

(b) The Department of Personnel may also authorize a certification from a common or similar State or local service eligible list under the following circumstances:

1. The appointing authority has requested the use of such list in writing;
2. The examination requirements of the titles for which the eligible lists may be certified shall be appropriate for the title in the requesting jurisdiction;
3. The State or local lists will be used to supplement the existing list in order to create a complete certification; and
4. Only those persons on the eligible list who have expressed an interest in working in the jurisdiction shall be certified.

(c) In local service, regular reemployment lists may be used to certify against vacancies in the same or comparable titles in all appointing authorities in the respective jurisdiction, except school districts.

(d) See N.J.A.C. 4A:8-2.3 for uses of special reemployment lists in State and local service.

#### **4A:4-4.4 Limitation on number of times eligible is certified**

(a) A non-veteran eligible who has been certified to the same appointing authority from an open competitive list on three occasions and who has been passed over in favor of a lower ranked eligible on each occasion, shall have his or her name withheld from future certification to the same appointing authority. The appointing authority may request that such eligible be recertified, in which case only that eligible and any higher or equal ranking veteran eligible shall be certified.

(b) All eligibles on a promotional list shall be certified, in order of rank, as long as they remain on the list.

Petition for Rulemaking.  
See: 32 N.J.R. 4016(b).  
Petition for Rulemaking.  
See: 33 N.J.R. 588(b).

#### **4A:4-4.5 Certifications limited to persons of a particular sex, religion or national origin**

(a) A certification may be issued limited to persons of a particular sex, religion or national origin of the eligibles, where such factors are bona fide occupational qualifications (BFOQ) that are essential to successful job performance and the normal operation of the appointing authority.

(b) The appointing authority shall determine those positions in State service and those specific titles in local service for which BFOQ designations are essential.

(c) A request for a BFOQ designation shall be signed by the agency or department head, or designee, and the affir-

mative action officer, and submitted by the appointing authority to the Department of Personnel, Division of Equal Employment Opportunity and Affirmative Action (EEO/AA) and shall include:

1. The purpose of the BFOQ being requested;
2. An accurate description of the employment for which the BFOQ is sought, including:
  - i. The position number in State service and the specific title in local service;
  - ii. The duties of the position and percentage of time required to perform those duties;
  - iii. The post location; and
  - iv. The shift designation.
3. A statement why a person without the specific BFOQ cannot perform the position's duties;
4. What accommodations were considered to permit persons without the BFOQ to perform the duties and why the accommodations were not adopted; and
5. Such other information as requested by the Division.

(d) The appointing authority shall have the burden of proof that a BFOQ designation is necessary.

(e) The Director, Division of EEO/AA shall review the request and advise the appointing authority in writing of his or her decision to either accept the BFOQ request or not accept the request based on insufficient justification.

(f) The Division of EEO/AA will audit BFOQ positions to eliminate artificial barriers that may exist to equal employment opportunity and particular BFOQ designations may be reconsidered or eliminated.

(g) Any person who has been denied an employment opportunity as a result of a BFOQ designation may contest the designation as a discrimination appeal in State service (N.J.A.C. 4A:7-3.2 et seq.) or a general appeal in local service (N.J.A.C. 4A:2-1.1).

#### **4A:4-4.6 Eligibles on military leave**

(a) Interested eligibles on military leave shall continue to be certified. The appointing authority may consider such eligibles immediately available for appointment even though reporting for work may be delayed.

(b) On return from military duty, an appointed eligible shall, after successful completion of the working test period, have the same rights, privileges and obligations as if the eligible had served continuously in the title from the original effective date of appointment.

**4A:4-4.7 Removal of names**

(a) The name of an eligible may be removed from an eligible list for any of the following reasons:

1. The causes for disqualification listed in N.J.A.C. 4A:4-6.1;

2. Permanent appointment through certification to the title for which the list was promulgated or made appropriate, except that the appointment to a lower title will not be cause for removal;

3. Inability, unavailability or refusal of eligible to accept appointment. An eligible who has declined appointment may, upon written request, have his or her name withheld from future certifications until available for appointment. The Department of Personnel must be notified when the eligible wishes to be considered for certification;

4. The eligible has a criminal record which adversely relates to the employment sought.

i. The following factors may be considered in determining whether a criminal record adversely relates to employment:

(1) The nature and seriousness of the crime;

(2) The circumstances under which the crime occurred;

(3) The date of the crime and age of the eligible when the crime was committed;

(4) Whether the crime was an isolated event; and

(5) Evidence of rehabilitation.

ii. The presentation of a pardon or an expungement shall prohibit removal from a list, except for law enforcement, correction officer or firefighter titles and other titles as the Commissioner may determine.

5. Notice by the postal authorities that they are unable to locate or deliver mail to the eligible;

6. Non-compliance with the instructions listed on the notice of certification;

7. Discontinuance of an eligible's residence in the jurisdiction to which an examination was limited or for a title for which continuous residency is required;

8. Discontinuance of the eligible's employment in the unit scope to which a promotional examination was limited, except when the eligible has accepted a temporary or interim appointment in another unit scope. An employee who subsequently returns to the unit scope within current continuous service may request, in writing to the Department of Personnel, that his or her name be restored to the promotional list;

9. Employees who are involuntarily transferred shall be retained on a promotional list until they have had an opportunity to take a promotional examination in the new promotional unit scope or have been appointed from the list;

10. Failure to maintain interest in a geographical area or choice; and

11. Other valid reasons as determined by the Commissioner.

(b) An appointing authority that requests removal of an eligible's name from a list shall submit to the Department, no later than the date for disposition of the certification, all documents and arguments upon which it bases its request.

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 Department.

2. If the appointing authority fails to provide either the Department or the eligible with copies of materials, the request for removal may be denied.

(c) The Department of Personnel shall determine if there are sufficient grounds for removal, notify the appointing authority and the eligible of its decision, and advise the eligible of his or her appeal rights.

(d) An eligible may appeal his or her removal from an eligible list utilizing the procedures in N.J.A.C. 4A:4-6.3.

(e) The removal of names from an eligible list will advance the rank order of all names below it. The Department may supplement a certification to provide the appointing authority with the number of names necessary for a complete certification.

(f) Acceptance or refusal of a temporary or interim appointment shall not be cause for removal from an eligible list.

(g) When the Department of Personnel has accepted a single application for one or more law enforcement title areas, pursuant to N.J.A.C. 4A:4-2.3(c), an eligible whose name has been removed from the pool of eligibles for one jurisdiction or title area for cause shall be removed from the pool of eligibles for any other jurisdiction or title area.

(h) When an eligible has been permanently appointed from a certification of a pool of eligibles, the eligible shall be removed from the pool of eligibles for that title area only.

Amended by R.1993 d.270, effective June 7, 1993.

See: 25 N.J.R. 1085(b), 25 N.J.R. 2509(a).

Revised (a)8; added new (f).

Amended by R.1997 d.482, effective November 17, 1997.

See: 29 N.J.R. 3385(a), 29 N.J.R. 4864(b).

Added (g) and (h).

Amended by R.1998 d.291, effective June 1, 1998.

See: 30 N.J.R. 890(a), 30 N.J.R. 1975(a).

Rewrote (b)1.

**Case Notes**

Statements made in report of background check of police officer applicant. Pollinger v. Loigman, 256 N.J.Super. 257, 606 A.2d 1113 (A.D.1992).

Removal of applicant's name from open competitive list was improper; inability to communicate effectively in English. In the Matter of Bangar, 94 N.J.A.R.2d (CSV) 500.

Disqualification; lack of job requirements. City of Trenton v. Porzilli, 94 N.J.A.R.2d (CSV) 172.

Inability to speak English warranted removal of name from eligible list. Patel v. Division of Youth and Family Services, 93 N.J.A.R.2d (CSV) 147.

Removal from eligibility list for position at college was justified by inability to communicate in English. Shah v. William Paterson College, 93 N.J.A.R.2d (CSV) 97.

#### 4A:4-4.8 Disposition of a certification

(a) Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

1. Appoint the eligible whose name has been certified from the special reemployment list;
2. Appoint the eligible whose name has been certified from regular or police or fire reemployment lists; or
3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:
  - i. Disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list;
  - ii. If the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed; and
  - iii. See N.J.A.C. 4A:4-2.15(i) for tie scores.

(b) The appointing authority shall notify the Department of Personnel of the disposition of the certification by the disposition due date in the manner prescribed by the Department. The report of disposition of the certification shall include:

1. Name of the eligibles to be permanently appointed;
2. The effective date of the requested permanent appointments;
3. In local service, the appointee's salary;
4. A statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tied score;
5. In situations where an appropriate list is used, the title and functions of the appointee's employment; and
6. Any other requested information.

(c) Failure to dispose by the due date may result in constructive appointment or other remedial action as set forth in N.J.A.C. 4A:10-2.

(d) If the certification will result in the displacement of a provisional employee who has permanent status, and it is

necessary to institute layoff procedures, the Department may, upon written request from the appointing authority, extend the time for disposing of the certification for an additional 45 days. See N.J.A.C. 4A:8-1.1 et seq. for layoff procedures.

(e) See N.J.A.C. 4A:10-2.2 for penalties for failure to appoint from a complete certification.

Amended by R. 1993 d.270, effective June 7, 1993.

See: 25 N.J.R. 1085(b), 25 N.J.R. 2509(a).

Revised (a)3iii.

Amended by R.1994 d.507, effective October 3, 1994.

See: 26 N.J.R. 2697(b), 26 N.J.R. 3941(a).

Administrative correction.

See: 31 N.J.R. 1186(a).

#### Law Review and Journal Commentaries

Civil Service. Judith Nallin, 133 N.J.L.J. No. 14, 65 (1993).

#### Case Notes

The Civil Service Act and its accompanying regulations did not require that preliminary notices of disciplinary action be signed by both police director and IAD Commander because the Act and its regulations did not require two signatures for the filing of a complaint. Grill v. City of Newark, 709 A.2d 333, 311 N.J.Super. 149 (N.J.Super.L. 1997).

Stating reasons for administrative actions limits arbitrary determinations, enhances judicial review of agency decisions, and discloses correctable deficiencies to aid in guiding future conduct. Local 518, New Jersey State Motor Vehicle Employees Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles, 262 N.J.Super. 598, 621 A.2d 549 (A.D. 1993).

Law Division had jurisdiction over declaratory judgment action seeking statement of reasons why employees were not selected for promotion under the Civil Service Act. Local 518, New Jersey State Motor Vehicle Employees Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles, 262 N.J.Super. 598, 621 A.2d 549 (A.D.1993).

Appointing administrative authority was not required by Civil Service Act or regulations to apprise unsuccessful qualified candidate of reasons for promoting lower-scoring eligible employee. Local 518, New Jersey State Motor Vehicle Employees Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles, 262 N.J.Super. 598, 621 A.2d 549 (A.D. 1993).

Minimal requirements for making a valid appointment: when appointment is final. Thomas v. McGrath, 145 N.J.Super. 288, 367 A.2d 898 (App.Div.1976), reversed per curiam 75 N.J. 372, 382 A.2d 1121 (1978).

Police captain fails to establish he was impermissibly bypassed for selection of police chief. Shaffery v. Middletown Township, 97 N.J.A.R.2d (CSV) 299.

Fire captains properly bypassed; exercise of discretion provided under the "rule of three" and not political discrimination. Bulger v. Town of Harrison, 93 N.J.A.R.2d (CSV) 509.

#### 4A:4-4.9 Date of appointment

(a) An eligible shall not be appointed and begin work after the expiration date of the eligible list except:

1. When the eligible is on military leave, or, in the case of promotional appointments, is on an approved leave of absence. Persons returning from military leave

or an approved leave of absence may begin work upon their return to active service.

2. When there is limited revival or statutory extension of an employment list, except that no appointment shall be made beyond the statutory extension date; or

3. When the certification is made just prior to the expiration of the eligible list, in which case the date of appointment and the date the eligible begins work shall be no later than the disposition due date.

Amended by R.1996 d.98, effective February 20, 1996.

See: 27 N.J.R. 4049(a), 28 N.J.R. 1201(b).

In (a)3 substituted "be no later than" for "coincide with".

#### 4A:4-4.10 Certification of additional eligibles

If, after accepting employment, an eligible cannot begin work within three weeks or such other reasonable time as specified by the appointing authority, the appointing authority may consider the eligible unavailable and request that the Department certify additional names.

### SUBCHAPTER 5. WORKING TEST PERIOD

#### 4A:4-5.1 General provisions

(a) The working test period is part of the examination process designed to permit an appointing authority to determine whether an employee can satisfactorily perform the duties of the title.

(b) All regular appointments to a title in the career service shall be subject to a working test period, except:

1. Appointments from special, police and fire and regular reemployment lists;
2. Appointments to a comparable or lower related title in lieu of layoff; or
3. Appointments to titles previously held on a permanent basis within current permanent continuous service.
4. For lateral title changes, see N.J.A.C. 4A:4-7.6(b).

(c) During the working test period, an employee shall perform the duties of the title for which appointment was made.

(d) An employee who is serving a working test period shall not be eligible for a promotional examination from that title.

#### Case Notes

Employee who worked out of title during working test period and did not perform the duties of the position was not entitled to permanent status (citing former N.J.A.C. 4:1-13.1 and 13.2). Cipriano v. Dep't of Civil Service, 151 N.J.Super. 86, 376 A.2d 571 (App.Div.1977).

Actual completion of a working test period is a basic condition of permanent employment (citing former N.J.A.C. 4:1-6.4). Cipriano v. Dep't of Civil Service, 151 N.J.Super. 86, 376 A.2d 571 (App.Div.1977).

Working out of title during working test period. Cipriano v. Department of Civil Service, 151 N.J.Super. 86, 376 A.2d 571 (App.Div.1977).

CETA hired police officers. Att'y Gen. F. O. 1977-No. 25 (see footnote).

Dismissal of employee at end of working test period for unsatisfactory performance was warranted, despite employee's claims that decision to dismiss her was made in bad faith. Schopf v. New Jersey Department of Labor, 96 N.J.A.R.2d (CSV) 853.

Release of family service specialist at end of working test period was not improper when based in part on comments of co-employees. Nwosu v. Department of Human Services, 95 N.J.A.R.2d (CSV) 436.

Working test period justified school security guard's removal for incompetency. Hogan v. Vineland Board of Education, 95 N.J.A.R.2d (CSV) 400.

Food service worker on approved medical leave was entitled to additional working test period. Singletary v. Bergen Pines County Hospital, 95 N.J.A.R.2d (CSV) 370.

Laborer granted new working test period because job requirement of commercial driver's license not documented in progress report or final report. Niosi v. Department of Public Works, 95 N.J.A.R.2d (CSV) 238.

Release of drug abuse counselor at end of working test period; lack of veracity, good communication skills, punctuality and reliability. Memmot v. Department of Health, Twp. of Freehold, 95 N.J.A.R.2d (CSV) 118.

Correction officer properly released at end of working test period. Muhammad v. Department of Corrections, 94 N.J.A.R.2d (CSV) 609.

Probationary employee failed to show that he was released in bad faith. Lindsley v. Department of Buildings and Grounds, Monmouth County, 94 N.J.A.R.2d (CSV) 604.

Deficiency in both quality and quantity of work; release at end of working test period. Brown v. Department of Labor, 94 N.J.A.R.2d (CSV) 362.

Demotion justified; performance did not substantially improve during three-month test period. Smith v. Jersey City Housing Authority, 94 N.J.A.R.2d (CSV) 381.

Termination of hospital attendant at end of working test period was justified. Vaidier v. Mercer County Geriatric Center, 94 N.J.A.R.2d (CSV) 94.

Release of probationary police officer; working test period. Burchardt v. Union Township Police Department, 93 N.J.A.R.2d (CSV) 618.

Release of assistant engineer at end of his working test period justified. De Botton v. Borough of Fair Lawn, 93 N.J.A.R.2d (CSV) 579.

Release at end of work test period was not justified. Hall v. Newark Housing Authority, 93 N.J.A.R.2d (CSV) 432.

Removal at end of working test period for unsatisfactory services was not in bad faith. Amin v. Department of Transportation, 93 N.J.A.R.2d (CSV) 406.

Release at end of working test period was not in bad faith. Capone v. State-Operated School District of Jersey City, 93 N.J.A.R.2d (CSV) 395.

No showing of bad faith; termination at end of employee's working test. Capone v. State-Operated School Dist. of City of Jersey City, Hudson County, 93 N.J.A.R.2d (CSV) 395.

Removal at end of working test period was not action taken in bad faith. Aller v. Department of Labor, 93 N.J.A.R.2d (CSV) 390.

Decision to remove at the conclusion of working test period was not formulated in bad faith. *Aller v. Department of Labor*, 93 N.J.A.R.2d (CSV) 390.

Termination of officer was in bad faith. *Bowers v. Irvington Township Police Department*, 93 N.J.A.R.2d (CSV) 55.

Good faith; termination at the end of a working test period. *Davis v. Department of Transportation*, 92 N.J.A.R.2d (CSV) 769.

Suspension and release at end of working test period. *Evelina v. William Paterson College of New Jersey*, 92 N.J.A.R.2d (CSV) 738.

Release from position at the end of working test period was justified. *Meyrick v. Hunterdon County Sheriff's Office*, 92 N.J.A.R.2d (CSV) 692.

No error in release at the end of working test period. *Edington v. Treasury Department*, 92 N.J.A.R.2d (CSV) 673.

Release after working test period; not bad faith. *Phillips v. New Jersey Department of Human Services*, 92 N.J.A.R.2d (CSV) 602.

Department of Transportation improperly used a working test period as a basis for terminating inspector's employment. *Andres v. N.J. Department of Transportation*, 92 N.J.A.R.2d (CSV) 481.

Employee released in good faith at end of working test period. *Johnson v. Vineland Developmental Center*, 92 N.J.A.R.2d (CSV) 363.

Bad faith termination of recruit because of unsatisfactory working test period. *Smith v. Northern State Prison*, 92 N.J.A.R.2d (CSV) 342.

Release at end of extended working test period; not justified. *Vegotsky v. Office of Administrative Law*, 92 N.J.A.R.2d (CSV) 162.

Release at end of working test period; failure to demonstrate bad faith. *Downs v. Marlboro Psychiatric Hosp.*, 92 N.J.A.R.2d (CSV) 94.

Appellant failed to show that employer (Newark Free Public Library) acted in bad faith in denying her a fair evaluation of her work performance and releasing her at the end of her working test period based on claim that her services were unsatisfactory (citing former N.J.A.C. 4:1-13.7). *Davis v. Newark Public Library*, 9 N.J.A.R. 84 (1987).

#### 4A:4-5.2 Duration

(a) The working test period shall not include any time served by an employee under provisional, temporary, interim or emergency appointment. The working test period shall begin on the date of regular appointment. See N.J.A.C. 4A:1-1.3 for definition of regular appointment.

(b) The length of the working test period, except as provided in (c) through (e) below, shall be as follows:

1. In local service, a period of three months of active service, which may not be extended.

2. In State service, a period of four months of active service, which the Commissioner may extend on request of an appointing authority for an additional two months. Such request should be submitted to the Department of Personnel at least five working days before the end of the four month period. The appointing authority shall notify the employee of the extension in writing on or before the last day of the four month period.

i. Regularly appointed employees serving in intermittent titles shall serve a working test period of 88 work days, which, upon the request of the appointing authority, may be extended by the Commissioner for an additional 44 work days. For purposes of this subsection, any part of a day shall constitute a work day.

ii. An employee serving in an intermittent title who is furloughed prior to completing the working test period, shall resume the working test period upon return from furlough.