



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Terrance Harrison,  
Police Sergeant (PM0712P), Clark  
Township

Bypass and  
List Removal Appeals

CSC Docket Nos. 2015-2240 and  
2016-905

ISSUED: **DEC 30 2016** (DASV)

Terrance Harrison, represented by Ashley V. Whitney, Esq., appeals the bypass of his name on the Police Sergeant (PM0712P), Clark Township, eligible list and his subsequent removal from the list. Since these matters address similar issues, they have been consolidated herein.

By way of background, the appellant, a veteran, appeared on the Police Sergeant (PM0712P), Clark Township, eligible list, which promulgated on August 7, 2014 and expires on August 6, 2017. The appellant's name was certified on November 25, 2014 along with three other names. In disposing of the certification, the appointing authority appointed the first, second, and fourth ranked eligibles on the certification effective January 1, 2015. The first and second eligibles are not veterans and the fourth eligible is a veteran. The appellant, who ranked third on the certification, was bypassed. In a letter dated December 29, 2014, the appointing authority indicated that it bypassed the appellant because he was serving a 20 working day suspension.<sup>1</sup> It also noted that the appellant appealed the suspension to the Civil Service Commission (Commission), and the appeal was pending at the time.<sup>2</sup> In that regard, by way of Final Notice of Disciplinary Action (FNDA), dated October 10, 2014, the appellant had been charged with incompetency,

<sup>1</sup> It is noted that the appointing authority initially requested that the appellant's name be removed "for good cause" from the November 25, 2014 certification. However, "due to administrative error," the certification was amended and the appellant's name was restored but bypassed. The Division of Agency Services did not find the removal of the appellant's name to be appropriate given that the appellant's appeal to the Commission was not yet resolved.

<sup>2</sup> The appellant's appeal was received by the Commission on October 21, 2014.

insubordination, conduct unbecoming a public employee, and various violations of the Clark Police Department Rules and Regulations. It was asserted, among other things, that the appellant misused and abused his privileges by improperly accessing official and personal information of several police department employees, the Mayor of Clark, and a law enforcement officer of another agency without a legitimate law enforcement purpose. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. The Administrative Law Judge (ALJ) found that during a two-month period, the appellant conducted unwarranted enhanced license plate searches on the above-referenced individuals and 137 other individuals. The appellant disregarded his training in that he performed almost exclusively enhanced searches as opposed to "random searches" and only issued two summonses during that time period. The ALJ recommended upholding most of the charges against the appellant and affirmed the 20 working day suspension. Upon its *de novo* review, the Commission accepted and adopted the ALJ's findings of fact and conclusions and sustained the 20 working day suspension. See *In the Matter of Terrance Harrison* (CSC, decided September 16, 2015). Thereafter, on October 7, 2015, the appellant pursued an appeal of the Commission's determination with the Superior Court of New Jersey, Appellate Division. That matter is currently pending.

On March 20, 2015, the subject eligible list was certified again. The appellant's name did not originally appear on the March 20, 2015 certification because of his initial removal on the prior certification. The appellant's name was later added and he was considered the number one ranked eligible on that certification, which contained five names. However, the appointing authority removed the appellant's name on the basis of an unsatisfactory employment record.<sup>3</sup> It appointed the second and fifth ranked eligibles on the certification, effective April 1, 2015, and the remaining eligibles were removed for failure to respond to the Notice of Certification. Upon receiving notice of his removal, the appellant appealed to the Commission.

It is noted that, prior to the March 20, 2015 certification, the appellant appealed his bypass to the Commission, asserting that contrary to the December 29, 2014 letter from the appointing authority, he was not serving a 20 working day suspension at the time. Although he had been disciplined, the appellant indicated that he appealed it to the Commission and was not made to serve the suspension while the appeal was pending. In response, the appointing authority maintained that it was appropriate not to have appointed the appellant given his "major infraction of the rule of procedure as it relates to Police business." It also stated

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<sup>3</sup> The appointing authority initially used a bypass code in not appointing the appellant, but the Division of Agency Services advised that the code was not appropriate given that the appellant is a veteran and ranked number one on the March 20, 2015 certification. However, the Division of Agency Services approved the removal of the appellant's name based on an unsatisfactory employment record.

that subsequent to the 20 working day suspension, the appellant was disciplined again for eight working days on the charge of insubordination. In that regard, the appellant was issued a FNDA, dated December 15, 2014, asserting that he had been insubordinate when retrieving a letter from his mailbox from Internal Affairs. The appellant stated that he was “sick of it” and blurted out “coward” in reference to a Police Lieutenant. Thus, the appointing authority contended that although the appellant has the ability to pass the promotional examination, he “has not matured sufficiently to command.” The appellant appealed the eight working day suspension to the Commission. The matter was transmitted to the OAL, where an ALJ upheld the charge against the appellant, but modified the penalty to a three working day suspension. The decision has been deemed adopted by the Commission. *See In the Matter of Terrance Harrison* (CSC, deemed adopted May 16, 2016).

In supplemental submissions, the appellant argues that he was prematurely and improperly removed from the November 25, 2014 certification and then unlawfully bypassed on that certification as a veteran. In that regard, the appellant maintains that the appointing authority’s attempt to remove his name from the subject eligible list was inappropriate because he had not yet had an opportunity for a hearing at the OAL at the time of the certification. He cites *In the Matter of Irene Percelli* (CSC, decided December 16, 2009) and *Matter of Wiggins*, 242 N.J. Super. 342 (App. Div. 1990) for the proposition that a “hearing before an appointing authority cannot be categorized as a hearing before a neutral forum.”<sup>4</sup> The hearing at the OAL commenced on June 12, 2015. Further, the appellant asserts that as a veteran, he could not have been bypassed under the “Rule of Three,” and could only be removed for cause which the appointing authority failed to present. Therefore, the appellant submits that he should be permanently appointed as a Police Sergeant, retroactive to January 1, 2015, when the other appointments were made on the certification. Nonetheless, the appellant argues that, even assuming he could have been bypassed on the November 25, 2014 certification, he should have been appointed from the March 20, 2015 certification as he is a veteran and ranked number one. As previously argued, the appellant maintains that because he did not yet have a hearing at the OAL, he also could not have been removed from the March 20, 2015 certification. Therefore, the appellant requests that his appeals be granted. In the alternative, he requests that the matters be referred to the OAL for a hearing as a contested case.

In response, the appointing authority, represented by Howard P. Lesnik, Esq., indicates that it had requested the removal of the appellant’s name from the

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<sup>4</sup> The Commission specifically indicated that “a hearing before an appointing authority cannot be categorized as a hearing before a neutral forum **for purposes of N.J.A.C. 4A:4-6.1(a)5 and Wiggins, supra.**” [Emphasis added]. *See Percelli, supra.* N.J.A.C. 4A:4-6.1(a)5 provides that an eligible may be removed from an eligible list who “[h]as been removed from the public service for disciplinary reasons after an opportunity for a hearing.” In the present case, the appellant was not removed from employment. Rather, a 20 working day suspension was levied against him after a departmental hearing was conducted on the charges.

subject eligible list in disposing of the November 25, 2014 certification due to his 20 working day suspension. However, in consultation with the Division of Agency Services, the certification was amended to reflect the appellant's bypass. Thereafter, the appointing authority removed the appellant from the March 20, 2015 certification based again on the 20 working day suspension. It emphasizes that the Commission has already affirmed the ALJ's recommendation to sustain the penalty. In addition, the appointing authority contends that the appellant's disciplinary history includes the eight working day suspension and a one-day suspension for sleeping in his patrol car. Moreover, it asserts that the appellant was found to have inserted icons of dead moose into accident reports that he has authored. The appointing authority indicates that the appellant was advised to cease such improper and unprofessional conduct. Therefore, the appointing authority submits that, despite the appellant's allegations of harassment, retaliation, and a hostile work environment which he raised at the OAL, the appellant's employment record is unsatisfactory and unsuitable for an individual seeking a Police Sergeant position.

In response, the appellant contends that the appointing authority relies on unsubstantiated facts in the record and completely ignores the crucial facts that he is a veteran and was improperly removed from the subject eligible list before he received the 20 working day suspension. Moreover, he disputes that he received discipline for sleeping on duty or for the content of any accident reports that he authored. He notes that the ALJ indicated in the initial decision of his appeal of the 20 working day suspension that there was no testimony of him having any prior discipline. Additionally, even if the discipline exists, the appellant states that his disciplinary history was not used as a basis for his list removal. Rather, the appointing authority only asserted the 20 working day suspension as grounds for his removal. Furthermore, the appellant reiterates his prior arguments that his pending disciplinary appeal at the OAL precluded the appointing authority from removing him from the subject eligible list on the basis of the 20 working day suspension.

## CONCLUSION

Initially, the appellant requests a hearing in these matters. However, bypass and list removal appeals are generally treated as reviews of the written record. *See N.J.S.A. 11A:2-6(b)*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service, 155 N.J. Super. 517 (App. Div. 1978)*.

The Commission has reviewed the appellant's bypass and subsequent removal from the Police Sergeant (PM0712P), Clark Township, eligible list, and

finds that the appellant has not met his burden of proof in these matters. See *N.J.A.C. 4A:2-1.4(c)* and *N.J.A.C. 4A:4-6.3(b)*.

The appellant argues that his 20 working day suspension should not have been considered in either bypassing or removing his name since it was under appeal to the Commission. However, this argument is erroneous. See *e.g.*, *In the Matter of Fontini Leftdwrige* (MSB, decided April 10, 2002). The suspension, regardless of whether it was served, had already been levied against the appellant by way of FNDA dated October 10, 2014. The certifications in question were issued on November 25, 2014 and March 20, 2015. Thus, the 20 working day suspension was part of the appellant's employment record at the time of the certifications and was appropriately considered by the appointing authority. Further, the appellant's reliance on *Wiggins* is misplaced since, as noted above, having the opportunity for a hearing before a neutral forum, such as the OAL, is applicable when being removed from an eligible list **under *N.J.A.C. 4A:4-6.1(a)5*** (prior disciplinary removal from public service). By contrast, the appellant's bypass and removal from the subject eligible list was due to his employment record, which contained the 20 working day suspension. In that regard, *N.J.A.C. 4A:4-4.7(a)1*, in conjunction with *N.J.A.C. 4A:4-6.1(a)7*, allows the Commission to remove an individual from an eligible list who has a prior employment history which relates adversely to the position sought. Nonetheless, it is noted that should the appellant be successful in his appeal to the Appellate Division of his 20 working day suspension, he may petition the Commission for reconsideration of its decision. However, as it now stands, the appellant's employment record includes the 20 working day suspension, which the Commission has sustained.<sup>5</sup>

Given the foregoing, the appellant's 20 working day suspension could have been considered in removing him from the November 25, 2014 certification. As explained further below, the suspension presents a sufficient basis. There was no need to have bypassed the appellant pending the resolution of his appeal. Nevertheless, the appellant was recorded as bypassed on the November 25, 2014 certification. Accordingly, it is appropriate to address the appellant's claim that he cannot be bypassed due to his veteran status. In that regard, *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 ("Rule of Three"). A nonveteran headed the November 25, 2014 certification. Thus, the nonveteran eligibles listed in the first and second rank were appropriately appointed. Upon their appointments, the appellant, who ranked

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<sup>5</sup> Even considering that the appellant's 20 working day suspension was a "pending" matter, pending disciplinary action could be considered by an appointing authority in its disposition of a certification and it constitutes a valid reason to bypass an eligible's name on a certification. See *In the Matter of Michael Boylan* (MSB, decided October 22, 2003); *In the Matter of Gary R. Kern, Antonio C. Campos, Larry W. Cole and Robert M. Rupp* (MSB, decided October 11, 2000).

third and is a veteran, now headed the list. However, the fourth ranked eligible, who is also veteran, was reachable and could be appointed. In that regard, *N.J.A.C 4A:5-2.2(e)* provides that “[i]f there is more than one vacancy, and a veteran is ranked first on the certification as a result of the first appointment from the certification, then a **veteran** must be appointed to the next vacancy. If, as a result of the second appointment, another veteran heads the certification, then a **veteran** must be appointed to the third vacancy. This process shall be followed for each appointment that is made from the same certification” (emphasis added). As illustrated in *N.J.A.C 4A:5-2.2(g)*, assume that the following represents the ranked order and status of eligibles on the same promotional certification from which multiple vacancies must be filled:

1. Non-Veteran 2. Veteran 3. Veteran 4. Non-Veteran

Either (1), (2) or (3) may be offered the first appointment. If the non-veteran is appointed to the first vacancy, a veteran, initially ranked (2) on the promotional certification, would now be ranked (1). Another veteran, initially ranked (3) on the promotional certification, would be ranked (2). The certification now appears as follows:

1. Veteran 2. Veteran 3. Non-Veteran

Either (1) or (2) may be appointed to the second vacancy, but (3) may not be appointed.

Therefore, the appellant’s bypass on the November 25, 2014 certification did not violate the rules on veterans preference nor the “Rule of Three” since a veteran was appointed to the third vacancy.

Moreover, it is clear that the appellant’s 20 working day suspension is sufficient to have removed him from the subject eligible list. Under the proper circumstances, eligibles have been removed from promotional lists where their employment history revealed only one major disciplinary action. *See In the Matter of Frank R. Jackson* (MSB, decided October 11, 2000) (Removal from Correction Lieutenant promotional list upheld for Correction Sergeant with two minor disciplinary actions and one 30-day suspension); *see also, In the Matter of Julian J. Maruri* (CSC, decided April 20, 2011) (No basis to restore the appellant’s name to eligible list just because he is a veteran when it was determined a sufficient basis existed to remove his name due to an adverse employment history). In the instant matter, the position of Police Sergeant is reserved for employees who exhibit good judgement, leadership skills, and deference to rules and regulations. The

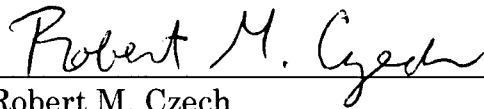
appellant's disciplinary history,<sup>6</sup> which reflects a serious offense resulting in a major discipline that occurred just prior to his certifications, shows a lack of respect for such tenets. Therefore, the appellant's employment record adversely relates to the position sought and is sufficient cause to remove his name from the subject eligible list. Accordingly, the appellant has failed to meet his burden of proof in these matters.

### 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 23<sup>RD</sup> DAY OF NOVEMBER, 2016



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<sup>6</sup> There is no dispute that the appellant received a 20 working day suspension and his eight working day suspension was modified to a three working day suspension. The appellant's remaining infractions that the appointing authority asserts are in dispute will not be considered at this time.

