



of Three,” as it exercised its selection direction to appoint lower ranked candidates. It maintains that the reason for the appellant’s bypass was based on merit. The appointing authority explains that after the appellant was sent for his psychological evaluation, it obtained information regarding the appellant’s background as a volunteer Fire Fighter which indicated that he did not possess the requisite skills for the position. The appointing authority discovered that the appellant “failed to abide by the lawful orders of his superiors,” and “had poor communication skills, questioned authority, and in doing so exercised poor judgment.” Additionally, the appellant was “observed arguing with superiors and not taking direction at the scene of a fire” and was once suspended in his volunteer Fire Fighter position due to insubordination. It was also asserted that the appellant had difficulty working as part of a team.

In support of the foregoing information, the appointing authority submits the certification of Fire Chief Charles Kenny of the Woodbridge Township Fire District #1, who interviewed the appellant after the information was obtained. Deputy Chief John Golden also interviewed the appellant. The appointing authority presents the interview notes. In the interview, the appellant allegedly confirmed that “he had a reputation . . . for not following the directives of his superior officers, argued with co-workers . . . and exhibited conduct that could be viewed as ‘difficult.’” Therefore, the appointing authority contends that the appellant is ineligible for appointment “due to his poor communication skills, insubordination, unsatisfactory employment history, and disrespect for the rules necessary for the performance of the job” of a Fire Fighter. It notes that neither Fire Chief Kenny nor any member of the Board of Fire Commissioners is related to any individual who had been appointed from the certification. Therefore, the appellant’s bypass was proper and not due to an invidious motive.

In reply, the appellant contends that “they had a decision made prior to my interview. Assuming they have written and/or recorded documentation and not ‘Hear Say’ [sic] including the ‘additional information from firefighters’ I would have still been denied for dishonesty if I did not answer what they expected to hear.” He notes that he never referenced the appointment of “Kenny” in his appeal and does not have concerns regarding his appointment.

## CONCLUSION

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-6, 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 an open-competitive list, provided that disabled veterans and then veterans shall be appointed in their order of ranking. In bypass appeals, the appellant has the burden of proof. *See N.J.A.C.* 4A:2-1.4(c). Additionally, when bypassing a higher ranked eligible, *N.J.A.C.* 4A:4-4.8 no longer requires an appointing authority to provide a statement of the reasons why the appointee was selected instead of a

higher ranked eligible or an eligible in the same rank due to a tie score.<sup>1</sup> As such, the appointing authority was not required to provide this agency with a statement as to why it appointed lower ranked eligibles over the appellant. *See e.g., Foglio, supra* (The Supreme Court held that, as bypassing a higher ranked eligible is facially inconsistent with the principles of merit and fitness, the appointing authority must justify its selection of a lower ranked eligible with a specific reason).<sup>2</sup> Moreover, it is well established that the appointing authority is not obligated to provide a candidate with the reasons why a lower ranked candidate was appointed. *See Local 518, New Jersey State Motor Vehicle Employee Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles*, 262 N.J. Super. 598 (App. Div. 1993) and *In the Matter of Brian McGowan* (MSB, decided April 6, 2005). Therefore, the appellant's contention in that regard are not persuasive. Nonetheless, in response to the appellant's appeal, the appointing authority has justified the reason for the appellant's bypass, consistent with *Foglio, supra*.

Additionally, in a case 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/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination 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 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 intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the discriminatory motive. In a case such as this, where the adverse action is failure to appoint, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

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<sup>1</sup> The rule amendment was effective May 7, 2012.

<sup>2</sup> For subsequent history, *see In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012), *on temporary remand* (CSC, decided November 7, 2012) (On remand from the Supreme Court, the Commission found that appointing authority provided a proper statement of reasons when bypassing the appellant when it indicated that based on its interviews, the appointees demonstrated the maturity and temperament for the position. Subsequently, however, the Commission acknowledged a settlement providing for Foglio's appointment).

As set forth above, the “Rule of Three” allows an appointing authority to use discretion in making appointments. See *N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3i. As long as that discretion is utilized properly, an appointing authority’s decision will not be overturned. 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).

A review of this matter indicates that the appointing authority had legitimate concerns regarding the appellant’s performance as a volunteer Fire Fighter, which were revealed after the appellant’s psychological examination and confirmed during the appellant’s subsequent interview. It is noted that appointing authorities are permitted to interview candidates and base their hiring decision on the interview. See e.g., *In the Matter of Wayne Rocco*, Docket No. A-2573-05T1 (App. Div. April 9, 2007) (Appellate Division determined that it was appropriate for an appointing authority to utilize an oral examination/interview process when selecting candidates for promotion); *In the Matter of Paul Mikolas* (MSB, decided August 11, 2004) (Structured interview utilized by appointing authority that resulted in the bypass of a higher ranked eligible was based on the objective assessment of candidates’ qualifications and not in violation of the “Rule of Three”).

In his reply, the appellant does not persuasively dispute the information obtained from the interview which led to his bypass. Rather, he argues that if he did not answer “what they expected to hear” then he would have been “denied for dishonesty.” This suggests that he was truthful during the interview. He also implies that the disqualifying information may be hearsay. However, the appellant does not submit any substantive evidence to refute Fire Chief Kenny’s certification or the interview notes of his interview. It was revealed that the appellant, among other troubling issues, was previously suspended for insubordination which may be considered in bypassing him. See e.g., *In the Matter of Paul DeMarco* (MSB, decided April 6, 2005) (Appellant’s disciplinary can be considered in determining whether he could be bypassed from the subject list). Moreover, the appellant does not object to “Kenny’s” appointment and the appointing authority makes clear that no relation exists between the Fire Chief and this lower ranked eligible who was appointed. It is emphasized that, 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,” absent any unlawful motive. In reviewing this matter, the Commission has not found that the appellant’s bypass was due to invidious reasons. Accordingly, since the appellant’s assertions are unsupported in the record, he has not established by a preponderance of the evidence a *prima facie* case as outlined above. Therefore, the appellant has not met his burden of proof.

Nonetheless, the Commission is troubled by the fact that the appellant was administered a psychological examination. There is no indication in the record that he was disqualified due to psychological reasons, which could have been a basis to remove him from the subject eligible list. Rather, the appointing authority bypassed the appellant for appointment, instead of removing him, “due to his poor communication skills, insubordination, unsatisfactory employment history, and disrespect for the rules necessary for the performance of the job” of a Fire Fighter. Pursuant to 42 U.S.C.A. sec. 12112(d)(3), no medical or psychological examination may be conducted prior to rendering a conditional offer of employment. *See also N.J.A.C. 4A:4-6.5(b)* (An appointing authority may only require a medical and/or psychological examination after an offer of employment has been made and prior to appointment). An appointing authority is barred from reevaluating any information that was known prior to extending the conditional offer of employment. *See Equal Employment Opportunity Commission’s ADA Enforcement Guidelines: Preemployment Disability Related Questions and Medical Examinations* (October 10, 1995). Those guidelines state, in pertinent part, that in order for a conditional offer of employment to be “real,” the employer is presumed to have evaluated all information that is known or should have reasonably been known prior to rendering the conditional offer of employment. This requirement is intended to ensure that the candidate’s possible hidden disability or prior history of disability is not considered before the employer examines all of the relevant non-medical information.

In the present case, it appears that the disqualifying information was discovered after the psychological examination. Thus, despite a technical violation of the ADA, the background of the appellant provides a sufficient reason to bypass him. Additionally, the appellant is not a veteran and can be bypassed under *N.J.S.A. 11A:4-8*, *N.J.S.A. 11A:5-6*, and *N.J.A.C. 4A:4-4.8(a)3i*. *Compare, In the Matter of Edison Cerezo*, Docket No. A-4533-02T3 (App. Div. October 15, 2004) (Appellate Division affirmed the decision denying appointing authority’s request to remove an eligible from the Police Officer eligible list due to unsatisfactory background when eligible was subjected to a psychological examination and eligible could not be bypassed).<sup>3</sup> *See also In the Matter of County Correction Lieutenant (PC2647F), Sussex County Sheriff’s Office* (MSB, decided March 8, 2006) (Eligible cannot be bypassed under the “Rule of Three” in a promotional situation when he

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<sup>3</sup> The former Merit System Board indicated that the appointing authority, in its discretion, could have considered Cerezo’s interview as a basis to bypass his name on the subject eligible list pursuant to the “Rule of Three,” *N.J.A.C. 4A:4-4.8(a)3*. However, in subjecting Cerezo to a psychological examination, which he passed and absent disqualification issues, Cerezo’s appointment was mandated. *See In the Matter of Edison Cerezo* (MSB, decided March 13, 2003). In the instant matter, staff was verbally advised by Fire Chief Kenny that all candidates were given psychological examinations. As such, it would be inequitable in this instance to consider a mandated appointment since other candidates were uniformly given psychological examinations and there are disqualification issues in the appellant’s background. Further, the Commission declines to remove the appellant from the eligible list as the appointing authority only requested his bypass.

was subjected to a psychological examination after the interview process and no disqualifying issue was found).

The Commission emphasizes that the conclusion to uphold the appellant's bypass in no way condones the actions of the appointing authority. The Commission is concerned by the appointing authority's apparent lack of thoroughness in investigating the appellant's background prior to subjecting him to a psychological examination. Therefore, the Commission directs the appointing authority to strictly comply with the requirements of the ADA in all future cases and cease subjecting any candidate to a psychological or medical examination without first conducting a thorough background check and prior to offering a candidate a conditional offer of employment. Should the appointing authority continue such practice, it is warned that it could be subject to fines pursuant to *N.J.A.C. 4A:4-10-2.1*.

### 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 15<sup>TH</sup> DAY OF APRIL, 2020

*Deirdre' L. Webster Cobb*

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