



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Kelly Chesler,  
Police Captain (PM0863S), Jersey  
City

CSC Docket No. 2019-2008

Reconsideration

ISSUED: JUNE 28, 2019

(SLK)

Kelly Chesler, represented by Nicholas P. Milewski, Esq., requests reconsideration of *In the Matter of Kelly Chesler* (CSC, decided December 19, 2018) where the Civil Service Commission (Commission) upheld the bypass of her name on the Police Captain (PM0863S), Jersey City eligible list.

By way of background, Chesler, a nonveteran, appeared on the PM0863S eligible list, which promulgated on March 26, 2015 and expired on March 25, 2018. Initially, Chesler was in the fourth position on certification PL171355, which was disposed of on December 19, 2017 with the first through third and fifth through 14<sup>th</sup> eligibles being appointed. Thereafter, Chesler was in the first position on certification PL171529, which was disposed of on January 19, 2018 with the second through fourth eligibles being appointed. Additionally, Chesler was in the first position on certification PL180256, which was disposed of on March 19, 2018 with the second through sixth eligibles being appointed. In *In the Matter of Kelly Chesler, supra*, the Commission upheld the bypass of her name based on her indefinite suspension on pending criminal charges.

On reconsideration, Chesler presents new evidence, which she believes should change the outcome of this matter. Specifically, she indicates that on October 23, 2018, the Hudson County Prosecutor's Office (Prosecutor's Office) dismissed the pending criminal charges against her due to lack of evidence. Additionally, Chesler states that the appointing authority has not sought any disciplinary penalty against her. Therefore, she argues that the reason for her

bypasses are now without merit. Chesler also highlights that the appointing authority has since changed its policy where officers who are indicted cannot be suspended more than 30 days if the pending criminal charges are not resolved in that time. Consequently, if the current policy had been in place at the time her name had been certified, she would have been appointed. Additionally, Chesler cites *In re Hruska*, 375 N.J. Super 202 (App. Div. 2005) to highlight that candidates may not be excluded from promotional consideration or comparison with other candidates because of an unannounced, secret eligibility requirement and must be evaluated using merit-based criteria. In *Hruska*, the Appellate Division directed the Department of Personnel to reissue the certification where Hruska had been bypassed so that the appointing authority could reconsider appointments without considering the unannounced, secret eligibility requirement that was the basis of the bypass. Chesler argues that since she was bypassed solely for an indictment that has been dismissed, the Commission should order her promoted to the rank of Captain. In the alternative, she argues that the Commission should reissue certification PL171355 and revive the list so that she can be evaluated for the Captain's promotion based on merit-based criteria.

In response, the appointing authority, represented by Chaunelle Robinson, Assistant Corporation Counsel, does not dispute Chesler's record of service, promotional history, and her work-performance history. However, it argues that her bypasses were justified as Chesler was under criminal indictment at the times her name was certified. Therefore, the appointing authority argues that Chesler has not met the standards for reconsideration as the Commission did not make a clear material error. Further, while the dismissal of the charges against her may be a new development, it asserts that this is not new evidence that would have changed the outcome of the original proceedings. Specifically, the Prosecutor's Office charged Chesler with conspiring to steal money from Jersey City through its off-duty program for Police Officers and it was proper for the appointing authority to bypass her while the matter was still pending. Similarly, she is not entitled to a retroactive appointment as it was the Prosecutor's Office, and not the appointing authority, which brought these charges. Moreover, as the appointing authority could not foresee the outcome of the Prosecutor's Office's case at the time of each bypass, the appointing authority's decisions to bypass Chesler were not based on discrimination, retaliation, or other improper motives and permissible under the Rule of Three. See *N.J.A.C. 4A:4-4.8*.

## 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.

A review of the record indicates that Chesler has met the standard for reconsideration. Specifically, she has presented that on October 23, 2018, the Prosecutor Office's dismissed the pending criminal charges against her with prejudice due to a lack of evidence. This occurred after Chesler submitted her original appeal. Further, this matter is distinguishable from *Hruska, supra*, as this matter did not involve an unannounced, secret eligibility requirement. Instead, as indicated in the original decision, it was permissible for the appointing authority to consider Chesler's pending discipline as a basis for bypassing her on a certification. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). Similarly, there are no grounds for a retroactive appointment as the fact that the allegations were ultimately found to be non-meritorious is of no moment as there were no findings of invidious motivation at the time that the decisions to bypass were made. See *In the Matter of Monica Miller* (CSC, decided April 17, 2019). However, it cannot be ignored that the charges against the Chesler were ultimately dismissed due to a lack of evidence. Further, the appointing authority does not dispute Chesler's experience and work-performance history and has apparently taken no administrative disciplinary action based on the underlying incident after the dismissal of the criminal charges. Moreover, she has not had the opportunity for the merits of her candidacy for promotion to be evaluated. Therefore, under these circumstances, Chesler's name should be restored to the Police Captain (PM0863S), Jersey City eligible list. Since the PM0863S eligible list expired on March 25, 2018, it is appropriate to revive that list at the time of the next certification to allow Chesler to be considered for prospective appointment. It is noted that at the next time Chesler's name is certified, while the appointing authority still has discretion to bypass her for an appropriate reason pursuant to the Rule of Three, the indictment that is the subject of this matter shall not be considered an appropriate reason to bypass her.

This determination is limited to the instant matter and does not provide precedent in any other matter.

### ORDER

Therefore, it is ordered that this request be granted in part and the list for Police Captain (PM0863S), Jersey City be revived in order for Kelly Chesler to be considered for appointment at the time of the next certification for prospective employment opportunities only.

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 26<sup>th</sup> DAY OF JUNE, 2019



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c: Kelly Chesler  
Nicholas P. Milewski, Esq.  
Brian Platt  
Chaunelle Robinson, Assistant Corporation Counsel  
Kelly Glenn  
Records Center

Attachment



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Kelly Chesler,  
Police Captain (PM0863S), Jersey  
City

CSC Docket No. 2018-2632

List Bypass Appeal

ISSUED: DECEMBER 21, 2018 (SLK)

Kelly Chesler, represented by Matthew T. Clark, Esq., appeals the bypass of her name on the Police Captain (PM0863S), Jersey City eligible list.

By way of background, Chesler, a nonveteran, appeared on the PM0863S eligible list, which promulgated on March 26, 2015 and expired on March 25, 2018. Initially, Chesler was certified on PL171355. Chesler was in the fourth position on PL171355, which was disposed of on December 19, 2017 with the first through third and fifth through 14<sup>th</sup> eligibles being appointed. Thereafter, Chesler was certified on PL171529. Chesler was in the first position on PL171529, which was disposed of on January 19, 2018 with the second through fourth eligibles being appointed. Additionally, Chesler was certified on PL180256. Chesler was in the first position on PL180256, which was disposed of on March 19, 2018 with the second through sixth eligibles being appointed.

In her April 16, 2018 appeal, Chesler highlights that she graduated first in her Academy class in 1999. Additionally, she presents that she was promoted to Police Sergeant in December 2005 and Police Lieutenant in June 2011. Chesler indicates that she subsequently served as the Executive Officer for the North District. She states that she applied for the subject examination, which had a closing date in July 2014. Chesler presents that on March 11, 2015, she filed a lawsuit against the appointing authority, the Public Safety Director, the Chief of Police, the then-Deputy Police Chief and two Officers due to alleged discrimination, retaliation, and violation of the State Constitution and certain statutes and laws.

Chesler argues that the appointing authority violated the "Rule of Three" by bypassing her on three separate certifications due to discriminatory reasons and to retaliate against her. She highlights that she was the only eligible on the list who was not appointed.

In response, the appointing authority, represented by Scott W. Carbone, Assistant Corporation Counsel, does not dispute Chesler's record of service. However, it asserts that her bypass was not related to her lawsuit. In support of this assertion, the appointing authority presents that another Officer filed a similar complaint, but was appointed. Therefore, the appointing authority argues it is implausible that it would bypass Chesler for an unlawful reason while appointing this other Officer who instituted similar litigation. Instead, it indicates that Chesler was bypassed because she was criminally indicted for official misconduct related to her service with the Jersey City Police Department, which led to her indefinite suspension without pay pending the disposition of the criminal charges. The appointing authority presents that she was under indictment each time a promotional appointment was made and remains in this status. Therefore, it argues that its bypass was proper under the "Rule of Three."

In reply, Chesler acknowledges that she is under indictment and will stand trial in this matter. She believes that the outcome of the criminal matter must be determined before the Civil Service Commission (Commission) can fully consider this appeal. Therefore, Chesler requests that this matter be held in abeyance until a verdict has been rendered in her criminal trial.

### 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, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment and, therefore, Chesler was reachable for potential appointment on the above-mentioned certifications. Nevertheless, Chesler alleges that she was bypassed for improper reasons. Specifically, she contends that she was bypassed because of discriminatory reasons and in retaliation for a lawsuit that she filed against the appointing authority and certain employees. However, Chesler acknowledges that she was under indictment for alleged activity related to her employment with the Jersey City Police Department at the time the appointing authority bypassed her name and appointed other Officers. Further, the Hudson County Prosecutor's Office, and not the appointing authority, charged Chesler with certain crimes related to her employment. Thereafter, pursuant to *N.J.A.C. 4A:2-2.4*, the appointing authority suspended her indefinitely as there is a pending indictment against her. Moreover, it is permissible for an appointing authority to consider an individual's pending discipline as a basis for bypassing an eligible on a certification. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). Consequently, the Commission finds that the appointing authority's decision to bypass Chesler on the above-mentioned certifications was appropriate based on the indictment against her. Moreover, the Commission finds that there is no reason to hold this matter in abeyance as, other than mere allegations, there is no evidence that has been presented that indicates that the appointing authority's decision to bypass her was based on anything other than her pending charges. However, if the resolution of the criminal complaint against the Chesler indicates new facts, she may pursue appropriate relief from the Commission at that time.

### 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 19<sup>th</sup> DAY OF DECEMBER, 2018



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