

resulted in his retirement.¹ As a result, the appellant contends that he was the only ranked candidate that remained on the certified list. Lastly, the appellant maintains that he has not had any serious disciplinary issues that would affect his employment with the appointing authority.

In response, the appointing authority stands by its decision to bypass the appellant from the certification list. Specifically, it indicated that the appellant was bypassed because he lacked the ability to supervise others; had been disciplined for insubordination on numerous occasions; "constantly" got into disputes with other employees; and had been moved to different departments because of his negative attitude. In support, the appointing authority submits, *inter alia*, a February 5, 2013 official reprimand letter to the appellant due to an established pattern of abuse of sick time and notices indicating that the appellant received one working day suspensions in 2009 and 2011.²

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. At the time of disposition of the certification, *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.³ Nevertheless, in response to the appeal, the appointing authority provided reasons for the bypass. *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 on the eligible list was improper.

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 the top 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 disciplinary history could be considered in determining whether he could be bypassed on the subject list. *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).

¹ The second ranked eligible retired, effective September 1, 2015.

² Although the appointing authority also submitted two written warnings, pursuant to *N.J.A.C* 4A:2-3.1(a), a written warning is not considered a disciplinary action.

³ The rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*.

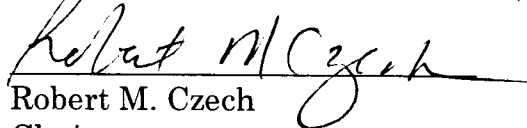
In the instant matter, though the appellant suggests that the appointing authority hires less qualified candidates with disciplinary infractions, he has not submitted any evidence to prove that it happened in this case. Records reveal that the second ranked individual did not receive a regular appointment in the subject title. Moreover, the appointing authority has presented a legitimate reason for its bypass of the appellant's name, namely, an unsatisfactory employment record. Furthermore, 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" to appoint a lower-ranked eligible absent any **unlawful** motive. See *N.J.A.C 4A:4-4.8(a)3*; See *In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012) *on temporary remand* (CSC, decided November 7, 2012). However, in the instant matter, the appellant does not even allege that his non-selection was based on an unlawful motive. 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 appellant has presented no arguments to dispute the appointing authority's determination. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name on the Assistant Supervisor of Public Works (PM1531S), Passaic City eligible list was proper and the appellant has not met 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



Robert M. Czech
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