



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Mark McGowan,
Police Officer (S9999R),
Borough of Manasquan

CSC Docket No. 2016-722

Bypass Appeal

ISSUED: **NOV 3 0 2016** (DASV)

Mark McGowan, represented by Charles J. Uliano, Esq., appeals the bypass of his name on the eligible list for Police Officer (S9999R), Borough of Manasquan.

By way of background, the appellant, a nonveteran, appeared on the Police Officer (S9999R), Borough of Manasquan, eligible list, which promulgated on May 2, 2014 and expires on May 1, 2016. The eligible list was certified on June 16, 2015 with 10 names. The appellant was ranked fourth on the certification. In disposing of the certification, the appointing authority removed the first and fifth ranked eligibles for failure to respond to the Notice of Certification and did not consider the second, third, sixth, and 10th ranked eligibles due to residency issues.¹ The remaining eligibles were the appellant and the seventh, eighth, and ninth ranked eligibles. The appointing authority bypassed the appellant and the eligible in the seventh rank and appointed the eighth ranked eligible effective August 3, 2015. The ninth ranked eligible was not reachable for appointment.

On appeal to the Civil Service Commission (Commission), the appellant indicates that he was not appointed because of residency issues. However, he explains that in October 2012, Hurricane Sandy rendered his home in Manasquan uninhabitable. He temporarily lived with his father in Wall Township pending the repairs to his home. He was then able to rent a place in Manasquan in February 2015. Therefore, the appellant argues that he was a resident of Manasquan. As

¹ The eligibles had Manasquan mailing addresses, but three eligibles actually resided within Wall Township and the other eligible resided in Brick Township, New Jersey.

such, the appellant contends that he was improperly bypassed on the subject eligible list.

In response, the appointing authority, represented by Mark G. Kitrick, Esq., indicates that it was never determined that the appellant did not meet the residency requirement for the position. In fact, it states that it advised the Division of Agency Services that other candidates on the subject eligible list were not residents and that the appellant and the eighth and ninth ranked eligibles became the top three eligible candidates. Nonetheless, it notes that the appellant's employment application indicated that he lived in Wall Township from November 2012 to February 2015 and resided there at the time of the examination closing date, which was September 4, 2013. Further, it states that it complied with its residency requirement, appointing a Manasquan resident prior to other residents of Monmouth County. Thus, the appointing authority maintains that it was well within its authority to have bypassed the appellant and choose any one of the three candidates pursuant to the "Rule of Three." Specifically, the appointing authority submits that it appointed the eighth ranked eligible because of the following reasons: the eligible possesses an Associate's degree in Criminal Justice and is enrolled at Stockton University; he served as a Manasquan Special Police Officer, crossing guard, and dispatcher and excelled in all positions with positive evaluations; and he demonstrates superior physical conditioning and training.

The appellant replies that the appointing authority did not comply with the "Rule of Three" because it appointed the eighth ranked eligible. It asserts that the top three eligibles were not ranked four, eight, and nine, but rather, they ranked four, five, and six. The appellant reiterates that he continuously resided in Manasquan, but for the period of his temporary relocation as a result of Hurricane Sandy.

In response, the appointing authority maintains that the eighth ranked eligible was reachable and his appointment was proper.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-6, and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on an open-competitive list, provided that disabled veterans and then veterans shall be appointed in their order of ranking ("Rule of Three"). *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof. It is noted that at the time of disposition of the certification in this matter, *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. The rule amendment was effective May 7, 2012. As such, the appointing authority was not required to

provide a statement as to why it appointed the eighth ranked eligible. *See e.g., In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City, 207 N.J. 38 (2011)* (Supreme Court held that, as bypassing a higher-ranked eligible is facially inconsistent with the principles of merit and fitness, the appointing authority must justify its selection of a lower-ranked eligible with a specific reason). Regardless, in the instant matter, the appointing authority has provided its reasons on appeal.

A review of the record indicates that the appellant was bypassed because the appointing authority found the lower ranked eligible to have favorable qualifications, namely his education, prior employment with the appointing authority, and his physical conditioning and training. These factors provide legitimate reasons for the eligible's appointment. *See e.g., In the Matter of Mahasen Adra-Halwani* (MSB, decided October 5, 2005) (Appointing authority was not precluded from using education as *one factor* in making an appointment but can also consider performance during the interview process and provisional service in the title). 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)3i*. The appellant has not presented any evidence that would lead the Commission to conclude that the appointing authority abused its 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, contrary to the appellant's assertion, the top three interested eligibles were the appellant in the fourth rank and the eligibles in the seventh and eighth rank. The other candidates were either removed or properly not considered for various reasons. Thus, there has not been a circumvention of the "Rule of Three."

Furthermore, the appointing authority did not actually bypass the appellant because he moved outside of Manasquan. It is noted that the appointing authority, in its discretion, *could* have bypassed the appellant or requested removal of his name from the subject eligible list if he did not continuously reside in Manasquan. In that regard, *N.J.A.C. 4A:4-2.11(e)1* states that unless otherwise specified, residency requirements shall be met by the announced closing date for the examination. When an appointing authority requires residency as of the date of appointment, residency must be continuously maintained from the closing date up to and including the date of appointment. Moreover, *N.J.A.C. 4A:4-4.7(a)7* provides that discontinuance of an eligible's residence in the jurisdiction to which an examination was limited or for a title for which continuous residence is required is a cause for disqualification from an eligible list. Nevertheless, the Commission need not decide whether, under these particular circumstances, the appellant

discontinued his residence in Manasquan since he was bypassed for other permitted reasons.

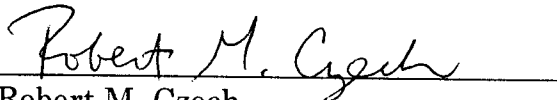
Lastly, it is emphasized that the appellant does not possess a vested property interest in a position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department 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 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 23RD DAY OF NOVEMBER, 2016



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