

B-604



STATE OF NEW JERSEY

In the Matter of William Ricci, Fire
Captain (PM5076M), Clifton

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

CSC Docket No. 2016-2068

Bypass Appeal

ISSUED: NOV 30 2016 (CSM)

William Ricci, represented by Michael Prigoff, Esq., appeals the bypass of his name on the Fire Captain (PM5076M), Clifton eligible list.

The appellant, a non-veteran, took the subject promotional examination, achieved a passing score, and was ranked #6 on the resultant eligible list. The appellant's name was certified to the appointing authority on March 20, 2014. In disposing of the certification on July 3, 2014, the appointing authority bypassed the appellant, who was listed in the first position on the PL1403214 certification, and appointed the eligible in the second position, Craig Hopkins, effective April 29, 2014. Approximately four months later, on September 8, 2014, the appellant appealed the bypass of his name to the Division of Agency Services (Agency Services). In its decision dated March 30, 2015, Agency Services found that no Civil service rules were violated in disposing of the certification and sustained the appointing authority's request to bypass his name.

In his appeal dated December 7, 2015 to the Civil Service Commission (Commission), the appellant's counsel concedes that this appeal is untimely and requests that the time frame be relaxed to consider the matter on the merits and in the interests of justice. Specifically, counsel states that he was diagnosed with a serious medical condition and his ability to practice law was severely impacted by the demands of his condition and treatment. Thus, he had been unable to finish many matters in a timely fashion and requests that these issues not detract from his client's right to have his case fairly determined.

With respect to the merits of his appeal, the appellant claims that his bypass was based on retaliatory considerations, anti-union animus, impermissible political reasons and nepotism. For example, he claims that upon reviewing his personnel file in May 2014, it contained all positive evaluations, except for one unsigned performance notice relating to an incident that occurred at a Company Officer Academy in December 2013. The appellant argues that the performance notice may have been inserted into his file after the promotion as a possible pretext to justify his bypass. In this regard, he claims that Fire Chief Vincent Colavitti asked Deputy Fire Chief Brian Mulligan to file another false report about him after the bypass in order to justify the action. He also notes that the performance notice was removed from his file as a result of a successful grievance. Additionally, the appellant claims that positive evaluations and awards he received were not in his personnel file, including a Class I rescue award, as possible pretext to justify his bypass. Further, he presents that he filed a grievance in 2003 on behalf of retired Fire Fighters, which went on for about seven years, resulting in the appointing authority having to pay an additional \$200,000 per year for five years in addition to legal fees. The appellant also contends that Colavitti engaged in anti-union activity "three or four years ago" involving other fire department officers by posting a message on an International Association of Fire Chiefs message board about how to "get rid" of a training officer who was union vice president.

Additionally, the appellant asserts that Colavitti's participation in the interview of Hopkins is evidence of nepotism in light of their close friendship. Moreover, he states that there were irregularities in the interview process, as five of the six interviews were conducted by Colavitti and Deputy Fire Chief Michael Sauer and his interview was conducted by Colavitti and then Deputy Fire Chief Kevin McCarthy. After his interview, the appellant alleges he was called into Colavitti's office and told he was being passed over because his firefighting tactics were not what was needed. However, when he asked for clarification, no explanation was offered. He claims that he was then told by Colavitti and Sauer that Hopkins has a number of fire certifications whereas he only has a nursing degree. Further, the appellant states that he has been informed by his supervising officers that they were not consulted about the decision to bypass him. He also states that in 2015 Colavitti tried to falsely accuse him of leaving a fire fighter in a burning building. The appellant contends that Colavitti recently retired as a result of other staff have being harassed by him who filed lawsuits against the appointing authority. Therefore, given his unblemished record, training relevant to 70% of fire department calls, and appointing a lower ranked eligible who has been disciplined, the appellant maintains that his bypass is based on improper animus and friendship for the appointee. As such, he requests a hearing at the Office of Administrative Law (OAL).

In response, the appointing authority, represented by Louis Rainone, Esq., argues that this appeal is an "untimely appeal from an untimely appeal." In this

regard, it notes that the initial appeal to Agency Services was filed on behalf of the appellant on September 8, 2014 challenging a promotion that occurred on April 29, 2014. In response to the appeals filed with Agency Services, the appointing authority raised the issue that the appeal was out of time since the appellant was fully aware of the promotions at the time they occurred and took no action for five and a half months before filing that appeal, which was ultimately denied. Thereafter, the appellant filed a second untimely appeal of Agency Services' March 30, 2015 decision to the Commission on December 7, 2015. The appointing authority underscores that notices of the promotions were provided to all employees, including the appellant and a formal promotional ceremony took place at City Hall on May 1, 2014 that received substantial press coverage in the *Bergen Record* on May 1, 2014. Given that there is nothing in the appellant's current appeal explaining why he did not take action following receipt of Agency Services' determination, his counsel's medical condition does not provide a basis on which to accept an untimely appeal. In this regard, the appointing authority emphasizes that appointments were made from a long ago expired list on April 29, 2014, and these two untimely appeal have dragged this matter on nearly two years past the date Hopkins has been serving permanently in the position.

In support of the bypass, the appointing authority provides a certification from the current Fire Chief, Kevin McCarthy, who assumed that position following Colavitti's retirement. McCarthy states that he reviewed the resumes of both the appellant and Hopkins that were submitted on April 14, 2014 and the promotional interview notes from their respective interviews. McCarthy indicates that he sat in on the appellant's interview, but did not sit in on Hopkins' interview. Thus, as he did not sit in on all of the candidate interviews, he did not provide an opinion or recommendation regarding the pending promotion. With respect to the resumes submitted, McCarthy states that the appellant does not list any fire service related training classes or certifications on his resume. Rather, he only indicates that he attended Passaic County College for Fire Science from 2003 to the present but it is unknown how many classes he has taken or the number of credits he obtained. The resume also indicates possession of an Associate's degree in Nursing, Fire Fighter 1 and 2 certificates, certificates obtained during his initial training, and training records from classes provided in-house to all members of the fire department. However, Hopkins' resume indicates certifications and training as Fire Fighter 1 and 2, Hazardous Materials Technician, On Scene Command and Specialist Cargo Tanker, New Jersey Incident Management Level 3, NJ Fire Officer 1, NJ Fire Instructor Level 1 and 2, Drill Ground Instructor, NFA Incident Safety Officer Trainer and Pump Operator. Additionally, Hopkins' resume indicates possession of an Associate's degree in Fire Sciences, Firefighter 3 certificates from Bergen County Fire Academy, ICS-400 Advanced ICS, four classes from the National Fire Academy, Methods of Instruction Class, Vehicle Extraction, Team Search, Foam Operators, Ladder Company Operations, Foam Firefighting and other training provided to all fire department members. In McCarthy's opinion, the documentation

and interview notes establish that in April 2014, Hopkins possessed more fire service experience, education, training, and qualifications than the appellant.

In response, the appellant states that he was forced to file his initial appeal on September 8, 2014, four months after the promotions were made without receiving a disposition notice. In this regard, he states that he was severely disadvantaged in filing his appeal as he did not know the reasons why he was bypassed. The appellant claims that he did not receive any disposition notice until March 30, 2015, when Agency Services issued its decision. Further, he emphasizes that the appointing authority requested additional time to file its response to this appeal, but never served him a copy of the request and its submission to the Commission was 16 days after the extension had expired. Additionally, the appellant provides a certification from Deputy Fire Chief Brian Mulligan, one of his supervisors, that indicates Colavitti ordered Mulligan to write a derogatory report about him as pretext to support his bypass. He also states that the McCarthy certification provided by the appointing authority has no probative value in this matter as he had little to no personal knowledge of Colavitti's decision to bypass him. Moreover, the appellant states that the appointing authority did not provide supporting documentation to McCarthy's certification.

CONCLUSION

Initially, the appellant requests that the time requirements for filing an appeal be relaxed due to the health conditions of his attorney. With regard to timeliness, it is noted that there is no jurisdictional statutory time limit within which the appellant was required to appeal. *See In the Matter of Allen*, 262 N.J. Super. 438 (App. Div. 1993). N.J.A.C. 4A:2-1.1(b) provides that an appeal shall be filed within 20 days of notice of the action, decision, or situation being appealed, and N.J.A.C. 4A:1-1.2(c) provides that a rule may be relaxed for good cause. The record does not evidence any basis in this particular case to extend or to relax the time for appeal. In this regard, it is appropriate to consider whether the delay in asserting his right to appeal was reasonable and excusable. *Appeal of Syby*, 66 N.J. Super. 460, 464 (App. Div. 1961) (construing "good cause" in appellate court rules governing the time for appeal); *Atlantic City v. Civil Service Com'n*, 3 N.J. Super. 57, 60 (App. Div. 1949) (describing the circumstances under which delay in asserting rights may be excusable). Among the factors to be considered are the length of delay and the reasons for the delay. *Lavin v. Hackensack Bd. of Educ.*, 90 N.J. 145 (1982). *See, also Allen, supra* (allowing relaxation of the Commission's appeal rules where police officer repeatedly, but unsuccessfully, sought clarification of his employment status); *In the Matter of Rochelle Rosen*, Docket No. A-6468-03T3 (App. Div. June 24, 2005) (Appropriate to decline to relax 20-day time frame for filing an appeal, in light of an unexplained two-year delay in filing an appeal); *In the Matter of Wayne Varga* (MSB, decided March 23, 2005) (Appellant unaware of time period for filing appeal who ultimately filed appeal six months later who

argued that he had to address the consequences of his job loss not a basis to overlook inordinate delay in filing appeal).

In this case, it is un rebutted that the appellant was aware that he was bypassed for promotion to Fire Captain as early as April 29, 2014, the date Hopkins was appointed. Indeed, in his appeal submissions to the Commission, he claims that Colavitti called him into his office after his interview and told him that he was being bypassed in favor of Hopkins for a number of reasons. However, the appellant did not file his initial appeal with Agency Services until September 8, 2014, approximately five months after the appointment and two months after the certification was recorded as disposed on July 3, 2014. As noted by the appointing authority, the appellant did not explain in his appeal to Agency Services or the Commission why he was delayed in pursuing an appeal of his bypass with Agency Services. Further, Agency Services issued its determination on March 30, 2015 sustaining the bypass of his name, but the appellant did not pursue an appeal to the Commission until December 7, 2015, approximately eight months later. Although it is unfortunate that his counsel's medical condition may have impacted the timeliness of his second appeal, there is no evidence in the record that the appellant himself was not aware of Agency Services' adverse determination or that he took any action at an earlier time to pursue this matter with the Commission. The purpose of time limitations is not to eliminate or curtail the rights of appellants, but to establish a threshold of finality. In this regard, all appointing authorities have a reasonable and legitimate expectation of the validity and finality of decisions issued by this agency. In the instant case, the additional delay in his filing of his appeal to the Commission almost nine months after Agency Services issued its determination unreasonably exceeds that threshold of finality, particularly given that a permanent appointment was made more than one and a half years prior. Therefore, this appeal can be dismissed solely on the grounds that it is untimely.

Nevertheless, even assuming the appellant filed a timely appeal, he has not established that he was bypassed based on improper union animus and friendship for the appointee. *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. Since he alleges that discretion was not properly utilized, the appellant requests a hearing. However, bypass appeals are treated as reviews of the written record. See *N.J.S.A. 11A:2-6b*. 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)*. For the reasons set forth below, 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).

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 first-ranked eligible, was bypassed on the March 20, 2014 certification of the eligible list in favor of the eligible in the 2nd position. The appointing authority indicated that it selected a lower-ranked eligible because that individual was better suited for the position based on his experience, education, and performance during the interview. The appellant challenges the appointing authority's proffered reasons, and asserts, among other things, that he was bypassed as a result of a performance notice that was ultimately removed from his personnel file, speculation that his complete personnel file was not reviewed, anti-union animus due his activities he was involved with years prior to the promotion, the interview process, and Colavitti's friendship with the appointee.

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 a performance notice that was ultimately removed from his personnel file, speculation that his complete personnel file was not reviewed, anti-union animus due to his activities he was involved with years prior to the promotion, the interview process, or Colavitti's friendship with the appointee. While the appellant claims that the totality of these factors establish that he was bypassed for some invidious reason, he has not provided one scintilla of evidence to support these contentions. See *In the Matter of James Burke* (MSB, decided January 26, 2005) (Appellant who argued that he was bypassed due to filing a lawsuit against the appointing authority ten years prior, arresting the Chief's nephew, and for his union affiliation did not demonstrate an improper motive for his bypass since the appointing authority documented legitimate business reasons for not selecting him). Further, other than his mere allegation that the interview process was inconsistent because McCarthy sat in on his interview, he has not provided any argument or evidence demonstrating that the selection method utilized by the appointing authority was flawed. See *In the Matter of William Ippolitto* (CSC, decided June 26, 2013) (Since

interviews are discretionary, lack of documentation or structure in the appellant's interview did not establish his bypass was improper as the hiring determination was made in compliance with Civil Service law and rules). Mulligan's certification only indicates that Colavitti asked him to write a memo to document any of the appellant's deficiencies and any reason why he believed he should be passed over for promotion. The fact that Mulligan did not believe the appellant should be bypassed and Colavitti requested such documentation one day after the promotions became effective does not establish that he was bypassed for some the invidious reasons he has proffered.

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.

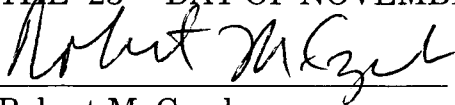
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name was proper and the appellant has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that 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
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals
& Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: William Ricci
Michael Prigoff, Esq.
Louis Rainone, Esq.
Kelly Glenn
Records Center



STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
AGENCY SERVICES
P. O. Box 313
Trenton, New Jersey 08625-0313

Chris Christie
Governor
Kim Guadagno
Lt. Governor

Robert M. Czech
Chair / Chief Executive

March 30, 2015

Mr. Michael L. Prigoff, Esq.
Lebson & Prigoff, LLC
Counsellors at Law
P.O. Box 68
39 Park Place
Englewood, NJ 07631

Dear Mr. Prigoff:

Subject: Eligible: William C. Ricci Symbol: PM5076M
 Title: Fire Captain Jurisdiction: Clifton
 Certification No: PL140321 Certification Date: Mar 20, 2014
 Initial Determination: Bypassed

This is in response to your correspondence contesting the bypass of your client's name, from the referenced eligible list.

The Appointing Authority disposed of the referenced certification indicating the selection of a lower ranked eligible and bypassed your client's name in accordance with N.J.A.C.4A: 4-4.8, which permits an appointing authority to make an appointment from among the three highest ranked eligibles according to the (Rule of Three). This rule is subject to the statutes governing veteran's preference when applicable.

It should be noted that effective May 7, 2012, a portion of N.J.A.C.4A:4-4.8 was repealed and the Appointing Authority is no longer required to provide a statement of reason when a lower or tied rank appointee is selected. The eligible list (PM5076M) expired on August 17, 2014.

After a thorough review of our records and all the relevant material submitted, we find that no Merit System rules were violated in disposing of the referenced certification. Therefore, the Appointing Authority's request to bypass your client's name has been sustained and your appeal is denied.

William C. Ricci

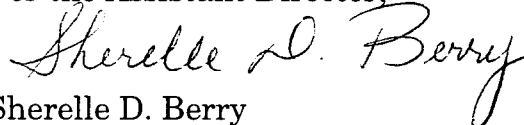
Page 2

Please be advised that in accordance with Civil Service Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs (DARA) within 20 days of the receipt of this letter. You must submit all proofs, arguments and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Please be advised that pursuant to P.L. 2010, c.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C.44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees. Address all appeals to:

Henry Maurer, Director
Division of Appeals and Regulatory Affairs
Written Appeals Record Unit
PO Box 312
Trenton, NJ 08625-0312

For the Assistant Director,



Sherelle D. Berry
Human Resource Consultant 2

c.

SDB