

B-13



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of David Ruditsky,
Police Sergeant (PM2701L),
Marlboro Township

CSC Docket No. 2015-1674

List Bypass Appeal

ISSUED: **AUG 21 2015** (DASV)

David Ruditsky, represented by Nancy A. Valentino, Esq., appeals the attached decision of the Division of Classification and Personnel Management (CPM),¹ which upheld the bypass of his name on the Police Sergeant (PM2701L), Marlboro Township, eligible list.

The appellant, a nonveteran, appeared as the third ranked eligible on the subject eligible list, which promulgated on June 3, 2010 and expired on June 2, 2014.² Certifications were issued on December 14, 2011 (PL111371), January 15, 2014 (PL140532), and May 29, 2014 (PL140034). The appellant was certified as the third ranked eligible on the December 14, 2011 certification and was listed in the number one position on the January 15, 2014 and May 29, 2014 certifications. In disposing of the certifications, the appointing authority did not appoint the appellant from the first certification although he was reachable and bypassed him on the January 15, 2014 and May 29, 2014 certifications. Rather, the appointing authority appointed the first ranked eligible on the December 14, 2011 certification effective December 17, 2011; the second ranked eligible on the January 15, 2014 certification effective March 20, 2014; and the second, third, and fifth ranked eligibles on the May 29, 2014 certification effective July 17, 2014, August 14, 2014, and August 20, 2014, respectively. The appellant appealed his bypasses on the January 15, 2014 and May 29, 2014 certifications to CPM. However, CPM determined that the appointing authority properly disposed of the certifications

¹ CPM is now known as the Division of Agency Services.

² The eligible list was originally set to expire on June 2, 2013, but was extended for one year.

pursuant to the "Rule of Three." *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3. CPM noted that an amendment had been made with regard to the May 29, 2014 certification, which changed the appellant's disposition from a bypass due to an unsatisfactory employment record³ to a bypass pursuant to the "Rule of Three."

On appeal to the Civil Service Commission (Commission), the appellant explains that in January 2014, he and the next five ranked eligibles were interviewed for a position. However, he was bypassed for appointment regarding four positions, despite being number one on the subject certifications. In support of his appeal, he submits a copy of his Employee Performance Evaluation Reports for the period from January 1, 2010 to June 30, 2010 and January 1, 2014 to December 31, 2014, in which he was rated mostly with "A's" (Acceptable) and had several "E's" (Excels). Additionally, the appellant presents letters of recommendation from his supervisor, a Police Sergeant, and another Police Sergeant, who endorse his appointment as a Police Sergeant.

In response, the appointing authority, represented by Louis N. Rainone, Esq., states that although the appellant "has offered a redacted version of his employment history and recommendations," he fails to identify any rule or law that the appointing authority violated in bypassing him. Rather, it submits two Settlement and Release Agreements, dated September 21, 2012 and August 12, 2014, regarding disciplinary actions against the appellant. The appointing authority indicates that, in addition to the appellant's disciplinary history as a basis to bypass him, the August 12, 2014 agreement released Marlboro Township from any and all claims arising from the appellant's employment prior to the date of settlement, which would apply to his bypasses. Moreover, it emphasizes that it utilized the "Rule of Three" to bypass the appellant, and he offers no argument that his bypass was wrongful or constituted an abuse of discretion.

It is noted that the September 21, 2012 agreement settled charges set forth in a Preliminary Notice of Disciplinary Action (PNDA), served on the appellant on July 24, 2012, charging him with neglect of duty and violations of the rules and regulations of the Marlboro Police Department/Call Response Guidelines. The appellant pleaded guilty to the charges and received a three working day suspension, which included forfeiting two vacation days and serving a suspension for one day on October 20, 2012. This suspension was also documented in a Notice of Minor Disciplinary Action dated October 22, 2012. In addition, the August 12, 2014 agreement settled charges set forth in a PNDA served on the appellant on June 30, 2014, charging him with neglect of duty and violations of the rules and regulations of the Marlboro Police Department. The PNDA indicated a possible suspension of 30 days. The appellant pleaded guilty to one violation of failing to

³ CPM's decision indicated that the error was a bypass due to an unsatisfactory background. However, agency records reveal that the appellant's disposition was originally recorded as a bypass due to an unsatisfactory employment record.

seek clarification of an order and received a 10 working day suspension, which included forfeiting four vacation days and a suspension of six days with four days to be served beginning August 16, 2014. This was also documented by way of a Final Notice of Disciplinary Action (FNDA) dated August 13, 2014.

In reply, the appellant asserts that the releases do not apply to Civil Service rules and his failure to be promoted. There is no reference in the releases with regard to the same. Moreover, the appellant argues that even if the releases bar him from appealing his bypasses prior to August 12, 2014, he maintains that he was passed over twice for a promotion after that time (since two appointments to Police Sergeants were made effective August 14, 2014 and August 20, 2014). Furthermore, he contends that the appointing authority has failed to provide valid and legitimate reasons for his bypasses.

The appointing authority responds that when it returned the May 29, 2014 certification, it made a notation that it bypassed the appellant due to an "unsatisfactory employment record" and attached the August 13, 2014 FNDA and the October 22, 2012 Notice of Minor Disciplinary Action. Thus, the appointing authority states that it clearly advised that these disciplines were considered in the appellant's bypass. It maintains that the releases, which refer to "any and all claims," include appeals before the Commission.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3 allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof in this matter. At the time of disposition of the certifications in this matter,⁴ *N.J.A.C.* 4A:4-4.8 no longer required that an appointing authority must, when bypassing a higher ranked eligible, give 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 tie score. In that regard, the rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*. As such, the appointing authority was not required to provide a statement as to why it appointed lower ranked eligibles on the January 15, 2014 (PL140532), and May 29, 2014 certifications. See e.g., *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, *Ocean City*, 207 *N.J.* 38 (2011). Regardless, in disposing of the May 29, 2014 certification and on appeal, the appointing authority has provided its reasons. It bypassed the appellant because of his disciplinary history.

⁴ The January 15, 2014 (PL140532), and May 29, 2014 (PL140034) certifications were returned by the appointing authority on March 31, 2014 and July 25, 2014, respectively, and the dispositions were approved by this agency on April 9, 2014 and October 20, 2014, respectively.

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)3*. 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).

In the instant matter, the appellant was certified three times from the Police Sergeant (PM2701L), Marlboro Township, eligible list and appealed his bypass on the January 15, 2014 certification and the May 29, 2014 certification. Four appointments from these two certifications were made on March 20, 2014, July 17, 2014, August 14, 2014, and August 20, 2014. The appointing authority indicates that a settlement agreement was entered, whereby the appellant released the appointing authority from all actions relating to his employment prior to August 12, 2014, which would include the bypasses in question. The Commission need not answer whether the releases were applicable to the instant matter, as there were appointments after the August 12, 2014 release and the appointing authority has otherwise presented a sufficient basis for bypassing the appellant.

In that regard, the appellant received minor discipline prior to the January 15, 2014 and May 29, 2014 certifications, and during the pendency of the May 29, 2014 certification, he was issued a PNDA on June 30, 2014, which was prior to the appointing authority's return of the certification and the first appointment on July 17, 2014 from the May 29, 2014 certification. It is well established that disciplinary action may be considered in bypassing the appellant for appointment. See *In the Matter of Paul DeMarco* (MSB, decided April 6, 2005) (Appellant's disciplinary action can be considered in determining whether he could be bypassed from the subject list). An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate's history and qualifications to determine the best candidate from a list of three eligibles, any of whom may be selected under *N.J.A.C. 4A:4-4.8(a)3*. In this regard, it is clear that the appellant's three working day suspension provides a sufficient basis to bypass him on the subject eligible list.

Moreover, absent any unlawful motive, it is permissible for an appointing authority to consider an individual's pending discipline as a basis for bypassing him on a certification. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). See also, *In the Matter of Gary R. Kern, et al.* (MSB, decided October 11, 2000) (It was determined that appellant was not entitled to retroactive date of appointment, nor were Civil Service law or rules violated, when the appointing authority initially bypassed him due to pending disciplinary charges that were

departmentally dismissed); *In the Matter of Michael Boylan* (MSB, decided October 22, 2003) (It was within the appointing authority's discretion to bypass appellant due to two discrimination complaints filed against him, which were transmitted to the Office of Administrative Law for a hearing and which might have resulted in disciplinary charges). Therefore, the appellant's proposed 30 working day suspension, which ultimately resulted in a 10 working day suspension, served as a sufficient basis to bypass him on the May 29, 2014 certification.

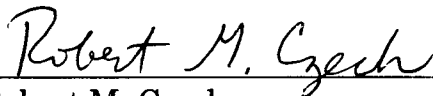
Therefore, under these circumstances, the Commission finds that the selection of lower-ranked candidates was not arbitrary. Even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the "Rule of Three," absent any unlawful motive. See *N.J.A.C. 4A:4-4.8(a)3*. In reviewing this matter, the Commission has not found that the appellant's bypass was due to invidious reasons. It is noted that the appellant does not possess a vested property interest in the position. 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). Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name on the Police Sergeant (PM2701L), Marlboro Township, eligible list was proper and the appellant has failed to meet his burden of proof in this matter.

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 AUGUST, 2015



Robert M. Czech
Chairperson
Civil Service Commission

**Inquiries
and
Correspondence**

**Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312**

Attachment

**c: David Ruditsky
Nancy A. Valentino, Esq.
Jonathan L. Hornik
Louis N. Rainone, Esq.
Kenneth Connolly
Joseph Gambino**



STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

DIVISION OF CLASSIFICATION AND PERSONNEL MANAGEMENT
P. O. Box 314
Trenton, New Jersey 08625-0313

Robert M. Czech
Chair/Chief Executive Officer

Chris Christie
Governor
Kim Guadagno
Lt. Governor

November 14, 2014

Stuart J. Alterman, Esq

RE: David Ruditsky – Title: Police Sergeant
Jurisdiction: Marlboro Township - Symbol: PM2701L
Certification No: PL140034 & PL140532

Dear Mr. Alterman:

This is in response to your correspondence of August 26, 2014 and November 4, 2014, contesting the bypass of your client's name on the referenced certified lists of eligibles. Due to the similarities, these appeals are being consolidated and addressed together.

Please be advised that the initial disposition of your client on PL140532 was erroneously recorded as a bypass due to an unsatisfactory background. However, the disposition was subsequently amended. Instead, the Appointing Authority disposed of both PL140532 and PL140034 reflecting the selection of a lower ranked eligible and bypassed your client's name in accordance with the "rule of three". Pursuant to *N.J.A.C.4A:4-4.8*, an appointing authority may make an appointment from among the three highest ranked interested eligibles on the certification. This rule is subject to the statutes governing veterans preference when applicable.

It should be noted that effective May 7, 2012, a portion of *N.J.A.C.4A:4-4.8* was repealed and the Appointing Authority is no longer required to provide a statement of reason when a lower or tied rank eligible is selected.

After a thorough review of our records and all the relevant material submitted, we find that no merit system rules were violated in disposing of the certification. Therefore, the Appointing Authority's decision to bypass your client's name has been sustained and your appeal is denied. Please be advised that PM2701L expired on June 2, 2014 and there will be no further certifications issued from this eligible list.

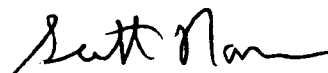
In accordance with Civil Service Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs (DARA) within 20 days of the receipt of this letter. You must submit all proofs, arguments, and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Stuart J. Alterman, Esq
RE: David Ruditsky
November 14, 2014
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Pursuant to P.L. 2010 C.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, C. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees. Address all appeals to:

Henry Maurer, Director
Division of Appeals and Regulatory Affairs
Written Appeals Record Unit
PO Box 312
Trenton, NJ 08625-0312

Sincerely,
For the Director,



Scott Nance, Supervisor
Certification Unit

c: Johnathan L. Hornik