



STATE OF NEW JERSEY

In the Matter of B.M., Fire Fighter
(M1862W), Passaic

CSC Docket No. 2021-1589

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

List Bypass Appeal

ISSUED: July 19, 2023 (SLK)

B.M., represented by James J. Carroll, Esq., appeals the bypass of his name on the Fire Fighter (M1862W), Passaic eligible list.

By way of background, the appellant appeared on the M1862W eligible list, which promulgated on March 29, 2019, and expired on April 19, 2023. The appellant's name was certified on October 14, 2020 (OL200792) for a position in the subject title. A total of 25 names were certified. The first and second positioned candidates were appointed, the third positioned candidate was bypassed, the fourth and fifth positioned candidates were retained for future certifications only, the sixth through ninth positioned candidates were appointed, the appellant, the 10th positioned candidate, was bypassed, the 11th and 12th positioned candidates were removed, the 13th positioned candidates was appointed, and the 14th through 25th positioned candidates were either not reachable for appointment or removed.

On appeal, the appellant initially states that he was advised by a friend who works for the appointing authority that he was bypassed because he failed a psychological examination. However, the appointing authority has not provided him notice that he failed the psychological examination.

In response, the appointing authority, represented by Joseph P. Horan, II, presents that the appellant was not removed, but bypassed. It states that it properly bypassed him because its outside psychological expert concluded that the appellant lacked the maturity and sound judgment to be a Fire Fighter. The appointing

authority provides the appellant's Driving While Ability Impaired (DWAI) violation after exiting the Holland Tunnel into New York City where he admitted during his psychological evaluation that his blood alcohol level was "1 or 1.1 or 1.2, something around there," which was over six times the New York State legal limit. Specifically, in 2020, while under the legal drinking age, the appellant, after consuming two shots of Cirac, one shot of Hennessy, and two to three beers, he made the decision to drive in New Jersey and through the Holland Tunnel to attend an "after-party" in New York City. The appointing authority asserts that the appellant was operating a motor vehicle, while impaired, and traveling some of the most densely congested roadways in the tri-state area, where he easily could have hurt himself or others. It notes that in New Jersey, for persons over 21, 0.08 is the blood alcohol limit and, for persons under 21, it is a mere 0.01. The appointing authority argues that good judgment is an essential element of all Fire Fighters as the position involves adherence to safety protocols and the failure to follow these protocols could mean the difference between life and death. Therefore, the appointing authority provides that the appellant's actions indicate that he lacks the good judgment to be a Fire Fighter and his bypass was warranted. Additionally, during his psychological evaluation, the appellant stated that honesty was one of his best personality traits. However, on his application in response to a question asking if he had ever been charged with crimes or detained by the police, instead of indicating that he was convicted of DWAI in New York State, he wrote, "Pull over [sic] and arrested for an alcohol related offense which was reduced to a traffic violation." The appointing authority contends that the appellant was trying to downplay the seriousness of the offense while it notes that this incident led to his driver's license being suspended for one year and he was required to pay \$1,750 in fines. The appointing authority also highlights the appellant's 1.92 high school GPA. Additionally, it presents that the appellant held nine different jobs since 2016, with seven lasting between one and four months. Therefore, the appointing authority believes that the appellant's employment history demonstrates that he lacks the commitment that it takes to be a Fire Fighter, and it would be a waste of resources to invest the time and expense needed to attempt to successfully onboard him as a Fire Fighter.

In reply, the appellant argues that the appointing authority has violated Civil Service law and rules by bypassing him under the Rule of Three. He asserts that if he failed his psychological examination, there is a procedure for him to appeal his removal on that basis. Instead, by bypassing him, the appellant believes that he has been put in "purgatory" as he is prohibited from exercising his rights to appeal his psychological examination.

Concerning his DWAI, the appellant admits that he made a mistake and he had succumbed to the pressure of him driving as he was the only person who had a car. He states that he has corrected his mistake by only having one drink at dinner, and he does not drink and drive. Further, the appellant asserts that he was not being untruthful when describing the incident as his DWAI was a traffic violation. Regarding his work history, the appellant presents that he was a college student

during this time, and he was balancing school while working part-time jobs. Therefore, he claims that the appointing authority's assessment of his work history is incorrect. He submits his own independent psychological evaluation that concludes that he is psychologically cleared to be a Fire Fighter. The appellant asserts that should the Medical Review Panel find that he is psychologically fit for duty, the appointing authority's reasons for the bypass become moot.

In further response, the appointing authority contends that after reading the appellant's appeal and the independent psychological report that he submitted, the appellant believes that because he has family members who have been Passaic Fire Fighters, he is also entitled to be one. However, it asserts that nepotism is an improper reason to be appointed as a Fire Fighter and to be appointed on such basis is a violation of the State Constitution and Civil Service law and rules. The appointing authority states that if the appellant feels that he has been put in "purgatory," he only has himself to blame by engaging in underage drinking and driving while intoxicated. Further, as the appellant remains on the list, he has the potential opportunity in the future to demonstrate that he is deserving to be appointed as a Fire Fighter. More, it highlights that the appellant's own psychological expert found him to have an "Adjustment Disorder." It presents that the Diagnostics of Statistical Manual of Mental Disorders, 5th Edition (DSM-5) defines an Adjustment Disorder as "the presence of emotional or behavioral symptoms in response to an identifiable stressor/s which occurred within the three months of the beginning of the stressors." The appointing authority states that individuals with an Adjustment Disorder typically require psychotherapy, and the purpose of the treatment is to help the individual to find new behaviors and ideas to help the person to be able to deal more effectively with the problem. If the issue is related to stress, the therapy could include relaxation training and techniques, and the person is generally told to avoid unnecessary stress. However, it provides that a Fire Fighter is a highly stressful position that involves emergency and dangerous situations. Therefore, it argues that a person who suffers from Adjustment Disorder is not psychologically fit to be a Fire Fighter.

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 disabled veterans and then veterans shall be appointed in their order of ranking.

As set forth above, the "Rule of Three" allows an appointing authority to use discretion in making appointments. See *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3i. As long as that discretion is utilized properly, an appointing authority's decision will not be overturned. 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).

A review of this matter indicates that the appointing authority had legitimate concerns regarding the appellant's ability to be a Fire Fighter. Specifically, in 2020, the appellant, while 20 years old and under the legal drinking age of 21, was arrested for DWAI. In reply, the appellant does not dispute that he engaged in the behavior which led to his DWAI arrest. Instead, he claims that his rights have been violated because he cannot challenge his failed psychological report since he was bypassed, instead of removed, he submits a psychological report from his own expert to support his claim that he is psychologically fit to be a Fire Fighter, and he explains how he has learned from his mistake and changed his behavior. However, it is noted that the subject examination closing date was August 31, 2018, which signifies that the appellant chose to engage in this dangerous and illegal behavior even though he knew he was applying to be a Fire Fighter, which demonstrates that he lacks the maturity and decision-making ability to be a Fire Fighter. Therefore, the record supports the appointing authority's decision to bypass the appellant was based on legitimate business reasons in compliance with the Rule of Three and not motivated by illegal or invidious motivation.

Additionally, it is noted that the appellant's DWAI would have also been grounds for the appointing authority to remove his name from the subject eligible list without the need for a psychological evaluation. Recent adverse conduct with law enforcement is relevant to the position sought, as such conduct is indicative of the appellant's exercise of poor judgment, which is not conducive to the performance of duties of a Fire Fighter. The public expects Fire Fighters to present a personal background that exhibits respect for the law and the rules. *See In the Matter of Jose Rivera, III* (CSC, decided July 13, 2017).

Nonetheless, the Commission is troubled by the fact that the appellant was administered a psychological examination. While the appointing authority bypassed the appellant for psychological reasons, which could have been a basis to remove him from the subject eligible list, the primary¹ behavior behind the appointing authority's decision to bypass him, his DWAI, which demonstrated that he lacked the maturity and good judgment to be a Fire Fighter, was known to it prior to subjecting the appellant to a psychological evaluation. Pursuant to 42 U.S.C.A. sec. 12112(d)(3), no medical or psychological examination may be conducted prior to rendering a conditional offer of employment. *See also N.J.A.C. 4A:4-6.5(b)* (An appointing authority may only require a medical and/or psychological examination after an offer of employment has been made and prior to appointment). An appointing authority is

¹ The appointing authority also cited secondary behavior that was known to it prior to subjecting him to a psychological evaluation including his high school GPA, his employment history, and his alleged lack of honesty regarding his description of the DWAI incident.

barred from reevaluating any information that was known prior to extending the conditional offer of employment. See Equal Employment Opportunity Commission's *ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995). Those guidelines state, in pertinent part, that in order for a conditional offer of employment to be "real," the employer is presumed to have evaluated all information that is known or should have reasonably been known prior to rendering the conditional offer of employment. This requirement is intended to ensure that the candidate's possible hidden disability or prior history of disability is not considered before the employer examines all of the relevant non-medical information.

In the present case, it appears that the disqualifying information was available to the appointing authority prior to the psychological examination. Thus, despite a technical violation of the ADA, the background of the appellant provides a sufficient reason to bypass him. Additionally, the appellant is not a veteran and can be bypassed under *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*. Compare, *In the Matter of Edison Cerezo*, Docket No. A-4533-02T3 (App. Div. October 15, 2004) (Appellate Division affirmed the decision denying appointing authority's request to remove an eligible from the Police Officer eligible list due to unsatisfactory background when eligible was subjected to a psychological examination and eligible could not be bypassed). See also *In the Matter of County Correction Lieutenant (PC2647F), Sussex County Sheriff's Office* (MSB, decided March 8, 2006) (Eligible cannot be bypassed under the "Rule of Three" in a promotional situation when he was subjected to a psychological examination after the interview process and no disqualifying issue was found).

The Commission emphasizes that the conclusion to uphold the appellant's bypass in no way condones the actions of the appointing authority. The Commission is concerned by the appointing authority subjecting the appellant to a psychological examination, and then choosing to bypass him, when it already possessed sufficient information to bypass or remove him. Therefore, the Commission directs the appointing authority to strictly comply with the requirements of the ADA in all future cases and cease subjecting any candidate to a psychological or medical examination prior to offering a candidate a conditional offer of employment when it already possesses sufficient information to bypass or remove a candidate. Should the appointing authority continue such practice, it is warned that it could be subject to fines pursuant to *N.J.A.C. 4A:4-10-2.1*.

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 19TH DAY OF JULY, 2023

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