



STATE OF NEW JERSEY

In the Matter of Matthew Bulzak,
County Correction Sergeant
(PC2075R), Camden County

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

CSC Docket Nos. 2016-1359 and
2016-3195

Bypass Appeal and List Removal
Appeal

ISSUED: NOV 30 2016 (CSM)

Matthew Bulzak, represented by Christopher Gray, Esq., appeals the bypass and subsequent removal of his name from the County Correction Sergeant (PC2075R), Camden County eligible list on the basis of an unsatisfactory employment record. These appeals have been consolidated due to common issues presented.

The appellant, a non-veteran, took the subject promotional examination, achieved a passing score, and was ranked on the resultant eligible list. The appellant's name was certified to the appointing authority on May 28, 2015 (PL150609). In disposing of this certification, the appointing authority bypassed the appellant, who was listed in the third position on the certification, and appointed the eligibles in the 4th, 7th, 8th, 10th, and 11th positions. It is noted that the eligible in the first position is no longer employed by the appointing authority. The Division of Agency Services (Agency Services) determined that the appointing authority properly disposed of the certification in accordance with the Rule of Three and recorded the certification as disposed. Subsequently, the subject list was certified on October 30, 2015 (PL151194). In disposing of the certification, the appointing authority removed the appellant's name on the basis of an unsatisfactory employment record.

Regarding his bypass on certification PL150609, the appellant states that he was recently nominated and elected Vice President of his union and has been an

Camden County Correctional Facility. Therefore, the appellant maintains that he was bypassed based on his union affiliation and union work and not based upon any legitimate criteria. With respect to his removal from the subject list as a result of his name being certified on PL151194, the appellant argues that the appointing authority is imposing a penalty of withholding a promotion based upon settled disciplinary matters or pending disciplinary matters.

In response, the appointing authority, represented by Antonieta Paiva Rinaldi, Assistant County Counsel, states that the appellant received a 10 day suspension for an incident that occurred on November 9, 2014. Specifically, the appellant failed to notify a supervisor that another employee brought contraband inside of the facility and photographed the appellant with a cell phone. Therefore, the appointing authority maintains that it had a sufficient basis for bypassing his name since the incident occurred less than one year prior to his name being certified from the subject list. With respect to the removal of his name from the list, the appointing authority states that the appellant was issued a Final Notice of Disciplinary Action on October 30, 2015 imposing a 30 day suspension effective November 8, 2015 for making inappropriate comments posted on his Facebook account regarding the inmate population housed in the correctional facility. As such, it maintains that the subsequent removal of his name from the list was appropriate.

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)3ii 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), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, provides that the appellant has the burden of proof to show by a preponderance of evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper. As long as that discretion is properly utilized, an appointing authority's decision will not be overturned.

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 Civil Service 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 appointment. *N.J.A.C.* 4A:4-6.1(a)7 states that an eligible may be removed from the list who has a prior employment history which relates adversely to the title.

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.

Initially, since the appellant, a non-veteran, headed the certification, it was within the appointing authority's discretion to select any of the top three eligibles remaining on the certification. The appellant, the third eligible, was bypassed on the May 28, 2015 certification of the eligible list in favor of the eligibles in the 4th, 7th, 8th, 10th, and 11th positions. The appointing maintains that it selected the lower-ranked eligibles because the appellant was suspended for 10 days based on an incident that occurred less than one year prior to his name being certified. The appellant challenges the appointing authority's proffered reasons, and asserts, among other things, that he was bypassed as a result of his recent election as Vice President of his union and for his union activities.

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 N.J. Super. 436 (App. Div. 1990). In *Jamison*, *supra* at 436, 445, the Court outlined the burden of proof necessary to establish discriminatory and retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for the decision.

The appellant has not established that his bypass was the result of his union activities. Rather, the record establishes that the appellant was suspended for 10 days for an incident that occurred less than one year before his name was certified for appointment consideration. While the appellant contends that his bypass was based on his union activities, he has not provided one scintilla of evidence to support this contention. Moreover, an employee's disciplinary history can be considered in determining whether he could be bypassed from the subject list. See *In the Matter of Paul DeMarco* (MSB, decided April 6, 2005). Indeed, it is permissible for an appointing authority to consider an individual's pending discipline as a basis for bypassing that individual 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 OAL for a hearing and which might have resulted in disciplinary charges).

Additionally, 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). Other than his mere allegations, the appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." Moreover, the appointing authority presented legitimate reasons for the appellant's bypass which have not been persuasively refuted.

With respect to the removal of his name from the subject list based on the subsequent certification, the appellant contends that it is inappropriate to remove his name since he is being punished based on a settled disciplinary matter and a pending disciplinary matter. The Commission disagrees. The position of County Correction Sergeant is reserved for employees who exhibit leadership skills, a positive work ethic, and respect for the rules. Thus, a disciplinary history that includes a major disciplinary action reflects serious offenses and shows a lack of respect for such tenets. *See In the Matter of Wayne Hundemann* (MSB, decided May 10, 2006).

While the appellant contends that it is inappropriate to remove his name from the list based on a pending disciplinary action, the record demonstrates that the appellant received a 10 day suspension on March 23, 2015 and a 30 day suspension on October 30, 2015. Thus, the appellant received two major disciplinary actions during the life of the subject list. Considering the nature of the position of County Correction Sergeant, it was appropriate to remove the appellant's name from the list. *See In the Matter of John Bonafide*, Docket No. A-1658-04T1 (App. Div. February 7, 2006) (Removal from Sheriff's Officer Lieutenant promotional list upheld for Sheriff's Officer Sergeant who received a six-month suspension for misuse of public property three months prior to the certification of his name for appointment); *In the Matter of Howard Doherty, Correction Sergeant, Department of Corrections (PS7099I)*, Docket No. A-4959-01T1 (App. Div. April 5, 2004) (Removal from Correction Sergeant promotional list upheld for Senior Correction Officer with 25 minor disciplinary actions, 24 of which were imposed for attendance-related infractions); *In the Matter of Frank R. Jackson, Correction Lieutenant, Department of Corrections (PS6320I)*, Docket No. A-1617-00T2 (App. Div. March 28, 2002) (Removal from Correction Lieutenant promotional list upheld for Correction Sergeant whose disciplinary record included two official reprimands for absenteeism and a 30-day suspension for falsification of a report, despite the recommendation of his immediate supervisor); *In the Matter of Albert S. Waddington, County Correction Sergeant (PC0349T), Camden County*, Docket No. A-568-99T2 (App. Div. December 5, 2000) (Removal from County Correction

Sergeant promotional list upheld for County Correction Officer with a lengthy list of counseling reports, poor evaluations, reprimands, minor disciplinary sanctions and two major disciplinary actions over approximately 13 years).

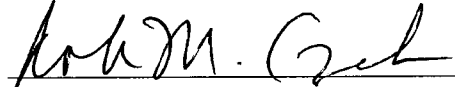
Accordingly, a thorough review of the record indicates that the appointing authority's bypass and subsequent removal from the list of the appellant's name was proper and the appellant has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that these appeals 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 23RD DAY OF NOVEMBER, 2016



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