



STATE OF NEW JERSEY

In the Matter of John Shaw, Fire
Lieutenant (PM1067V), Belleville

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

CSC Docket No. 2022-1186

List Removal Appeal

ISSUED: February 1, 2023 (SLD)

John Shaw, represented by Robert K. Chewning, Esq., appeals Belleville’s (Belleville) request to remove his name from the eligible list for Fire Lieutenant (PM1067V) due to an unsatisfactory employment history.

The appellant, a veteran, took and passed the promotional examination for Fire Lieutenant (PM1067V), which had a closing date of August 21, 2017. The resulting eligible list promulgated on January 17, 2019 and expired on January 16, 2022. Four names, including the appellant’s name as the first listed veteran eligible were certified to the appointing authority on September 20, 2021 (PL211096). In disposing of the certification, the appointing authority requested the removal of the appellant’s name on the basis of an unsatisfactory employment history and appointed the remaining three eligibles, effective October 1, 2021. Specifically, the appointing authority claimed that since 2011, the appellant has violated numerous departmental rules; received multiple written reprimands; received a four working day suspension in 2012; was removed from the Arson Investigation Unit in 2016; received a four working day suspension and had his driving assignment privileges revoked in 2017; and received a 16 working day suspension in 2018. In support, the appointing authority submitted several Preliminary Notices of Disciplinary Action (PNDA) and Final Notices of Disciplinary Action (FNDA). For example, it provided a May 24, 2018 FNDA indicating that the appellant received a 16 working day suspension on charges of insubordination, conduct unbecoming a public employee and other

sufficient cause.¹ The FNDA also noted that the suspension was to begin on May 31, 2018 and end July 31, 2018 “(1 working day/24hr shift).” Specifically, the appointing authority indicated that the appellant was arrested on May 31, 2017, and pled guilty to violations of *N.J.S.A. 2C:29-1A* and *N.J.S.A. 2C:33-2A(1)*.

On appeal, the appellant maintains that his employment history was not a basis for his removal. Specifically, the appellant argues that his two arrests, one in 2016 in Texas, and another in 2017 in Belmar, New Jersey are not sufficient to uphold his removal as they occurred over five years earlier. Additionally, the appellant notes that although he was arrested in Texas on charges of public intoxication and failure to obey the lawful order of a Police Officer, all charges were dismissed and the charges expunged. The appellant also contends that with regard to the arrest in Belmar, he was charged with obstructing administration of law and disorderly conduct; he pled guilty pursuant to a conditional discharge and served a one-year probation period. The appellant maintains that he completed his probation and that the arrest and charges were subsequently expunged.

Additionally, the appellant argues that, as part of his “disciplinary record,” the appointing authority inappropriately includes items that did not result in any discipline. Moreover, the appellant disputes that he received a suspension in 2012, as the FNDA lists the discipline as “Other . . . forfeiture of four (4) vacation days.”² The appellant alleges that the appointing authority treated him differently than the other Fire Fighter who was involved in that matter by imposing discipline only on the appellant.

Moreover, the appellant maintains in his 12 years with the appointing authority, he has only received eight disciplinary matters, including written reprimands, the “other” noted above, and two suspensions, which is less than other individuals. Moreover, the appellant maintains that his disciplinary history is not as severe as one of the eligibles who was appointed to the title of Fire Lieutenant from the subject certification even though that individual entered into a “last chance agreement” after a positive drug test and entering into rehabilitation.³

Further, the appellant maintains that none of the discipline on his record is sufficiently close in time to warrant his removal from the subject eligible list. The appellant also asserts that since 2017, he has worked without incident, and has served as an “Acting” Fire Lieutenant on 126 shifts from 2013 to 2021. Moreover, the

¹ There is no record that the appellant appealed this suspension to the Civil Service Commission (Commission).

² The February 22, 2012 FNDA indicates that the appellant was charged with violations of departmental policies for a verbal altercation with another Fire Fighter and that the penalty was forfeiture of four vacation days. Regardless of the appellant’s attempt to classify this as a non-suspension, the forfeiture of vacation days would be considered a suspension.

³ Agency records indicate that this individual had one major disciplinary suspension in 2010.

appellant maintains that he meets the job requirements to be promoted to the subject position.

Finally, the appellant argues that the actual reason he was not appointed was due to his political affiliation with the Democratic Party. Specifically, the appellant maintains that he has met with hostility and opposition due to his political affiliation. For example, the appellant claims that in March 2017, during a pro-Trump rally he was at protesting, a Fire Lieutenant verbally berated him and called him homophobic slurs when he confronted the appellant about protesting. The appellant states that he believes the Fire Lieutenant was intoxicated and even attempted to get him arrested by speaking to Police Officers who were on-duty at the rally. The appellant claims that since then, co-workers claimed that he had brought disrepute unto the service for protesting, and he has continued to be called homophobic slurs.⁴ Moreover, the appellant asserts that it is known that he is a Democrat, a majority of the Fire Department are affiliated with the Republican Party and the current Mayor of Belleville supported a Republican candidate for Governor. The appellant argues that it is, therefore, obvious that his disciplinary record was a pretextual reason for his removal from the subject eligible list, and thus he is entitled to a hearing. In relevant part, the appellant submits in support a certification, time sheets with his “Acting” status noted, and a 2016 order of dismissal from the City of Austin, Texas.

The appointing authority, represented by David L. Epstein, Esq., argues that the appellant’s name was properly removed from the certification on the basis of his unsatisfactory employment record. In this regard, it argues that the appellant’s extensive history of misconduct, arrests, rules infractions, dishonesty, carelessness, work ethic and lack of commitment to the profession, disqualify him from consideration. The appointing authority notes that the appellant has a well-documented lack of respect for authority, as evidenced by his two arrests and multiple violations of departmental rules, some of which have resulted in suspensions. The appointing authority concedes that, although the appellant’s most recent years with it have not had any disciplinary matters, that alone cannot overcome the seriousness of his overall disciplinary record.

Moreover, the appointing authority argues that the appellant’s use of his “Acting” service as a Fire Lieutenant is misleading. Specifically, the appointing authority notes that the “Acting” position is not recognized by civil service, and it is instead a *per diem* position utilized by it as a budgetary measure to control overtime and to compensate for inadequate manpower. Moreover, the responsibilities of an “Acting” Fire Lieutenant are merely temporary and cease at the end of shift. The appointing authority notes that even during the appellant’s time as “Acting,” he never assumed the role of Incident Commander “In-Charge” of a working structural fire,

⁴ It is noted that the appellant provided no other names of individuals who he claimed engaged in the harassing behavior, other than the name of the individual who was at the pro-Trump rally.

and thus his current suggestion that he has demonstrated his qualifications is inaccurate.

In summary, the appointing authority notes that the appellant's employment record evidences that during 2016 through 2017, his behavior became reckless and resulted in him twice being arrested, led to him being thrown off the Arson Unit, having his Fire Department driving privileges suspended, and receiving several written reprimands, and a minor and major suspension.

CONCLUSION

Initially, the appellant requests a hearing in this matter. List removal appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. For the reasons articulated below, no material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C. 4A:4-6.1(a)7*, allows the removal of an individual from an eligible list who has a prior employment history which relates adversely to the position sought. Additionally, *N.J.A.C. 4A:4-6.3(b)*, in conjunction with *N.J.A.C. 4A:4-4.7(d)*, provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error. Further, *N.J.A.C. 4A:4-4.7(a)1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)9*, allows the Commission to remove an eligible's name from an eligible list for other sufficient reasons. Removal for other sufficient reasons includes, but is not limited to, a consideration that based on a candidate's background and recognizing the nature of the position at issue, a person should not be eligible for appointment.

In the instant matter, the appellant's name was removed from the subject eligible list based on his employment record. Specifically, the appointing authority provided that the appellant's employment history included a 16 working day suspension in 2018, four-day suspensions in 2017 and 2012, multiple written reprimands and counselings, revocation of Fire Department driving privileges, and removal from the Arson Investigation Unit. On appeal, the appellant argues that his disciplinary record only evidenced eight disciplinary matters, including written reprimands, a "non-suspension" in 2012, and two suspensions, one each in 2017 and 2018. The appellant maintains that his disciplinary history was remote in time and was less severe than one of the individual's appointed from the subject certification who had entered into a "last chance agreement." Moreover, the appellant argues that his service as an "Acting" Fire Lieutenant establishes that he more than meets the requirements for this position.

The Commission does not agree that the appellant's disciplinary history was insufficient to support the removal of his name from the subject eligible list. In this regard, the appellant received a 16, 24-hour working day suspension in 2018. Initially, it must be noted that such a suspension is equivalent to a 48 working day suspension. The Commission has previously found that a single working day, for disciplinary purposes, cannot be calculated based on anything more than an eight-hour working day. *See In the Matter of William Brennan* (MSB, decided July 7, 1998) (Five-day standard has been interpreted to refer to five working days of not more than 40 hours of pay); and *In the Matter of Michael Larino* (MSB, decided June 21, 2006) (Hearing granted to a Fire Fighter who was suspended for five, 24-hour days totaling 120 hours). Thus, in this matter, the appellant's suspension for 16, 24-hour days totaled 384 hours, or a 48 eight-hour working day suspension.⁵ Moreover, this suspension occurred in 2018, after the July 2017 closing date for the subject examination, and less than three and one-half years prior to the subject certification (PL211096) in September 2021. The appellant's record also evidences four working day suspensions in 2017 and 2012.

Additionally, although the appellant served as "Acting" Fire Lieutenant for occasional shifts for several years, this does not establish that the use of his disciplinary history was inappropriate. For example, in *In the Matter of Robert Pienciak* (CSC, decided October 17, 2018) the Commission determined that the fact the appellant may have been performing the duties of the subject title on an "acting" basis did not mean that the appointing authority did not have sufficient justification to find that the appellant's disciplinary history made him not suitable for a permanent appointment in the subject title.

Further, the Commission finds that the appellant's employment history which includes a recent major disciplinary action and several minor disciplinary actions clearly relates adversely to the title sought. The Commission notes that the position of Fire Lieutenant is reserved for employees who exhibit leadership skills, a positive work ethic, and respect for the rules in regulations. Thus, a disciplinary history that includes a recent major disciplinary action reflects serious offenses and shows a lack of respect for such tenets. *See In the Mater of Wayne Hundemann* (MSB, decided May 10, 2006).

The appellant claims that the use of his employment history was only a pretext for the actual reason for the removal of his name from the subject eligible list. Namely, he contends he was removed due to his political affiliation. In this regard, the appellant argues that a Fire Lieutenant and several co-workers use homophobic slurs and berated him for protesting at a Pro-Trump rally, and that the Mayor voted

⁵ To the extent that the appellant's official County and Municipal Personnel Record (CAMPS) indicates a 16 working day suspension, that record should be updated to reflect that suspension was for 16, 24-hour days. Regardless, the Commission notes that even a 16 working day suspension, which is a significant major discipline, given the proximity to the certification date, would be sufficient to support removal from a list for a supervisory-level public safety position.

for a Republican candidate. However, other than these tenuous allegations, the appellant has presented no evidence or documentation that anyone with the authority to appoint or remove him from the subject eligible list engaged in any discriminatory behavior. Further, his voting for a candidate in the opposing party or being a known member of that party is not evidence that the appellant was treated differently due to his political affiliation when he was considered for appointment from the list. Regardless, the Commission has found that his significant disciplinary history provides a legitimate basis for his removal from the list.

Finally, the appellant maintains that one of the individuals who was appointed had signed a “last chance agreement,” which is further evidence that the appointing authority’s assertion that he had an unsatisfactory employment record was pretextual. The Commission does not agree. In this regard, agency records for that eligible only reveal that he had one major disciplinary action, a suspension in 2010, which is more than 11 years from the certification date. Regardless, there is no substantive evidence establishing that, in its discretion, the appointing authority did not properly consider the appellant’s disciplinary record in making its determination. Accordingly, based on the foregoing, the Commission finds that the appellant’s employment history constitutes sufficient cause to remove his name from the eligible list for Fire Lieutenant (PM1067V), Belleville.

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 1ST DAY OF FEBRUARY, 2023

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