



STATE OF NEW JERSEY

CIVIL SERVICE COMMISSION

In the Matter of Fred Cassel, Deputy
Fire Chief (PM2734T), City of Linden

Hearing Granted

CSC Docket No. 2019-1442

ISSUED: June 28, 2019 (SLD)

Fred Cassel, represented by Albert K. Marmero, Esq., appeals his bypass on the Deputy Fire Chief (PM2734T), City of Linden eligible list.

By way of background, the subject examination was announced with a closing date of December 21, 2015. The resulting eligible list of 10 names promulgated on August 11, 2016 and expires on August 10, 2019. A certification (PL181629), containing the names of three eligibles, including the appellant as the first ranked non-veteran eligible, was issued to the appointing authority on December 17, 2018. The appointing authority returned the certification appointing the second ranked eligible, Salvatore Principato, effective December 17, 2018 and bypassing the appellant.

On appeal, the appellant argues that his bypass was improper as it was the result of reprisal. Specifically, the appellant claims that on July 27, 2016, Fire Chief Joseph G. Dooley physically assaulted him upon his arrival at a fire and berated him for not being reachable in a timely manner by central dispatch despite being on-call. The appellant maintains that on August 2, 2016, he filed an Employee Complaint Form concerning the assault, and that as a result, on August 4, 2016, Dooley removed him from the Arson Squad and on August 6, 2016, ordered the appellant to refrain from speaking about the assault. Thereafter, the appellant maintains that Dooley served him with a Preliminary Notice of Disciplinary Action (PNDA) seeking his removal. The appellant notes that the appointing authority filed two separate PNDAs charging him with failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty and other

sufficient cause. The appointing authority alleged in the first PNDA that the appellant failed to respond to a fire in a timely manner while he was on-call and in the second PNDA, that he made false statements concerning his complaint that Dooley had assaulted him. The appointing authority indicated that the discipline was “to be determined” but it could be an unspecified suspension and/or demotion to Fire Lieutenant, or removal.¹ The appellant further maintains that Dooley attempted to block the appellant’s appointment from the subject eligible list by revising his own plans to retire and telling the current Deputy Fire Chiefs not to retire until after the expiration date of the subject eligible list. Additionally, the appellant maintains that he was also fined 12 hours of compensation time for attempting to print a single piece of paper from a personal email. Finally, the appellant asserts that his bypass on the subject eligible list was a continuation of the on-going retaliation by Dooley, which also included Dooley publicly slandering the appellant at an October 16, 2018 City Council meeting.

Despite an opportunity to do so, Linden has not submitted any arguments in response.

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, the “Rule of Three,” 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 the evidence that an appointing authority’s decision to bypass the appellant on 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 actions is warranted. See *Jamison v. Rockaway Township Board of Education, supra*. In *Jamison*, at 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 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.

¹ Agency records indicate that after a departmental hearing, the appointing authority issued a Final Notice of Disciplinary Action (FNDA), upholding the charges with regard to the appellant’s failure to respond to a fire in a timely manner, but dismissed the charges related to the claim that the appellant made false statements. The FNDA indicated that the appellant was to be suspended for 10 working days. The appellant appealed to the Civil Service Commission (CSC Docket No. 2019-2800), and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, where it is currently pending.

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 discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer then has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, the appellant argues that his bypass was a continuation of ongoing retaliation by Dooley, and he provides examples of his claims.² However, despite an opportunity to do so, the appointing authority has presented no reason to support its appointment of Principato instead of the appellant, who was the first ranked eligible. Moreover, the appointing authority has submitted no arguments disputing the appellant's claims. Therefore, this matter evidences a dispute that cannot be resolved on the basis of the written record. Accordingly, the Commission finds it necessary to refer this matter to the Office of Administrative Law in order to develop a factual record as to whether the appellant's bypass for appointment on the December 17, 2018 certification (PL181629) of the promotional list for Deputy Fire Chief (PM2734T) was appropriate or if it was retaliatory as alleged by the appellant.

ORDER

Therefore, it is ordered that the matter of appellant's bypass for Deputy Fire Chief be transmitted to the Office of Administrative Law for a hearing as a contested case. In so doing, the appointments of lower-ranked eligibles are designated conditional pending the outcome of this appeal.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 26TH DAY OF JUNE, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

² It is noted that the 10 working day suspension currently pending at the OAL, if sustained, would be sufficient reason to bypass the appellant. As such, it is recommended that this matter be consolidated with that matter at OAL as the determination in that matter may have a significant bearing on this matter.

Inquiries
and
Correspondence

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

c: Fred Cassel
Albert K. Marmero, Esq.
Joseph C. Bodek
Pamela N. Ullman, Deputy Attorney General
Kelly Glenn
Records Unit
Beth Wood w/file