



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jamila Bey,
Assistant Social Work Supervisor
(PS2900K), Ancora Psychiatric
Hospital

List Bypass Appeal

CSC Docket No. 2016-1609

ISSUED: NOV 29 2016 (SLK)

Jamila Bey appeals the bypass of her name on the Assistant Social Work Supervisor (PS150859), Ancora Psychiatric Hospital eligible list.

By way of background, on June 25, 2015 the subject list was certified (PS150859) and the appellant was listed in the 1st position. The appellant was bypassed, the eligibles in the 2nd, 4th, 6th, and 9th positions were appointed, the eligibles in the 3rd, 8th, and 13th positions were interested in future certifications only, the eligibles in the 5th and 11th positions were removed for failure to respond to the certification notice, the eligible in the 7th position was removed for separating from the appointing authority, and the eligibles in the 12th and 14th positions were not reachable.

On appeal, the appellant presents that she has applied for the subject title five times over the past 10 years. She indicates that in a prior certification she was second on the list and she is the first ranked eligible on the subject certification. The appellant maintains that she has never been disciplined and has always received satisfactory evaluations. Ms. Bey represents that the appointing authority advised her that she was bypassed because she answered questions like a social worker and that the appointed candidates answered questions like a supervisor. Further, the appellant acknowledges that the appointing authority offered her a voluntary developmental plan so that she could develop supervisory skills. However, she claims that she has already performed the tasks that were outlined in the developmental plan and that her superior admitted that she was a good social worker. Also, the appellant highlights that completing a developmental plan is not

a requirement for the promotion and that no one else needed to complete one in order to be promoted to the subject title. Therefore, she believes that she has been bypassed for discriminatory reasons. Specifically, the appellant thinks that she was bypassed because she has a history of leaves of absence due to a medical disability.

In response, the appointing authority acknowledges that the appellant is a good social worker without any major performance issues. However, it presents that it advised her that she was bypassed under the Rule of Three because other candidates scored higher on the interview. Further, the appointing authority states that it discussed with the appellant possible developmental activities that could take place to assist her career growth. However, the appointing authority indicates that the appellant has never gotten back to it regarding whether or not she was interested in pursuing these developmental activities.

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 no veteran heads the list. Additionally, *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 the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

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 action is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court outlined the burden of proof necessary to establish discriminatory and/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or 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-discriminatory or non-retaliatory reason for the decision.

If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

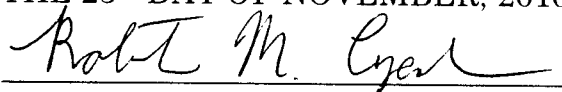
In the instant matter, the appellant was in the first position on the subject certification. However, it was within the appointing authority's discretion to select any of the top three eligibles for each appointment. Nevertheless, the appellant alleges that she was bypassed for an improper reason. Specifically, the appellant contends that she was bypassed due to her leaves of absence due to a medical disability. However, initially, it is noted that the appellant did not provide any evidence that she suffers from a medical disability. Further, other than her mere allegations, the appellant has not presented any substantive evidence regarding her 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." *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). Additionally, the appointing authority has presented a valid business reason for bypassing the appellant, namely, that the selected eligibles scored higher on their interviews by answering questions from a supervisor's perspective while the appellant answered questions from a social worker perspective. Thus, the Commission finds that the appellant did not meet her initial burden of establishing a *prima facie* case of disability discrimination by a preponderance of the evidence.

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 23rd DAY OF NOVEMBER, 2016



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