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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Frank Brogna,  
Deputy County Emergency  
Management Coordinator (C0699P),  
Monmouth County

Request for Reconsideration

CSC Docket No. 2015-3273

ISSUED: **DEC 17 2015** (WR)

Monmouth County represented by Steven Kleinman, Esq., petitions the Civil Service Commission (Commission) for reconsideration of its attached final decision, rendered on May 6, 2015, which granted the appeal of Frank Brogna concerning the removal of his name from the Deputy County Emergency Management Coordinator (C0699P), Monmouth County eligible list on the basis of having an unsatisfactory background report.

Frank Brogna, a veteran, took the open competitive examination for the subject title, achieved a passing score, and was ranked first on the subject eligible list, which promulgated January 1, 2013 and expires January 2, 2016. His name was certified on January 7, 2013. In disposing of the certification, the appointing authority removed the appellant's name from the eligible list on the basis of having an unsatisfactory background report because the appellant allegedly failed to disclose his prior interactions with law enforcement. The appointing authority further asserted that the appellant became angry during the interview when questioned about the prior interactions. As set forth in detail in the attached decision, the Commission reversed the removal, as *N.J.S.A. 11A:4-10* precluded the appointing authority from inquiring into Brogna's prior interactions with law enforcement that did not result in a criminal conviction and there was no indication in the record that Brogna attempted to deceive the appointing authority about his background.

In its request for reconsideration, the appointing authority reiterates that the subject position, although not a sworn law enforcement position, is "highly safety

sensitive and undisputedly requires the exercise of appropriate judgement at all times.” Moreover, the appointing authority asserts that the Commission mischaracterized its position by stating that the appointing authority acknowledged that Brogna’s past interactions with law enforcement were not serious. This mischaracterization, the appointing authority argues, is so egregious that it “calls into question the accuracy and logic of the Commission’s entire decision.” Nevertheless, the appointing authority now unequivocally states that “the information uncovered in [Brogna’s] background investigation raises serious concerns about his fitness for the position.” It notes that in its prior submission to the Commission, it concluded that Brogna’s past interactions with law enforcement were so serious that criminal charges could have been brought against Brogna, had they been pursued by the other parties involved. The appointing authority also notes that it previously described these interactions as “disturbing,” “questionable” and reflected “inarguably poor” or “flawed” judgment. The appointing authority observes that had it not considered those incidents serious, it would not have sought Brogna’s removal from the subject eligible list.<sup>1</sup>

The appointing authority further asserts that the Commission erred in its initial decision by concluding that it was reasonable for Brogna to assume the appointing authority’s questions regarding his past interactions with law enforcement were limited to criminal convictions. The appointing authority argues that the Commission “made a decision about a critical contested question of fact” and should accordingly refer this matter to the Office of Administrative Law for a hearing.<sup>2</sup> Finally, the appointing authority asserts that pursuant to *N.J.A.C. 4A:4-6.1(9)*, which permits removal from an eligible list for “other sufficient reasons,” it was allowed to question Brogna about his prior interactions with law enforcement that did not result in a criminal conviction. The appointing authority questions “how can a responsible employer make a judgement about whether or not a candidate’s background is suitable for a position, if it cannot broadly inquire into his or her background?”

It is noted that in response to the initial appeal, the appointing authority submitted a memorandum dated April 25, 2013 detailing Brogna’s interview regarding his background investigation. In the memo, the interviewing detective stated that he asked Brogna “if he had ever had any involvement with the police at any time, in which he answered ‘no.’” The detective stated that he then clarified that “police involvement included any and all interaction with the police no matter the circumstance,” and Brogna replied that he had not had any such interaction.

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<sup>1</sup> It is noted that Brogna alleged in the initial appeal that the appointing authority sought his removal so it could appoint someone else. As a veteran and first-ranked eligible on the subject eligible list, the appointing authority was obligated to either appoint Brogna or remove him from the eligible list.

<sup>2</sup> It is noted that the appointing authority opposed Brogna’s request for a hearing in the initial appeal, claiming that there was no factual dispute in the matter.

The detective maintained that when he raised an incident that occurred in 2008 in which the police responded to a dispute that involved him, Brogna explained the incident. Then, when asked if he had had any other interactions with law enforcement, he explained two incidents that occurred in 2003 and 2009. After detailing these incidents, the detective stated that Brogna "became agitated, and expressed his displeasure" after being asked to re-explain the aforementioned incidents in a handwritten statement.

Finally, despite the opportunity to respond to the appointing authority's request for reconsideration, Brogna did not do so.

### CONCLUSION

*N.J.A.C.* 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

The appointing authority contends that the Commission committed a material error by misinterpreting its position that Brogna's prior interactions with law enforcement were not serious. The Commission disagrees that it mischaracterized the appointing authority's position. The appointing authority described Brogna's conduct as "questionable" and referred to the 2003 and 2009 incidents as "disturbing." However, the appointing authority also stated that the 2009 incident by itself might have had "no impact whatsoever" in its decision to remove him from the subject eligible list. Moreover, the appointing authority indicated that it believed that Brogna's alleged failure to disclose these incidents was more disturbing than the incidents themselves. Regardless of how the appointing authority wishes to characterize the incidents, those interactions did not result in criminal convictions or pending criminal charges and, as detailed in the attached decision, *N.J.S.A.* 11A:4-10 precludes the appointing authority from inquiring into Brogna's prior interactions with law enforcement except for criminal convictions or pending criminal charges. Although the appointing authority asserts that *N.J.A.C.* 4A:4-6.1(9) permits it to inquire into Brogna's prior interactions with law enforcement, the Commission reminds the appointing authority that an administrative regulation cannot supplant a statute enacted by the legislature.

Regarding the appointing authority's request for a hearing, 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). Based on the record in general and the appointing authority's April 25, 2013 memorandum in particular, 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). As indicated above, once the appointing authority clarified that it was inquiring into his prior interactions with law enforcement that did not result in a criminal conviction, Broгна explained his interactions with law enforcement in 2003, 2008 and 2009. There is no indication in the record that Broгна made a false statement or attempted to deceive the appointing authority in his explanations of the incidents. Finally, as noted above, in the initial appeal Broгна claimed that there were "factual issues in dispute regarding the events during the interview . . . and his personal and employment history." The appointing authority responded that there was no material and controlling dispute of fact in the matter and the Commission denied Broгна's request. Accordingly, the doctrine of collateral estoppel prevents the appointing authority from claiming that a dispute of material fact now exists in the present matter.

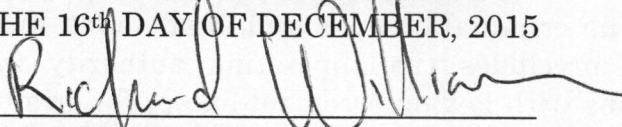
Therefore, the appointing authority has not shown that a clear material error has occurred nor has it presented new evidence or additional information not presented at the original proceeding which would change the outcome of the case. Accordingly, under the circumstances presented, there are no grounds on which to grant reconsideration of the prior decision.

#### ORDER

Therefore, it is ordered that the request for reconsideration 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 16<sup>th</sup> DAY OF DECEMBER, 2015

  
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Member  
Civil Service Commission

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and  
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Henry Maurer  
Director  
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Attachment

c: Frank Brogna  
Steven Kleinman, Esq.  
Frank Tragno  
Joseph Gambino  
Kenneth Connolly

Bde



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Frank Brogna,  
Deputy County Emergency  
Management Coordinator (C0699P),  
Monmouth County

List Removal Appeal

CSC Docket No. 2014-859

ISSUED: **MAY 11 2015** (WR)

Frank Brogna, represented by Michael H. Ansell, Esq., appeals the removal of his name from the eligible list for Deputy County Emergency Management Coordinator (C0699P), Monmouth County, on the basis of having an unsatisfactory background report.

The appellant, a veteran, took the open competitive examination for Deputy County Emergency Management Coordinator (C0699P), Monmouth County, achieved a passing score, and was ranked first on the subsequent eligible list.<sup>1</sup> The appellant's name was certified on January 7, 2013. In disposing of the certification, the appointing authority requested the removal of the appellant's name from the eligible list on the basis of an unsatisfactory background report. Specifically, it asserted that the Ocean Township Police listed the appellant as a suspect in a 2008 larceny investigation. During an interview that was part of his background investigation, the appellant failed to disclose this incident despite being asked about it. The appointing authority maintained that once the appellant admitted to that incident, he further disclosed two more interactions with law enforcement: one while attending a military academy in 2003, when he used another student's computer equipment without permission; and the second in 2009 when the Raritan Township Police were called for a wellness check which resulted in the appellant being sent for a mental health evaluation. The appointing authority also alleged

<sup>1</sup> The subject eligible list promulgated on January 1, 2013 and expires on January 2, 2016. To date, two appointments have been made, effective May 5, 2013.

that the appellant became angry during the interview when questioned about these incidents.

On appeal to the Civil Service Commission (Commission), the appellant explains in detail his interactions with law enforcement that occurred in 2003, 2008 and 2009 and accuses the appointing authority of making a "mountain out of a mole hill." The appellant explains that he has no criminal record and argues that pursuant to *N.J.S.A. 11A:4-10* and *4-11*, the appointing authority cannot use unsubstantiated allegations that do not result in convictions to remove him from the subject eligible list. Regarding his interview with a detective during his background investigation, the appellant claims that the detective asked him a vague question about any past interactions with law enforcement. As the employment application only required him to list any convictions or guilty pleas, the appellant contends that he believed the detective's question referred to those types of interactions with law enforcement and therefore, answered that he had not had any such interactions. The appellant maintains that he tried to cooperate with the detective but did not fully understand the question. Additionally, the appellant denies that he lost his temper during the interview; rather, he maintains that it was the detective who did. The appellant explains that the detective and two other individuals bombarded him with questions in an attempt to confuse him and became "enraged" and attempted to intimidate him after he "half-heartedly" asked the detective whether he was being interrogated. The appellant claims that he apologized for making the detective upset. Finally, the appellant requests a hearing. In support of his appeal, the appellant, in relevant part, submits multiple character reference letters; various certifications, reports and commendations related to his military service and a letter from his friend explaining the "theft" of the friend's modem from the 2008 incident.

In response, the appointing authority, represented by Steven Kleinman, Esq., states that because its Office of Emergency Management is located within its Sheriff's Office, "it is required to hold applicants to a particularly high standard, as such standards are required for the Sheriff's Office to maintain its 'four-star' [Commission on Accreditation of Law Enforcement Agencies (CALEA)] accreditation." The appointing authority further explains that the subject position is highly sensitive, requires the exercise of appropriate judgment at all times and accordingly demands the highest level of personal and professional integrity. Therefore, due to the appellant's questionable background and his failure to be forthcoming about it, the appointing authority contends that his removal from the subject eligible list is warranted.

While the appointing authority recognizes that the appellant's past interactions are not particularly serious, it claims that such a pattern of conduct raises concerns about the appellant's judgment. Additionally, it argues that the appellant had no right to conceal this information during an interview. In this



regard, the appointing authority maintains that the detective conducting the interview asked the appellant twice about whether he had any prior involvement with law enforcement and explained that involvement meant any contact with the police, but that the appellant unequivocally responded that he had none. However, once the detective confronted the appellant with the 2008 incident, the appellant then explained the incidents from 2003 and 2009. The appointing authority notes that the detective believed that the appellant was intentionally attempting to conceal critical information from the appointing authority. It states that the appellant became agitated when asked to make written statements about these incidents, exclaiming "this is ridiculous, why am I being interrogated" and contends that his "adversarial and confrontational attitude . . . raises reasonable questions regarding his fitness for the position." Finally, the appointing authority argues that *N.J.A.C.* 4A:4-6.1(a)9 provides an appointing authority with "broad grounds" to remove an appellant and Civil Service regulations are not so restrictive that they prevent an appointing authority from seeking an eligible's removal based on negative information uncovered during his background investigation. In support, it submits a copy of the appellant's application, documentation from the appellant's background investigation, and various information from the appellant's aforementioned interactions with law enforcement.

### CONCLUSION

Initially, the appellant requests a hearing in the matter. However, list removal appeals are generally treated as reviews of the written record. See *N.J.S.A.* 11A:2-6(b). 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). 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)6, allows the Commission to remove an eligible's name from an employment list when he or she has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process. Additionally, *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 an appointment. *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.



*N.J.S.A.* 11A:4-11 and *N.J.A.C.* 4A:4-4.7(a)4 provide that an eligible's name may be removed from an employment list when an eligible has a criminal record which includes a conviction for a crime which adversely relates to the employment sought. The following factors may be considered:

- a. Nature and seriousness of the crime;
- b. Circumstances under which the crime occurred;
- c. Date of the crime and age of the eligible when the crime was committed;
- d. Whether the crime was an isolated event; and
- e. Evidence of rehabilitation.

The presentation to an appointing authority of a pardon or expungement shall prohibit an appointing authority from rejecting an eligible based on such criminal conviction, except for law enforcement, firefighter or correction officer and other titles as determined by the Commissioner. Additionally, pursuant to *N.J.S.A.* 11A:4-10, an appointing authority may only question an eligible for a law enforcement, fire fighter or correction officer title as to any arrest.

While the Monmouth County Sheriff's Office is a law enforcement agency and employs individuals in law enforcement titles, the appellant was not an applicant for a law enforcement title. On the contrary, he was an applicant for the title of Deputy County Emergency Management Coordinator and therefore, should not have been asked about prior interactions with law enforcement. *See In the Matter of Andrew Gales* (CSC, decided June 10, 2009) *aff'd on reconsideration* (CSC, decided August 19, 2009) (Police Assistant title is not a law enforcement title and appellant should not have been asked if he had been arrested on his pre-employment application). Moreover, although the appointing authority maintains that it is required to hold applicants to a higher standard in order to sustain its "four star" rating from the CALEA, the Commission observes that it is not bound by criteria utilized by the appointing authority and must decide each list removal on the basis of the record presented. *See In the Matter of Victor Rodriguez* (MSB, decided July 27, 2005).

Nevertheless, once the appellant decided to answer the appointing authority's questions, he was obligated to provide accurate information. *See In the Matter of Carla Gardner* (MSB, decided November 17, 2004); *In the Matter of Gary Pinar* (MSB, decided March 26, 2003). The record indicates that the appellant provided truthful information. In this regard, the employment application for the subject position required the appellant to disclose whether he had ever been convicted or pleaded guilty to a crime, misdemeanor, disorderly person's offense, or other offense. Accordingly, during his interview, it was reasonable for the appellant to assume that the detective's question about his prior interactions with law enforcement referred to these types interactions. The record demonstrates that while the appellant initially indicated that he had not had such interactions, once

he realized the depth of the detective's questions, he willingly disclosed that he had minor interactions with law enforcement in 2003, 2008 and 2009. Since *N.J.S.A. 11A:4-10* prohibits an appointing authority from questioning an applicant for a non-law enforcement position as to any arrest which did not result in a conviction or guilty plea, the Commission does not agree that the appellant's initial statements during the interview were an attempt to provide false information or to conceal information that the appointing authority had no authority to request. Therefore, because the appellant was a candidate for a non-law enforcement position, has not been convicted or pleaded guilty to any crime and did not attempt to deceive the appointing authority about his background, he cannot be removed from the list based on falsification or his criminal record. Moreover, while the Commission agrees that the position in question is sensitive and candidates for such a position should exhibit a background demonstrating good judgment and high moral standards, it does not agree that the appellant's background should disqualify him for the position. In this regard, as acknowledged by the appointing authority, the interactions in the appellant's past were not particularly serious. Such a background should not exclude a candidate for the subject position from consideration.

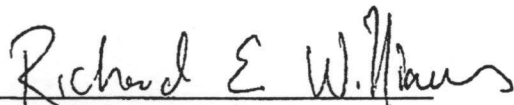
Accordingly, the appellant has sustained his burden of proof and should be restored to the Deputy County Emergency Management Coordinator (C0699P), Monmouth County, eligible list. Moreover, because two lower-ranked eligibles were appointed effective May 5, 2013 and the appellant is a veteran, his appointment is mandated, provided that he first passes an updated background check. See *N.J.S.A. 11A:4-8* and *N.J.S.A. 11A:5-6*. However, while the appointing authority must appoint the appellant should he pass the updated background check, it is not required to displace any currently employed individual in appointing the appellant.

#### ORDER

Therefore, it is ordered that the appeal be granted and the appellant's appointment is mandated, subject to an updated background check. If appointed, upon the successful completion of his working test period, the Commission orders that the appellant be granted a retroactive date of appointment to May 5, 2013. This date is for salary step placement and seniority-based purposes only.

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 6th DAY OF MAY, 2015



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Civil Service Commission

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and  
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c: Frank Brogna  
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Kenneth Connolly

UNION MEMBERS BY THE  
CIVIL SERVICE COMMISSION  
THE 15th DAY OF MAY 1912

*[Signature]*  
L. H. ...  
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Henry ...  
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