



**STATE OF NEW JERSEY**

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

In the Matter of Wayne Miller, Police  
Lieutenant (PM0698V), Bridgeton

Bypass Appeal

CSC Docket No. 2019-2979

**ISSUED: SEPTEMBER 12, 2019 (HS)**

Wayne Miller appeals the bypass of his name on the Police Lieutenant (PM0698V), Bridgeton eligible list.

The appellant appeared as the fifth ranked eligible on the subject eligible list, which promulgated on March 8, 2018 solely with the names of non-veteran eligibles and expires on March 7, 2021. A certification was issued on December 13, 2018 (PL181602) with the appellant listed in the third position. In disposing of the certification, the appointing authority requested that the first listed eligible be retained as she was only interested in future certifications. The appointing authority bypassed the second listed eligible and the appellant. It appointed J.H., the fourth listed eligible, effective March 19, 2019.

On appeal to the Civil Service Commission (Commission), the appellant notes that he placed higher on the eligible list than did the appointee and maintains that his experience and training made him more qualified for the position. He recounts that from October 13, 2018 to January 23, 2019, he was assigned as “Acting” Lieutenant in a temporary position while the current Lieutenant was out on injury leave. The appellant also claims that J.H.’s father is a retired Police Sergeant who worked closely with the current Police Chief and remains close friends with him. According to the appellant, it is “unknown” if this bias had any influence on the “[Police Chief]’s decision” to bypass him. In support, he submits his semi-annual

evaluation and performance report for the July 1, 2018 to December 31, 2018 period.<sup>1</sup>

In response, the appointing authority maintains that it had legitimate reasons to bypass the appellant. Specifically, it notes that the appellant received major discipline, a 10 working day suspension, on a charge of conduct unbecoming a public employee in November 2017 while serving in the title of Police Sergeant. The appointing authority states that the Police Chief remains concerned about the appellant's judgment in that incident especially since he was a supervisor at the time. It also points to a scheduling issue that occurred in November 2018. The appointing authority maintains that J.H. is very qualified for the position based on his credentials, experience and record.

In reply, the appellant states that he self-reported the incident from which his discipline stemmed and agreed to the penalty, yet he is still being held accountable over a year later for being honest. He contends that if the incident was of such concern, he would not have been assigned as "Acting" Lieutenant. He notes that J.H. has also previously received major discipline.<sup>2</sup> The appellant also claims that a Police Sergeant had been demoted in August 2016. This Police Sergeant, according to the appellant, faced major discipline for several off-duty incidents but was re-appointed to Police Sergeant in July 2018. In addition, the appellant asserts that as there are clear factual disputes between the parties, the Commission should refer this matter for a hearing.

## CONCLUSION

Initially, 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 that can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d).* For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service, 155 N.J. Super. 517 (App. Div. 1978).*

*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. Moreover, it is noted that the appellant has the burden of proof in this matter. *See N.J.A.C. 4A:2-1.4(c).*

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<sup>1</sup> The report describes the appellant's "Acting" Lieutenant role as "unexpected[]."

<sup>2</sup> According to the County and Municipal Personnel System, J.H. forfeited seven vacation days in 2007 as a disciplinary penalty. At the time, J.H. was serving in the non-supervisory title of Police Officer.

Since only non-veterans were listed on the certification, it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification. The appointing authority justifies its decision to bypass the appellant partly on the basis of his November 2017 major discipline, a 10 working day suspension. It is well established that disciplinary actions may be considered in bypassing an individual for appointment. *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). 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 three eligibles, any of whom may be selected under *N.J.A.C. 4A:4-4.8(a)3*. While the appellant does not dispute that he received major discipline in November 2017, he does reference that J.H. forfeited seven vacation days in a 2007 disciplinary action. However, that action occurred *more than 10 years* before J.H. was considered for the position at issue and while J.H. was serving in the *non-supervisory* title of Police Officer. The appellant's disciplinary action, by contrast, occurred only approximately one year and four months before the appointment at issue during his service in the title of Police Sergeant. As such, the appointing authority's apparent determination that the appellant had the worse disciplinary record at the time the eligibles were being considered for the position at issue was not unreasonable.

The appellant's suggestion that his discipline could not have been of concern to the appointing authority in light of his service as "Acting" Lieutenant is unpersuasive. In this regard, the record reflects that this assignment was "unexpected[]." There is no such designation as an "Acting" appointment under Civil Service rules. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1 et seq.* provide for regular, conditional, provisional, interim, temporary and emergency appointments. *See In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Moreover, as already noted, it has been well established that disciplinary actions may be considered in bypassing an individual for *appointment*. *See DeMarco, supra*. As such, the Commission is not convinced that the appointing authority lost its discretion to consider the appellant's discipline when bypassing him for a regular promotional appointment merely due to his approximately three-month stint in an "Acting" capacity. Such "Acting" service did not create an entitlement to a regular appointment.

The appellant claims that the Police Chief was biased in favor of J.H. since the Police Chief worked closely with J.H.'s father and remains close friends with him. However, the appellant offers no support for the existence of this bias and even admits that it is "unknown" if this alleged bias had any influence on the Police Chief. The Police Chief, in any event, did not make the ultimate decision to bypass the appellant as he is not the appointing authority. The appellant also claims that

a Police Sergeant, who was demoted in August 2016 and faced major discipline for several off-duty incidents, was reappointed to Police Sergeant in July 2018. However, the Commission need not consider this claim as the appellant does not name the Police Sergeant or offer any further details or documentation. Given the documented disciplinary actions for the appellant and J.H., neither the appellant's mere insinuation of bias nor the reappointment of an unnamed Police Sergeant in 2018 give rise to any material issue of fact. The Police Sergeant and the appellant do not, in any event, appear to have been similarly situated. In this regard, the Police Sergeant was repromoted after two years had passed, while the appellant's discipline occurred approximately one year and four months before the appointment at issue in this matter. Therefore, the appellant's discipline provided a sufficient basis to bypass him on the subject eligible list.

Additionally, 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*; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 *N.J.* 38, 49 (2011). 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). Moreover, the appellant does not possess a vested property interest in the position. In this regard, 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). 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." In fact, the appellant was not the only one bypassed as the second listed eligible was bypassed as well. Moreover, the appointing authority presented a legitimate reason for the appellant's bypass that has not been persuasively refuted. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name 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 10<sup>TH</sup> DAY OF SEPTEMBER, 2019



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