority.

⁶ There is still no entitlement to back pay based on this appointment as the appellant never served in the Fire Captain title and this remedy is consistent with other Commission cases where a veteran is restored to a list and his appointment is mandated. *See e.g., In the Matter of Ali Dismuke* (CSC, decided February 12, 2014).

⁷ The Fire Captain (PM2342C), Paterson list has not yet promulgated.

⁸ As the 26TH ranked candidate, he will be listed first on any subsequent certification of the PM1501V list, or on the first certification of the PM2342C list. However, as a non-veteran, his appointment is not mandated.

ORDER

Therefore, it is ordered that the appeals of Gremier Alemany and Lucas Zarate be granted. It is further ordered that their names be restored to the Fire Captain (PM1501V), Paterson eligible list.

Additionally, it is ordered that Alemany receive a retroactive appointment, effective, June 11, 2019, which date shall be conferred upon his successful completion of a working test period. This appointment is for salary step placement and seniority-based programs only.

Finally, it is ordered that Zarate's name is to be certified until the expiration of the PM1051V list. If it is not certified prior to its expiration, the Commission orders that it be revived at the time of the first certification of the PM2342C eligible list, so that his name can be certified on that first certification only, for prospective employment opportunity.

The Civil Service Commission awards no additional remedies.

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 AUGUST, 2022

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13150-18
AGENCY DKT. NO. CSC Dkt#2018-
3600.2018-3506 & 2018-1581

**IN THE MATTER OF GREMIER ALEMANY
AND LUCAS ZARATE, CITY OF PATERSON
FIRE DEPARTMENT.**

Greg Jones, Esq., for appellant, Gremier Alemany (Arseneault & Fassett, LLC,
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Craig Keiser, Deputy Attorney General, for respondent, Civil Service Commission,
Division of Administrative Services (Matthew J. Platkin, Acting Attorney
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Record Closed: May 13, 2022

Decided: June 24, 2022

BEFORE BARRY E. MOSCOWITZ, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

On November 18, 2017, appellants sat next to each other for the promotional examination for fire captain, and respondent disqualified them for cheating because appellants had many of the same answers. Should appellants remain disqualified from the exam when the evidence preponderates that they did not cheat? No. Under N.J.A.C. 4A:4-6.3, appellants bear the burden of proof by a preponderance of the evidence.

PROCEDURAL HISTORY

On May 17, 2018, respondent, the Civil Service Commission, Division of Administrative Services, disqualified appellants, Gremier Alemany and Lucas Zarate, from the promotional examination for fire captain for the City of Paterson for cheating. In its letters to Alemany and Zarate, the Division of Administrative Services specified that it had conducted an internal investigation for their written examinations for First Level Fire Supervisor (PM105IV), that the investigation had been conducted in response to alleged irregularities and suspected cheating, and that its findings revealed an unusually high number of identical responses between the two, including both correct and incorrect responses. As a result, the Division of Administrative Services invalidated the scores.

Both Alemany and Zarate appealed the determination, and on September 6, 2018, the Civil Service Commission issued its decision. In its decision, the Civil Service Commission concluded that a factual dispute exists whether Alemany and Zarate shared examination answers during the test administration. As a result, it ordered that the case be transmitted to the Office of Administrative Law for resolution:

Therefore, it is ordered that the issue of whether Gremier Alemany and Lucas Zarate shared test answers during the administration of the subject test is referred to the Office of Administrative Law for a hearing. If violations are established, the Administrative Law Judge should determine whether the sanctions applied by Administrative Services were appropriate or recommend further sanctions. Should he be disqualified, Zarate's appeal of test administration is moot, and should he not be disqualified, the Commission will decide the matter.

On September 11, 2018, the Civil Service Commission transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On November 4, 2021, and November 16, 2021, I held the hearing; on May 13, 2022, the parties submitted their closing briefs; and on that date, I closed the record upon receipt of the briefs.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

Zarate

Lucas Zarate has been a firefighter for the City of Paterson for sixteen years. Zarate had always wanted to be in service. His two older brothers are either retired police officers or firefighters, and Zarate wanted to serve as well, so after graduating from the Don Bosco Technical High School in 1999, Zarate applied to both the police and fire academies.

Zarate was eventually accepted to the fire academy and began with the Paterson Fire Department in 2005. He also became an emergency medical technician that same year. Before then, in 2001, Zarate enrolled in college at William Paterson College, and has been attending part time, on and off, ever since, having taken an extended break when he became a firefighter. Zarate has one class remaining and is scheduled to graduate later this year. He had never been accused of cheating.

To be sure, Zarate was earnest in his testimony and trustworthy with his answers. I do not believe for a minute that Zarate cheated. I believe that both Zarate and Alemany are victims of circumstance.

Zarate and Alemany are friends. Zarate testified that he has worked with Alemany in the same company at the Paterson Fire Department for the past nine years and that they initially bonded over their passion for their work. Zarate further testified that they socialize outside of work, including with their families for celebrations. They are both family men with young families and their friendship felt both familiar and understandable.

Zarate sought promotion to captain in 2014 and underwent a rigorous course of study. Zarate testified that he read the requisite books, attended a prep course, spoke with numerous coworkers, and studied with other firefighters, including Alemany. This course of study took eighteen months.

The promotional examination for fire captain is a seventy-five-multiple-choice-question test, which candidates have ninety minutes to complete. Zarate testified that he answered only fifteen or sixteen of the seventy-five questions wrong, which placed him on the eligibility list, but not high enough to be promoted during that cycle, so Zarate readily decided to try again. That test is the subject of this case. The test was announced in August 2017, but Zarate had already embarked on that same rigorous course of study in anticipation of the announcement. This time, Zarate read new materials, attended a different prep course, spoke to more officers, and formed a study group. Zarate further testified that the study group met three times a week, that he read every night, and that he spoke to fellow firefighters almost exclusively about the test while at work. The study group even came up with mock tests and used a white board for hypotheticals.

On November 18, 2017, the date of the test, Zarate met Alemany, along with several other firefighters, at a local diner for coffee and breakfast before the test. The test was scheduled for 9:30 a.m. at Morris County Community College, and the coffee and breakfast allowed the firefighters to relax before the test. Zarate testified that the conversation was lighthearted and that they reminded each other to take their time on the test and to fill out the answer sheets carefully.

When the firefighters arrived at the college, they were directed to a room filled with conference tables. Zarate estimated that 100 firefighters were crowded into this room, and he assumed that this room was merely a holding room, a room where they would remain until they were ushered into classrooms with desks for the test, because the last time that he took the test, he took the test in a classroom with individual desks, and the firefighters sat two desks apart. Zarate testified that he saw Alemany in the back of the room, so he walked over to talk to him while they waited to be directed into the classrooms for the test. Zarate further testified that when he learned from Alemany that they were going to be taking the test in that room and not in a classroom with individual desks, he simply sat down in the empty chair next to Alemany, which was at the head of the table. This was circumstance; it was not planned.

The conference tables were approximately three feet by five feet with six chairs (two on each side and one at each head), so when Zarate sat down in the empty chair next to Alemany, Alemany was to his right. Tellingly, Zarate testified that if the conference table had been a table at a restaurant, he would have asked for a bigger table. In short, the table was simply too small for six people, let alone six large firemen and their test documents—which included two test booklets and one answer sheet (a Scantron sheet) for each of them. As such, the two test booklets and the Scantron sheet could not be spread out before each fireman without one fireman encroaching upon another.

To tackle the space, Zarate placed his Scantron sheet beneath his chair and kept the two test booklets in front of him, one on top of the other. Booklet A contained the scenarios and questions that needed to be answered, and Booklet B contained the diagrams or visuals that the scenarios and questions referenced. Zarate testified that the test strategy he learned was to read through Booklet A in the first sixty minutes, during which time he would circle the answer or write the letter of the answer in the margin if he was sure of it. If he was unsure of the answer, he either skipped the question or marked it with an X or an underline, so he could return to the question later. The second time around he would open Booklet B for reference, notwithstanding the lack of space before him, and write the letter of the answer in the margin of Booklet A if he was sure of it, or mark the question once again in Booklet A if he was still unsure of it. The third time

around he would write the letter of his final answer in the margin of Booklet A. In the final minutes, he would transfer all his answers in Booklet A to the Scantron sheet.

Zarate testified that he had fifteen to twenty minutes left when he finished transferring his answers from Booklet A to the Scantron sheet. Zarate further testified that he was "annoyed and agitated" because the test was "challenging and difficult." Zarate later testified that he was sensitive to filling out the Scantron sheet because when he sat for the SAT in high school, he mistakenly transferred his answers to the Scantron sheet incorrectly, having "double-answered" one question, which threw off all the other answers that followed.

Regarding the alleged cheating in this case, Zarate testified that a monitor approached him between thirty and forty-five minutes before the test ended to tell him to cover his answers in Booklet A, which Zarate said he did by hunching over it. Zarate said that the monitor said, "I need you to cover up your paper." Zarate was emphatic that he did not cheat. He declared that he did not cheat, that he did not look at Alemany's work, and that Alemany did not look at his. He reiterated that he did not communicate with Alemany during the test, or with anyone else for that matter. I believe him.

In the remaining fifteen to twenty minutes, Zarate waited for the papers to be collected and then went to the supervisor in the front of the room to file a formal appeal of the test conditions because he wanted his objections to the test conditions known.

Dick

Robert Dick was the test proctor who approached Zarate near the end of the exam to ask him to cover his booklet. It was the first time that Dick had ever served as a proctor of a test. Dick testified that his full-time job is as a "loss prevention manager" at Target, which means that he "oversees security and investigates theft." Dick further testified that he saw "glances" between Alemany and Zarate "three times," so he "worked his way around the room so as not to be obvious" and stood behind them to their right, about five feet away. Dick testified that he could see writing in the test booklets from that vantage point and asked Zarate to cover his test booklet, which he said Zarate did. Dick

corroborated that this interaction occurred near the end of the exam. He also reported this occurrence to the supervisor in the front of the room.

More than five months later, his supervisor, Michelle Karngbaye, asked Dick to search his memory and memorialize what he had observed. In an email dated April 30, 2018, but forwarded on May 1, 2018, Dick wrote to Karngbaye that he observed two candidates who “appeared to be sharing answers.” In other words, Dick did not state that they cheated. He was equivocal:

Hi Michelle,

Per our conversation, here were my observations regarding the 2 candidates that appeared to be sharing answers on the Fire Chief's exam that I assisted in administering on 11/18/17.

The two candidates I observed were sitting on either edge of the corner of the same testing table, with the candidate appearing to give the answers sitting at the “head” of the table, and the apparent recipient sitting to his right. From across the room, I observed the candidate at the head of the table appearing to look at the testing sheet of the candidate to his right, and I observed what I believed to be nonverbal interaction between the two candidates. I observed this behavior several more times over the course of approximately 15 minutes, after which I stepped more closely to the table at which the candidates were seated. When I was approximately 5 feet from the table, looking from an angle between the two candidates, I could see that the candidate at the head of the table had been writing test answers in large letters in the right-hand margin of his testing booklet. I continued to watch from this distance and saw that the candidate to his right was looking at the head of the table's test booklet and his test sheet, which he was looking over himself to the far right of his testing space. I don't recall exactly what I then said to the candidate at the head of the table, but was to the effect of asking him to cover the test answers that he was leaving visible. This interaction was approximately 5 seconds in length, and was met with no objection. The candidate did comply with the request I made at that point. This interaction was near the end of the testing time.

I hope this helps. Please feel free to reach out if you have any questions.

Robert

[R-1.]

Dick was also equivocal at the hearing. During cross-examination, Dick admitted that he did not know if there had been any cheating. He admitted that there had been “no intentional eye contact,” and he admitted that he could not tell where or what either Alemany or Zarate were looking at or why. Yet, he still stated immediately thereafter that there were “brief glances at each other’s booklets” and “eye contact with one another” before landing on his statement of “nonverbal interaction.” Above all, Dick admitted that he did not know if there had been any cheating, and surrendered that it was not his place to make such a determination.

Still, Dick backtracked once more during cross-examination to state that Alemany and Zarate merely looked in each other’s direction, but repeated that he could not tell what they were looking at or why. In fact, he was not even sure if there had been any eye contact. When pressed by me, he returned to his characterization of “nonverbal interaction,” modifying that the three glances he observed were not connected to anything. Significantly, he shared his concern about the test conditions—corroborating how cramped and crowded they were.

Whether reviewing Dick’s email or Dick’s testimony, the ultimate finding is the same: Dick did not allege that either Alemany or Zarate cheated on the exam. All he could write and say is that he saw “nonverbal interaction” between the two. Yet through a twisted game of telephone with the supervisor of the test, Karngbaye, and the director of the test, Michael Johnson, the conclusion was still reached that Alemany and Zarate had cheated.

Karngbaye

Karngbaye is a human resource consultant for the Civil Service Commission. She serves as the supervisor of the Information Center at the Civil Service Commission and served as the supervisor of this examination at Morris County Community College on November 17, 2018. Karngbaye has been working for the Civil Service Commission for

the past thirty-five years and has been either monitoring or supervising these kinds of tests for the Civil Service Commission since 1995. Karngbaye testified that as the supervisor for this particular test that particular day, she was the one responsible for the test materials, the test conditions, and the test monitors.

Karngbaye, however, testified that she was not a witness to the alleged cheating. She said that she sat in the front of the room and merely received a report from Dick about cheating. At least that is what she took from Dick's report. She also testified that she did not receive any report or any concern from any other monitor, and five other monitors patrolled the overcrowded room that particular day. Ultimately, what Karngbaye wrote in her report is what, I believe, steered Johnson to conclude that Alemany and Zarate cheated.

In her report, Center Supervisor Report on Conduct (J-5), Karngbaye listed what was reported to her, including three separate complaints about the test conditions and Dick's lone concern about the alleged cheating. The report is handwritten and only one page long. Only two entries pertain to this case, and they are reproduced below in full. Neither state that Alemany or Zarate cheated, they merely imply it:

3 Candidates appealed test administration—

6 candidates to a table, not enough room to look at both booklets and answer sheets

Monitor Rob noticed candidates Lucas Zarate and Gremier Alemany looking at each other papers.

One wrote large answers in the book the other looked

[J-5.]

On cross-examination, Karngbaye agreed that the test center was crowded, but she would not admit that the candidates sat too close to one another.

Johnson

Michael Johnson is the director of Test Development for the Civil Service Commission and the one who made the final determination that Alemany and Zarate had cheated. He has worked for the Civil Service Commission for the past thirty-five years and has been in the Analytics Department since 2016. Yet Johnson performed no analytics in this case. He simply concluded that Alemany and Zarate cheated because of two handwritten sentences Karngbaye scratched in her report and the fact that Alemany and Zarate had many of the same right and wrong answers. Moreover, Johnson admitted that he and his committee reached the ultimate conclusion that Alemany and Zarate cheated without performing a probability study to support their statistical inference. Worse, Johnson dismissed such a notion with an attitude of certitude that lacked any humility and described a committee process that was just as presumptuous as it was incomplete. As such, Johnson was not a trustworthy witness upon whose testimony I could rely. Below are some of the additional reasons why his own description of his own conduct in this case left me no choice but to find that his testimony was speculative on the record and not evidentiary.

Johnson testified that he read Dick's email to Karngbaye, that he looked over both Zarate's and Alemany's test booklets, that he saw the large letters Zarate wrote as part of his test-taking strategy, and that he saw that Alemany and Zarate had many of the same right and wrong answers.

On cross-examination, Johnson provided additional details. He testified that he shared his observations with a committee of eight other people, and that they reached the same conclusion that he had—but Johnson admitted that they never compared Zarate's and Alemany's answers to anyone else's, that they never spoke to Dick about what he did and did not observe, and that they never spoke to Alemany or Zarate about anything. In fact, Johnson admitted that they simply assumed that Zarate had written his answers in large letters as part of a cheating scheme so Alemany could see them and enter them on his Scantron sheet as his own. Johnson also admitted that he never tested this assumption by comparing what Alemany wrote in his test booklet to what he entered on his Scantron sheet. Above all, Johnson admitted that he did not know who circled

what when in his test booklet and who filled out what when on his Scantron sheet. Finally, Johnson testified that he thought Dick had stopped the presumed cheating once he observed it—but Johnson backed away from his responsibility as the ultimate decision maker by stating that Dick and Karngbaye had already determined that Alemany and Zarate had cheated, even though that assertion appears nowhere in either Dick's email or Karngbaye's report. Parenthetically, Johnson never explained why it took five committee meetings to reach such an unsubstantiated conclusion. Worse still, Johnson testified that he and the committee had made the determination that Alemany and Zarate had cheated before he had even received Dick's email about what he did and did not see. As such, his determination was based on circumstance: the fact that Alemany and Zarate sat next to each other in cramped and overcrowded test conditions, the fact that Zarate wrote his answers in large letters in his test booklet so he could transfer them more readily to his Scantron sheet under strict time limitations, and the fact that Alemany and Zarate had many of the same answers. What Johnson did not have, of course, was a probability study to support the statistical inference that the existence of the same right and wrong answers meant that Alemany and Zarate had cheated. Without such a study, no evidence exists to support the warrant.

On redirect examination, Johnson tried to provide that support, but in doing so, he merely underscored his faulty reasoning. To prop up his conclusion that Alemany and Zarate cheated, Johnson asserted, once again without substantiation, that 90 percent of the candidates who take these tests circle their answers in the test booklets before transferring them to the Scantron sheets, and that 100 percent of the candidates who do cheat do so by writing their answers in large letters in the test booklets for others to see. Even so, Johnson admitted that he had no idea how Alemany and Zarate were even positioned during the exam to effectuate this scheme, and he never accounted for why Zarate, who is part of the 10 percent of candidates who do not circle their answers, might not have cheated, unless what he really means is that 100 percent of candidates who write their answers in large letters in their test booklets cheat. Regardless, his thought process was never completed, and his statistical analysis was never undertaken. Meanwhile, the cramped and overcrowded test conditions were never considered at all.

The truth also disproves Johnson's theory of the case: Of the seventy-five questions, only one of the answers Alemany had filled in on his Scantron sheet matched what Zarate had written in large letters in his test booklet *and* differed from what Alemany had circled in his test booklet (question 12). Meanwhile, twelve of the answers Alemany had filled in on his Scantron sheet differed from what Zarate had written in large letters in his test booklet (questions 7, 10, 17, 27, 47, 49, 52, 54, 55, 56, 66, and 75). This alone undermines Johnson's theory of the case. Another inconvenient truth also exists: the answers Alemany filled in on his Scantron sheet match nearly exactly what Alemany circled in his test booklet. Moreover, Alemany circled the answers in his test booklet before Zarate even wrote any large letters in his—which can be gleaned below.

Alemany

Alemany had wanted to go to college after high school, but he enrolled in the National Guard for its benefits instead. Alemany enlisted in 2002 and trained in 2003. He spent six of the following eight years on active duty. During that time, Alemany also enrolled in Morris County Community College, but was deployed to Iraq in the summer of 2004 and spent eleven months there. It was during his time in Iraq that his commanding officer suggested that Alemany become a firefighter. Alemany testified that he enjoyed his time in the military immensely and that his sergeant suggested that what Alemany liked about the military he would also like about a fire department—its paramilitary structure, its comradery, and its problem-solving requirements.

Alemany applied to become a firefighter upon his return from Iraq and was accepted to the fire academy in April 2008. While he waited to be accepted to the fire Academy, Alemany worked in the pharmaceutical industry. Alemany was already married when he started the academy, and he was redeployed to Iraq in the middle of his training at the academy. Alemany spent nine more months in Iraq, missing the birth of his first child, but returned safely in the summer of 2009. Alemany has been with the ladder company in Paterson ever since.

Alemany has a clear passion for firefighting and for public service. He is a determined and responsible family man whose testimony I found most credible. I do not

think for a split second that Alemany cheated. That is not who he is. In my estimation, Alemany is a man of integrity—and his testimony brings home why the charges against both him and Zarate must be dismissed.

Alemany sat for this exam twice before. Alemany testified that the first time he sat for the test it was 2011, and that he did not prepare for it because he felt that he was too young and inexperienced due to his absences engendered by his deployment. Still, Alemany sat for the exam for the experience. Alemany said that he got about two-thirds of the answers right.

Alemany testified that the second time he sat for the test it was 2014, and he prepared by taking a prep class. Alemany said that he read and studied the pertinent materials and that he joined a study group, which included Zarate. Alemany commented that he must have read thousands of pages to prepare for that exam. Alemany continued that he took the test at Paramus Catholic High School and that he sat at his own desk in a classroom spaced approximately thirty chairs apart from the other test takers.

Alemany also had a test-taking technique: First, he read the scenarios in Booklet A; second, he highlighted the relevant parts and circled the right answers if he was sure of them or the questions if he was unsure; third, he transferred his answers to the Scantron sheet. Alemany stated that he was pleased with his result (he got 85.270 percent of the answers right), but that he was not pleased with his performance on the oral test. He said that he got “tripped up” on one scenario and that it “sunk his battleship.”

Alemany testified that for this test, he studied even more. Alemany said that he knew the test would be offered in November 2017, so he began his study in April 2017. Alemany commented that he reread the books that he had studied the previous time and focused on the highlights. He also took another, different prep class, which ran from April 8, 2017, to September 28, 2017.

As for the test, Alemany corroborated what Zarate said. Alemany testified that a mass text was sent out to the study group the morning of the exam to meet at the local diner for breakfast. Alemany further testified, that when he and the others arrived at

Morris County Community College for the test, they were crowded into a room, which he assumed was a holding room in which they would remain before assignment to a classroom for the test. Alemany said that he was surprised when he learned that the test would be taken in that overcrowded room. He also said that Zarate sat at the head of the table to his right.

Alemany testified that it took him seventy-five of the ninety minutes to go through the test once, that he did not have time to pay attention to what anyone else was doing, and that he had no idea which booklets Zarate had and where. He also did not recall the test monitor; he only remembered that someone said something to Zarate near the end of the exam when he was filling in his Scantron sheet. Alemany added that he too appealed the test conditions, and recalled that two other people appealed the test conditions as well, someone who stood in line ahead of him and someone who stood in line behind him.

To be clear, Alemany did not deny that he saw Zarate's test booklets. He admitted that he did, that he saw them, that they were visible to him, but he insisted that he did not look at them, that he did not copy answers from them, that he did not cheat. And I believe him. In short, Alemany did not have time to be bothered. As both Alemany and Zarate demonstrated amply at the hearing, the test scenarios were involved, their multiple-choice answers were similar, and no easy answers were to be found anywhere on the exam. To answer these questions correctly involved significant preparation and careful reading. It also required clutch performance at test time. At least two to three passes through the test were a well-documented test strategy, and time was needed at the end of the test to transfer the answers from the test booklets to the Scantron sheets. Cheating under these circumstances was still possible, but I believe both Alemany and Zarate wholeheartedly when they assert that they did not. More significantly, the record is devoid of any evidence, let alone a preponderance of the evidence, that they did. Accordingly, I repeat that neither Alemany nor Zarate cheated on the exam in any way whatsoever.

CONCLUSIONS OF LAW

Under N.J.A.C. 4A:4-6.3, appellants bear the burden of proof in examination and selection disqualification appeals, and they do so by a preponderance of the evidence. In this case, the evidence preponderates that neither Alemany nor Zarate cheated. As discussed above, the witnesses who testified on behalf of the Division of Administrative Services were bereft of details and understanding. In fact, Dick, who proctored the test, and who did so for the very first time, never even alleged that either Alemany or Zarate cheated, either during the exam, in his statement, or at the hearing. His statement that he witnessed “nonverbal interaction” has no identifiable referent, and his refusal to make his statement more specific and concrete was damning. Moreover, Johnson, who made the ultimate decision that Alemany and Zarate cheated, admitted at the hearing that he had no evidence of cheating, other than his unstudied opinion that the similarity of right and wrong answers made it so. Finally, the fact that only one of the answers Alemany had filled in on his Scantron sheet matched what Zarate had written in large letters in his test booklet *and* differed from what Alemany had circled in his test booklet disapproves Johnson’s theory of the case—as does the fact that twelve of the answers Alemany had filled in on his Scantron sheet differed from what Zarate had written in large letters in his test booklet, the fact that what Alemany had filled in on his Scantron sheet matched nearly exactly what Alemany had circled in his test booklet, and the fact that Alemany had circled the answers in his test booklet before Zarate had even written any large letters in his. None of this was considered by the committee. Accordingly, I **CONCLUDE** that this case against Alemany and Zarate should be **DISMISSED**.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case against Alemany and Zarate be **DISMISSED**. I further **ORDER** that their scores be **REINSTATED** and that Alemany and Zarate be **RESTORED** to the list of eligibles. Finally, I **ORDER** that both Alemany and Zarate be **AWARDED** all back pay, seniority, counsel fees, and costs.

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 case. 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 under N.J.S.A. 52:14B-10.

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.

June 24, 2022
DATE


BARRY E. MOSCOWITZ
Acting Director and Chief ALJ

Date Received at Agency: June 24, 2022

Date Mailed to Parties: June 24, 2022

dr

APPENDIX

Witnesses

For Appellants:

Lucas Zarate
Gremier Alemany

For Respondent:

Robert Dick
Michelle Karngbaye
Michael Johnson

Documents

Joint:

J-1 Test Booklets A and B for Zarate dated November 18, 2017
J-2 Test Booklets A and B for Alemany dated November 18, 2017
J-3 Scantron Sheet for Zarate dated November 18, 2017
J-4 Scantron Sheet for Alemany dated November 18, 2017
J-5 Center Supervisor Report on Conduct dated November 18, 2017
J-6 Color Scantron Sheet for Zarate dated November 18, 2017
J-7 Joint Stipulation of Facts dated October 26, 2021

For Zarate:

P-1 to P-8 Not in Evidence
P-9 Test Score for Zarate dated November 18, 2017
P-11 Test Score for Alemany dated November 18, 2017
P-12 to P-23 Not in Evidence
P-24 Seniority Score Report dated November 15, 2018
P-25 Eligible/Failure Roster dated January 1, 2019
P-26 Test Administration Appeal/Comment Form by Zarate dated November 18, 2019

- P-27 Test Administration Appeal/Comment Form by Alemany dated November 18, 2019
- P-28 Not in Evidence
- P-29 Letter from Civil Service Commission to Alemany dated April 11, 2018
- P-30 to P-31 Not in Evidence

For Alemany:

- A-1 Letter from Paul Drennan to To Whom It May Concern listing the classes Alemany took at the Fire Officer Training Academy undated
- A-2 to A-15 Not in Evidence

For Respondent:

- R-1 Email from Dick to Karngbaye dated April 30, 2018