



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Charles Martina, Jr.,  
Police Sergeant (PM5146N),  
Plainfield

CSC Docket No. 2018-360

Reconsideration

ISSUED: APRIL 9, 2018

(SLK)

Charles Martina, Jr., represented by Steven J. Kafowitz, Esq. requests reconsideration of the attached decision rendered on July 13, 2017, which denied his appeal of his bypass for appointment from the Police Sergeant (PM5146N) Plainfield eligible list.

By way of background, on November 13, 2014, the subject list was certified (PL141429) and the eligibles in the first three positions were appointed. The petitioner was listed in the 4<sup>th</sup> position on that certification. Thereafter, on December 28, 2015, the list was again certified (PL151403). The petitioner, who was listed in the 1<sup>st</sup> position, and the eligible in the 2<sup>nd</sup> position were bypassed, the eligibles in the 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> positions were appointed, the eligible in the 4<sup>th</sup> position was interested in future certifications only, and the eligibles in the 5<sup>th</sup> and 6<sup>th</sup> position were removed. The petitioner did not appeal his bypass on certification PL151403. Thereafter, on December 21, 2016, the list was certified (PL161524). The petitioner, who was listed in the 1<sup>st</sup> position, and the eligible in the 2<sup>nd</sup> position were bypassed and the eligibles in the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> positions were appointed. The petitioner appealed his bypass on certification PL161524. In response, the appointing authority presented that the petitioner was bypassed as he had an unresolved disciplinary matter involving a serious charge, untruthfulness, that would significantly impede his capabilities as a Police Officer if that charge was upheld. The Civil Service Commission (Commission) found that the appointing authority had presented a valid business reason for bypassing the petitioner, namely, that he was facing a pending disciplinary charge involving untruthfulness,

which, if upheld, would affect his ability to serve in the subject title, especially since one of the duties of the subject title is to testify in court.

On reconsideration, the petitioner asserts that it is not true that he has a pending disciplinary charge for untruthfulness. The petitioner acknowledges that in 2009 he was charged with untruthfulness. However, he claims that the parties reached a settlement and the untruthfulness charge was vacated and replaced with a different charge. The petitioner submits a July 2013 letter from his attorney, Michael J. Mitzner, Esq., which states that he is in agreement with the aforementioned settlement. He attaches a February 2016 letter from an attorney for the appointing authority, which states the appointing authority's position FOR SETTLEMENT PURPOSES ONLY, among other details, was that the petitioner would accept the guilty plea for a charge of "courtesy."

In response, the appointing authority, represented by Littie E. Rau, Esq., attaches a September 22, 2017 letter from the Hearing Officer that discusses the date for a disciplinary hearing for the 2009 incident that includes the untruthfulness charge and an October 5, 2017 letter from Mr. Mitzner, which suggests dates for this hearing.

## CONCLUSION

*N.J.A.C. 4A:2-1.6(b)* sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

*N.J.S.A. 11A:4-8*, *N.J.S.A. 11A:5-7* 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 a promotional list provided no veteran heads the list. Additionally, *N.J.A.C. 4A:2-1.4(c)* 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 the instant matter, the petitioner has not met the standard for reconsideration. The petitioner submits letters to suggest that the untruthfulness charges against him have been vacated. Therefore, he asserts that the appointing authority cannot claim this charge as a legitimate business reason to bypass him for a position as a Police Sergeant. However, the appointing authority submits recent letters that demonstrate that the untruthfulness charge against the petitioner is still pending. It is further noted that, as indicated its prior decision, even if the disciplinary action was no longer pending, the petitioner has not presented any substantive evidence that his bypass was based on invidious motivation.

**ORDER**

Therefore, it is ordered that this request 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 4<sup>th</sup> DAY OF APRIL, 2018**

*Deirdre L. Webster Cobb*

Deirdre L. Webster Cobb  
Acting Chairperson  
Civil Service Commission

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and  
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**Attachment**

c: Charles Martina, Jr.  
Steven J. Kaflowitz, Esq.  
Rick Smiley  
Littie Rau, Esq.  
Kelly Glenn



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Charles Martina, Jr.,  
Police Sergeant (PM5146N),  
Plainfield

CSC Docket No. 2017-2098

List Bypass Appeal

ISSUED: **JUL 17 2017** (SLK)

Charles Martina, Jr., represented by Wolodymyr Tyshchenko, Esq., appeals the bypass of his name on the Police Sergeant (PM5146N), Plainfield eligible list.

By way of background, on November 13, 2014, the subject list was certified (PL141429) and the eligibles in the first three positions were appointed. The appellant was listed in the 4<sup>th</sup> position on that certification. Thereafter, on December 28, 2015, the list was again certified (PL151403). The appellant, who was listed in the 1<sup>st</sup> position, and the eligible in the 2<sup>nd</sup> position were bypassed, the eligibles in the 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> positions were appointed, the eligible in the 4<sup>th</sup> position was interested in future certifications only, and the eligibles in the 5<sup>th</sup> and 6<sup>th</sup> position were removed. The appellant did not appeal his bypass on certification PL151403. Thereafter, on December 21, 2016, the list was certified (PL161524). The appellant, who was listed in the 1<sup>st</sup> position, and the eligible in the 2<sup>nd</sup> position were bypassed and the eligibles in the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> positions were appointed. The appellant appealed his bypass on certification PL161524.

On appeal, the appellant presents that he was not called to have a meeting with the Public Safety Director while there were meetings with other Police Officers who were lower ranked on certification PL161524. Thereafter, the appellant requested a meeting with his superiors who advised him that he was being bypassed again even though he was the first ranked eligible on the list. Consequently, the appellant believes that he was arbitrarily bypassed or bypassed with an unlawful motive.

In response, the appointing authority, represented by Little Rau, Esq., presents that it was within its discretion to bypass the appellant in accordance with the Rule of Three. Specifically, the Police Director recommended that the appellant be bypassed as he had an unresolved disciplinary matter involving a serious charge, untruthfulness, that would significantly impede his capabilities as a Police Officer if that charge is upheld. It highlights that one of the duties for the subject title is to testify in court. The appointing authority also notes that the second ranked officer was also bypassed. The appointing authority states that the appellant has not presented any evidence to support his accusation that he was bypassed for an invidious reason.

### 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)3i 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) 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 1<sup>st</sup> position on the subject certification. However, it was within the appointing authority's discretion to select

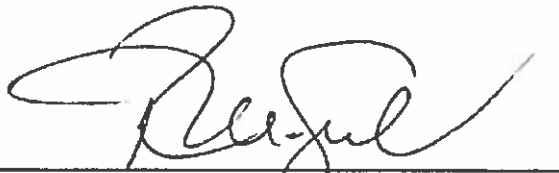
any of the top three eligibles for each appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. However, other than his mere allegations, the appellant has not presented any substantive evidence regarding his bypass that would lead the Civil Service Commission (Commission) to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." See *In the Matter of Chirag Patel* (CSC, decided June 7, 2017). 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 appellant was facing a pending disciplinary charge involving untruthfulness, which, if upheld, would affect his ability to serve in the subject title, especially since one of the duties of the subject title is to testify in court. Thus, the Commission finds that the appellant did not meet his initial burden of establishing a *prima facie* case that his bypass was based on invidious motivation.

### 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 13<sup>th</sup> DAY OF JULY, 2017




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Robert M. Czecoh, Chairperson  
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