



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Brian Carabellese,
Fire Fighter (M2554M),
City of Newark

CSC Docket No. 2014-1496

List Removal Appeal

ISSUED: SEP 05 2014 (DASV)

Brian Carabellese, represented by Daniel J. Zirrith, Esq., appeals the removal of his name from the Fire Fighter (M2554M), City of Newark, eligible list due to his failure to meet the residency requirement.

The open-competitive examination for Fire Fighter (M2554M), City of Newark, was announced with a closing date of March 31, 2010 and was open to residents of Newark. Applicants were required to maintain continuous residency up to the date of appointment. See *N.J.A.C. 4A:4-2.11(e)1*. The appellant, a nonveteran, passed the subject examination and ranked 72 on the resulting eligible list, which promulgated on December 13, 2011 and expires on December 12, 2014.¹ The second certification of the eligible list was issued on July 23, 2012 containing the names of 126 eligibles. The appellant was listed in the 11th position on the certification. In disposing of the certification, the appointing authority requested the appellant's removal. It indicated that an investigation of the appellant was conducted and based on an attempted visit to the appellant's claimed residence and representations by his neighbors that they have never seen the appellant, it determined that the appellant failed to meet the residency requirement. One neighbor stated that a female lived in the carriage house of the property where the appellant claimed residency. The appellant appealed to the Division of

¹ The Fire Fighter (M2554M), City of Newark, eligible list was scheduled to expire on December 12, 2013. However, the list was extended for one year.

Classification and Personnel Management (CPM), which referred the matter to the Civil Service Commission (Commission) for direct review.

On appeal, the appellant certifies that he has resided continuously in Newark since February 2010. He explains that he lived with his former girlfriend and daughter in an apartment in Bayonne, New Jersey, from October 2008 through January 2010. His relationship with his girlfriend had ended and he moved to an "apartment suite in the rear of the main house" located on Parker Street in Newark. The appellant states that the landlords, Fredd Ochoa and Benjamin Taveras, lived in the main part of the home. Additionally, the appellant asserts that there was no written lease, but he paid rent monthly, which included the utilities, as evidenced by copies of cancelled checks from February 2010 through July 2011 and a Rent Invoice/Receipt which he submits. Beginning on August 1, 2011, the appellant contends that he lived in the carriage house apartment on the property, which is a separate structure behind the main house. The appellant submits copies of lease agreements for the period between August 1, 2011 through July 31, 2013 and August 1, 2013 through July 13, 2014, cancelled checks, and utility bills for the carriage house apartment. In further support of the foregoing, the appellant submits the certifications of Ochoa and Taveras dated January 24, 2014. Ochoa states that he operates his architectural business from his home and has observed the appellant work "very long and odd hours." However, for the past three years, [he has] observed him arrive to and leave from the property on a daily basis" and knows that the appellant occasionally sleeps at another location if his work schedules demands it. Taveras also verifies that he has observed the appellant return to the carriage house apartment almost every night after work. As for the neighbors, Ochoa states that he "very rarely ever see[s]" the one who lives across the street and the next door neighbor may not have lived in her house for a period of time as there were foreclosure signs on the property and she divorced her husband. Moreover, the appellant indicates that he found the apartments on craigslist.org and presents a copy of the advertisement for the apartment suite, which was posted on January 7, 2010 and viewed by the appellant on January 10, 2010. He also includes the advertisement of the carriage house apartment, which was posted on August 11, 2011 and viewed by the appellant on July 14, 2011.

Additionally, the appellant indicates that he changed his address on his driver's license to the Parker Street address on March 4, 2010 from a Bayonne address.² He renewed his license on September 1, 2011. He also presents a County of Essex Voter Acknowledgment Card with a registration date of March 8, 2010. Furthermore, the appellant's voter profile reveals that he voted in Newark for various elections beginning on May 11, 2010. The appellant also indicates that he

² The record reveals that this Bayonne address is the address the appellant indicated is his mother's residence and not the address he notes he lived at with his girlfriend from October 2008 through January 2010.

reported for jury duty on September 7, 2012 and presents documents in that regard which reflects his Newark address. Moreover, the appellant submits additional documentation in connection with his employment as a Registered Professional Nurse with the Bayonne Medical Center, as well as social security documents, student loan and tax documentation, and statements from credit card companies, insurance companies, and his banks to support that he has lived in Newark continuously since February 2010

Regarding the investigation of his residency, the appellant responds that he does not know the neighbors with whom the appointing authority spoke and that he does not have children residing with him or dogs to walk which would cause him to have interaction with his neighbors. As for the neighbor's comment regarding a female tenant, the appellant explains that when he moved to the carriage house apartment, Valerie Bertrand, a female, moved to the apartment suite in August 2011. The appellant submits Bertrand's certification, dated January 26, 2014, attesting to the foregoing. Bertrand states that she has observed the appellant "coming and going from the property, on a continuous basis" since she has resided in the apartment suite on Parker Street. Moreover, the appellant notes that the carriage house is at a recessed location on the property behind solid black gates. The appellant opens the gate by remote control from his car. An individual standing on the street or on other properties would not be able to identify someone behind the gate. The appellant includes pictures of the home and gate to support his description of the property. Further, due to his work schedule, the appellant indicates that he comes home at 9:00 p.m. at the earliest and often does not arrive until after midnight. He states that occasionally if he works past 2:30 a.m. and is required to return to the hospital by 7:30 a.m., he sleeps at his mother's house in Bayonne. Thus, the appellant argues that his neighbors may not have observed him in the neighborhood as he spends a very limited time outside of the gate. In addition, the appellant maintains that on May 13, 2012 at 5:21 p.m., the investigator called him and asked to meet with the appellant "at that moment." The appellant explained to the investigator that he was at work and could not meet with him at that time or the next morning since he was scheduled to work beginning 7:30 a.m. Further, he states that he attempted to contact the investigator thereafter and when he eventually spoke with him about his work schedule, the investigator stated "if you gotta work, you gotta work." In conclusion, the appellant contends that "the only reason" why he was removed from the subject eligible list "is ostensibly because a field investigation erroneously and prematurely concluded, contrary to the abundant and overwhelming documentation," that he did not reside in Newark because his work schedule prevented him from meeting with the investigator "at his residence at normal hours."

As for the standards set forth in *N.J.A.C. 4A:4-2.11(c)* to establish local legal residence, the appellant lists that he clearly has shown that he rents the property in question; he has spent the last four years at the location except for "the rare

occasion” when he sleeps at his mother’s house due to his work schedule; he is single and lives alone; he has “begun establishing roots” in Newark as evidenced by his Newark address being recorded on all his mail and legal documentation; and his daughter does not reside with him, making the location of her school irrelevant. Furthermore, the appellant notes that the appointing authority did not provide him with copies of all documentation sent to CPM as required by *N.J.A.C. 4A:4-4.7(b)1* and 2. Rather, CPM provided the documentation. Thus, the appellant maintains that the appointing authority’s request to remove his name from the subject eligible list must be denied.³ Accordingly, he indicates that his appointment should be “mandated with any back pay, retroactive benefits, including seniority, and attorney’s fees to which he is entitled.”

In response, the appointing authority, represented by Emily Truman, Assistant Corporation Counsel, indicates that the appellant gave his consent to have his background and residency investigated. His investigation was conducted by Ramon Irizarry, a Fire Fighter, who has worked for 22 years as a detective in the Newark Fire Department’s Division of Investigations. The appointing authority submits the certification of Irizarry, who states that he performed a field investigation, which included interviewing witnesses, and attempted to hold an in-person interview with the appellant at his claimed residence. Irizarry spoke with a police officer who lived next door, who indicated that she has been living at her residence for 10 years and was familiar with all her neighbors. She never saw the appellant and asserted that the tenant who actually lived in the claimed property is female. The neighbor who lived across the street also indicated that she never saw the appellant and the actual tenant was female. Irizarry found the neighbors to be credible witnesses. Additionally, Irizarry contends that he attempted “on several occasions” to observe the appellant directly at the Parker Street address. However, he was not successful since no one answered the doorbell and, after contacting the appellant on the telephone, the appellant “made several excuses” claiming that he had to work or was “on call” and had to spend the night at his mother’s house in Bayonne. Thus, the appointing authority states that “Irizarry was able to form the conclusion that [the appellant] rarely, if ever, stayed at the Parker Street address,”

³ *N.J.A.C. 4A:4-4.7(b)* provides that “1. Upon request of the eligible or upon the eligible’s appeal, the appointing authority shall provide the eligible with copies of all materials sent to the appropriate Commission representative. 2. If the appointing authority fails to provide either the appropriate Commission representative or the eligible with copies of materials, the request for removal **may** be denied.” [Emphasis added.] However, the appellant’s argument fails since it is clear that *N.J.A.C. 4A:4-4.7(b)2* does not require this agency to automatically deny a request for removal if an appointing authority fails to provide the required material to the candidate or this agency. Rather, it states that the Commission *may* deny such a request. Thus, even though the appointing authority did not submit the requested documentation to the appellant previously, the appellant received the documentation from CPM and the matter is now before the Commission with complete documentation. See *In the Matter of Joseph Branin* (MSB, decided April 6, 2005); *In the Matter of Irving Frederick Greivous* (MSB, decided May 19, 2004); *In the Matter of Michael Rubine, Police Officer (M5507T)*, *North Bergen* (MSB, decided September 10, 1998).

and the appellant spent the majority of his time at his mother's residence. Further, since the appellant works in Bayonne, "lived" at his mother's residence, and his child resides in Bayonne, Irizarry concluded that it was "highly unlikely" that the appellant would continue to claim residency at the Parker Street address. Therefore, Irizarry submitted his recommendation to have the appellant removed from the subject eligible list. Irizarry certified that he "was not pressured, forced, coerced or otherwise compelled to make the finding regarding Carabellese and [he] did not treat [his] investigation of Carabellese differently than any other candidate before or after." Accordingly, the appointing authority requests that the appellant's appeal be denied.

In reply, the appellant contends that the appointing authority "added nothing new to support its decision" and has failed to address the "voluminous supporting records" he has submitted on appeal. The appellant reiterates that he does not personally know the neighbors who were interviewed. Considering his "odd" work schedule and the layout of the property, the appellant argues that "it is highly probable that most of his neighbors would not be able to identify him." Further, the appellant maintains that "Irizarry failed to present [him] with a reasonable opportunity to meet with him."

CONCLUSION

N.J.A.C. 4A:4-2.11(c) provides that where residence requirements have been established in local service in addition to the New Jersey State residency requirement, residence with regard to local service requirements means a single legal residence. The following standards shall be used in determining local legal residence:

1. Whether the locations in question are owned or rented;
2. Whether time actually spent in the claimed residence exceeds that of other locations;
3. Whether the relationship among those persons living in the claimed residence is closer than those with whom the individual lives elsewhere. If an individual claims a parent's residence because of separation from his or her spouse or domestic partner (see section 4 of P.L. 2003, c. 246), a court order or other evidence of separation may be requested;
4. Whether, if the residence requirement of the anticipated or actual appointment was eliminated, the individual would be likely to remain in the claimed residence;

5. Whether the residence recorded on a driver's license, motor vehicle registration, or voter registration card and other documents is the same as the claimed legal residence. Post office box numbers shall not be acceptable; and
6. Whether the school district attended by child(ren) living with the individual is the same as the claimed residence.

See e.g., In the Matter of Roslyn L. Lightfoot (MSB, decided January 12, 1993) (Use of a residence for purposes of employment need and convenience does not make it a primary legal residence when there is a second residence for which there is a greater degree of permanence and attachment). *See also, In the Matter of James W. Beadling* (MSB, decided October 4, 2006). Moreover, *N.J.A.C. 4A:4-2.11(e)1* states that unless otherwise specified, residency requirements shall be met by the announced closing date for the examination. When an appointing authority requires residency as of the date of appointment, residency must be continuously maintained from the closing date up to and including the date of appointment. Additionally, *N.J.A.C. 4A:4-4.7(a)7* provides that discontinuance of an eligible's residence in the jurisdiction to which an examination was limited or for a title for which continuous residence is required is a cause for disqualification from an eligible list. *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.

In the instant matter, the appellant has certified on appeal that his residence has been continuous in Newark since before the March 31, 2010 closing date of the examination to the present. He has also submitted numerous documents, dated as early as February 2010, indicating that he has resided in Newark. Moreover, the appellant provides credible explanations as to why he was unable to meet with Irizarry and has been forthright about his occasional stay in his mother's home in Bayonne. Further, while the statements of the neighbors may have been credible in that they truly may not have seen the appellant, their statements are rebutted by the certifications of Ochoa and Taveras, the property owners who also live at the location, and Bertrand, the presumed "female" who lives at the property. Pursuant to the standards set forth in *N.J.A.C. 4A:4-2.11(c)*, the appellant has presented convincing evidence that he resides at Parker Street despite only renting the property. Moreover, the record does not reveal sufficient evidence that the appellant spends more time at his mother's home than at the Parker Street apartment(s) to invalidate his residency in Newark. In addition, government documents, such as the appellant's driver's license and voter registration card, which are dated March 4, 2010 and March 8, 2010, respectively, prior to the examination closing date, also reflect the Parker Street, Newark, address. Further, it is not disputed that the appellant's daughter does not live with him. As such, the

school district the daughter attends is irrelevant. Lastly, while Irizarry concluded that it was "highly unlikely" that the appellant would continue to claim residency at the Parker Street address considering he works in Bayonne, he "lived" at his mother's residence, and his child resides in Bayonne, the appellant submits substantial documentation establishing his residency in Newark prior to the closing date of the examination and there is no convincing evidence that his residency was not continuous.

Accordingly, the appellant has met his burden of proof in this matter and the appointing authority has failed to present a sufficient basis to remove the appellant's name from the eligible list for Fire Fighter (M2554M), City of Newark, eligible list. It is noted that since the appellant is not a veteran, his appointment is not mandated. Additionally, the appellant is subject to an updated background check and must successfully pass medical and psychological examinations prior to any appointment. Therefore, the appellant has not presented a sufficient basis for a retroactive appointment or back pay. *See e.g., In the Matter of John Tracy* (CSC, decided March 13, 2014) (The Commission denied an appellant's request for reconsideration of the remedies provided to him upon his restoration to a Fire Fighter eligible list, finding that the appellant was not a veteran and thus not entitled to a retroactive appointment). The Commission stresses that 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).

Regarding counsel fees, N.J.A.C. 4A:2-2.12(a) provides that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues before the Commission. *See also, N.J.S.A. 11A:2-22*. The present case is clearly not a disciplinary action. Moreover, the appellant is not entitled to back pay, benefits, and counsel fees under N.J.A.C. 4A:2-1.5(b). That regulation provides in pertinent part that:

[b]ack 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 [Commission] or where the Commission finds 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 or layoff appeal, nor is this a situation where the appointing authority has failed or delayed to carry out a Commission order. Further, the appellant has not shown that the appointing authority abused its discretion, acted in bad faith, or had an invidious reason to request the appellant's removal from the subject eligible list. Irizarry wholeheartedly believed, albeit incorrectly, that the appellant did not meet the residency requirement and attested in a certification that he "was not pressured, forced, coerced or otherwise compelled to make the finding regarding Carabellese." Therefore, under these circumstances, there is no basis to grant the appellant's request for back pay, benefits, and counsel fees.

ORDER

Therefore, it is ordered that this appeal be granted and the appellant's name be restored to the Fire Fighter (M2554M), City of Newark, eligible list, for prospective employment opportunities only. However, should the appellant not receive an opportunity to be considered for a position prior to the expiration of the eligible list, the list shall be revived and the appellant's name certified at the time of the next certification for Fire Fighter, City of Newark.

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 SEPTEMBER, 2014



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