In the Matter of James Cullen, Police Captain, Morristown
CSC Docket No. 2012-335
(Civil Service Commission, decided January 9, 2013)

James Cullen, represented by Joseph Murphy, Esq., appeals the determination of the Division of Selection Services and Recruitment (Selection Services) that the appellant's veterans' status was not retroactive for the examination for Police Captain (PM3586L), Morristown. The appellant also appeals his bypass on the June 2011 certification of the eligible list for Police Captain (PM3586L).

By way of background, the promotional examination for Police Captain (PM3586L) was announced with a closing date of June 22, 2009. The appellant and three other individuals applied for and were admitted to the subject examination. All of the candidates took the written portion of the examination on September 24, 2009. The oral portion of the examination was scheduled for December 5, 2009. However, since the appellant was on active military duty he was unavailable to take the oral examination on December 5, 2009. The resulting eligible list, containing the names of W.O., Steven Sarinelli and D.L., as the first, second and third ranked eligibles respectively, promulgated on April 1, 2010[1] and expires on March 31, 2013.

Upon the appellant's return from active duty, the appellant applied for veterans' status from the Department of Military and Veterans Affairs (DMVA). On January 21, 2011, the appellant was granted veterans' status. However, since the eligible list for Police Captain (PM3586L) promulgated on April 1, 2010, the appellant's veterans' status did not apply for the subject examination. The appellant was provided a make-up examination for the oral portion of the examination on January 22, 2011, which he passed. As a result, the appellant's name was added to the subject eligible list on June 3, 2011 as the first ranked non-veteran eligible.

On June 3, 2011 a certification containing only the name of the prior first ranked eligible, W.O. was issued to the appointing authority. On June 8, 2011 the appointing authority requested the remaining names be added to the eligible list. Thereafter, on June 9, 2011, the names of the remaining three eligibles were added to the outstanding certification. The appointing authority returned the certification as follows:

Rank	**Name**	**Disposition Code**
A-1	Appellant	I2 – Retain, interested others appointed
1	W.O.	RR – Removed, eligible retired effective December 1, 2010
2	Sarinelli	A4 – Appointed, effective July 1, 2011
3	D.L.	RR – Removed, eligible retired effective February 1, 2011

[1] The subject eligible list actually issued on March 24, 2010, prior to the promulgation date.

In bypassing the appellant, the appointing authority indicated that it appointed Sarinelli since he had more experience in Internal Affairs and the Detective Bureau.

On appeal to the Civil Service Commission (Commission), the appellant notes that he applied for and was granted veterans' status on January 18, 2011. The appellant asserts that he contacted this agency to correct his veterans' status after his addition to the list and was informed that DMVA made that determination and he would have to contact it. The appellant argues that when he contacted DMVA, he was told that DMVA agreed that his status should be changed to "veteran" and it would contact this agency to correct the error on the subject eligible list. Thereafter, DMVA contacted him and advised him that this agency would not change his status pursuant to its "interpretation" of the law. The appellant asserts that he then contacted this agency again and was told that it would not change his status.

The appellant argues that this agency's determination that he was a non-veteran on the subject eligible list is in violation of the plain language and intent of *N.J.S.A.* 11A:5-1(b) which provides that veterans' status on examinations is to be granted when it is achieved no later than eight days prior to the issuance of an employment list for which the individual received a passing score on the examination. Specifically, he asserts that the Legislature amended *N.J.S.A.* 11A:5-1(b) in 2007 to extend the time period in which returning military service members could establish veterans' preference. He argues that by adding the phrase "that individual," the Statute ties the date the veterans' status must be established to a particular individual. Moreover, the statutory language does not "tie an eligible" to an "original" list or a "prior" list, but simply states, "no later than eight days prior to the issuance of an employment list, for which the individual received a passing score." Additionally, the appellant argues that the legislative history clearly indicates that the legislature intended to allow veterans to file for veterans' preference after they take a civil service examination, but require the eligible to submit proof of the veterans' status eight days prior to the promulgation of the eligible list, thereby allowing individuals who were on active duty at the time of an examination to qualify for veterans' preference. Therefore, the appellant argues that since he took a make-up examination, the eligible list he received a passing grade from promulgated on June 3, 2011, more than 100 days after he established his veteran status.

He further argues that due to a conflict between the intent of *N.J.S.A.* 11A:5-1(b) and *N.J.A.C.* 4A:4-2.9(d), make-up examinations for individuals returning from military leave, he is deprived of the "intended" protection of *N.J.S.A.* 11A:5-1(b) and therefore, the intent of *N.J.S.A.* 11A:5-1(b) must prevail. Specifically, he asserts that the intent of *N.J.S.A.* 11A:5-1(b), in extending the time limit in which veterans' preference could be established, was to allow individuals to obtain veterans' preference, even though the applicant was not technically a veteran at the time he or she applied for the subject examination. Moreover, since the statute does not reference make-up examinations, and the intent was clearly to favor returning

veterans, he should have been deemed a veteran on the subject eligible list since the "corrected" list, which included his name, was not "issued" until more than 100 days after obtaining veterans' preference. The appellant maintains that this interpretation is confirmed by e-mails with Senator Joseph Vitale's office, in which they recommended a resolution[2] "in his favor." Therefore, he maintains that since he should have been listed as a veteran on the subject certification, he could not have been bypassed and is entitled to an appointment as Police Captain, effective July 1, 2011. He also claims that he is entitled to back pay from July 1, 2011, until his actual appointment to Police Captain.

Additionally, the appellant argues that requiring him to establish his veterans' status prior to the date of an examination he could not take because he was deployed, creates an additional prerequisite in violation of Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 *U.S.C.* § 4301-4333. Therefore, he is entitled to the broadest possible latitude in applying all possible benefits and protections implicated under USERRA. Consequently, his veterans' status should have been applied for the subject examination.

In the alternative, the appellant argues that the bypass of his name on the subject certification was for a discriminatory reason and therefore it is unnecessary to reach the issue of whether or not he was a veteran for purposes of the subject eligible list. In this regard, he maintains that the instant bypass of his name was merely a continuation of the Police Chief and the appointing authority's discrimination against him due to his military service, which began in 1997 when he announced his attention to join the United States Coast Guard. In support, he submits a June 13, 2008 complaint he filed in the United States District Court of New Jersey alleging, in part, violations of USERRA and the New Jersey Law Against Discrimination (LAD).[3] Moreover, the appellant asserts that upon his return from active military duty in November 2010, the Police Chief and the appointing authority continued its discrimination in violation of USERRA by giving him an unfavorable schedule, placing him in an administrative position, thereby stripping him of his supervisory duties, assigning him to a sub-standard office next to the bathroom and assigning non-police duties. The appellant argues that only his recall to active military duty on January 16, 2011 stopped the discriminatory actions. Additionally, the appellant asserts that prior to finally being appointed as a Police Sergeant, he was bypassed three times, despite being the number one ranked eligible.

The appellant asserts that Saranelli, a non-veteran, has less experience and education then he does and therefore, his bypass can only be due to his military service. In this regard, he notes that he possesses a Master's Degree and a law

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[2] Although the e-mails submitted by the appellant reference an analysis from the Office of Legislative Services which apparently recommended a legislative remedy to the situation, the analysis itself was not submitted by the appellant.

[3] The appellant entered into a March 11, 2010 settlement agreement regarding this complaint, in which he released all claims against the appointing authority and the Police Chief, from the beginning of his employment through the date of the agreement.

degree and has been employed with the appointing authority since 1986. Additionally, he asserts that he has proven his skill, leadership abilities, confidence and intelligence in carrying out his duties as a Police Lieutenant and a Coast Guard Officer as evidenced by his State-wide training experience; supervisory, administrative and field experience; and his military record containing multiple deployments since 2001, and includes numerous awards, medals and commendations for meritorious service. The appellant maintains that due to his excellent credentials, the appointing authority cannot prove by a preponderance of the evidence that his bypass would have taken place despite his protected status.

Further, the appellant maintains that the appointing authority has failed to provide the required statement of reasons for its selection of Sarinelli pursuant to the rule of three. *See In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 *N.J.* 38 (2011). Instead he asserts that since the appointing authority did not provide the reasons for Sarinelli's appointment until after the appellant's appeal, it is clear that the appointing authority merely "manufactured" the reasons for its appointment of Sarinelli. The appellant asserts that the appointing authority's statement in support of Sarinelli's appointment was purposely vague to provide the impression that Sarinelli possessed 12 years of experience, when he only possessed four years of the indicated experience, which was broken down into individual components. Moreover, the appellant argues that due to his military service, he was not provided the same opportunities for additional training, special assignments, educational opportunities or other discretionary appointments. Therefore, he argues that since he was not provided the same opportunities, the appointing authority cannot now use those deficiencies to support his non-appointment. He also argues that due to the history of discrimination by the Police Chief, none of his reviews or his disciplinary record could be considered unbiased. Rather, he argues that only the "unbiased" scores from the subject examination should be used as the deciding factor in making the appointment and since he scored the highest, he should have been appointed. In this regard, he maintains that the appointing authority does not complete formal, objective job performance evaluations for its employees. Instead, all determinations are at the subjective discretion of the Police Chief, who also has the power to enter disciplinary reprimands into an employee's personnel file, award commendations or offer special assignments. The appellant asserts that "favored" employees have discipline handled "off the books" and are granted commendations and special assignments. The appellant maintains that by any "objective measure," his qualifications and capacity for leadership are remarkable, as evidenced by his excellent record with the Coast Guard. Consequently, he asserts that the disparity between the Coast Guard's evaluations of him and the appointing authority's evaluations can only be due to personal animosity, bias and discrimination due to his military service.

Finally, the appellant argues that since his bypass can only be due to his military service, the appointing authority is also in violation of USERRA and the LAD. In this regard, he notes that USERRA only requires that he establish that his military status was a motivating or substantial factor in his non-appointment,

which based on the foregoing, he has done. Moreover, the LAD provides that military service is a protected class and since his bypass was due to his military service, the bypass was in violation of the LAD. *See N.J.S.A.* 10:5-3.

Initially, the appointing authority, represented by Susan E. Volkert, Esq., argues that the appellant's appeal of his veterans' status is untimely, and should be dismissed on that basis. In this regard, it asserts that *N.J.A.C.* 4A:2-1.1(b), provides that an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. The appointing authority notes that in a letter dated June 3, 2011, the appellant was notified by this agency that he had passed the subject examination and that his rank was "A1 Non-Veteran." Further, the notice indicated that the appellant could "appeal [his] rank, final average, and/or scoring" within 20 days from the date of this notice. However, the appellant did not appeal the matter within the 20-day time period, nor does he assert that he did so.[4] Therefore, the appointing authority argues that since the appellant did not timely file his appeal of his veteran status, the instant appeal should be dismissed.

Regardless of whether the appellant's appeal of his veterans' status was timely filed, the appointing authority argues that the appellant's claim that the denial of his veterans' status for the subject examination violates USERRA is without merit since USERRA does not extend to employment preferences for veterans. Rather, it maintains that USERRA offers protections of rights and benefits arising from his employment, and not those rights and benefits arising from his military service. *See* 38 *U.S.C.A.* §4302(b). Therefore, since veterans' preference flows from the appellant's military service and not from his employment, the determination that his veterans' preference does not apply on the instant eligible list is not a violation of USERRA. Moreover, the appointing authority notes that in *Wilborn v. Dep't of Justice*, 230 *F.3d* 1383 (Fed. Cir. 2000), the Federal Circuit held that "while USERRA prevents the denial of promotion on the basis of military service, it does not itself provide a remedy to veterans who are not given preferences in employment decisions." In particular, the Court held that "a preference in employment decisions [was] not a 'benefit of employment' [under] 38 *U.S.C.A.* §4303(2)," instead, it was a benefit related to the individual's military service. The appointing authority also argues that USERRA is only intended to treat military service member employees equally with non-military service member employees and not preferentially. Therefore, the failure to afford him veterans' preference on this examination did not violate USERRA.

Additionally, the appointing authority argues that the appellant has failed to establish that it changed his employment responsibilities substantially due to his military service. In this regard, it notes that "materially adverse actions include termination, demotion accompanied by a decrease in pay, or a material loss of benefits or responsibilities, but do not include 'everything that makes an employee

[4] The file in this matter indicates that although the appellant's initial appeal letter was undated, the package was postmarked July 22, 2011.

unhappy'." *See Crews v. City of Mt. Vernon*, 567 *F.3d* 860, 869 (2009) (quoting *Lapka v. Chertoff*, 517 *F.3d* 974, 986 (7th Cir. 2008)). Moreover, based on the foregoing, the appellant's allegations that he has been subjected to a subpar workspace cannot serve as a basis for a USERRA claim. With regard to the appellant's allegations that he was not given the same assignment and was stripped of his supervisory responsibilities, the appointing authority argues that USERRA does not guarantee the same position, schedule and title. Specifically, USERRA does not prohibit lawful adverse job consequences that result from an employee's restoration on the "seniority ladder." *See* 20 *C.F.R.* §1002.194.

Moreover, the appointing authority asserts that *N.J.A.C.* 4A:4-2.9 provides that employees returning from military leave shall be provided make-up examinations for active promotional lists for which they were eligible while on military leave, and if they pass, their names will be placed on the eligible list, "for prospective appointment only, based upon the score obtained, as if the examination had been taken when originally held." Moreover, *N.J.S.A.* 11A:5-1.1. provides that the Adjutant General of DMVA is empowered to determine whether a person is considered a "veteran" under the relevant statutes and code provisions. In the instant matter, the appellant returned from military service in November 2010 and received notification of his veteran status for all "future" examinations on January 21, 2011. Therefore, he was properly determined to be a non-veteran on the subject eligible list. As a non-veteran, the appellant could be bypassed for appointment, pursuant to the "Rule of Three." *See N.J.S.A.* 11A:4-8. In this regard, the "Rule of Three" allows an appointing authority the discretion to appoint any of the top three interested eligibles. Moreover, it asserts that under that discretion, no special weight needs to be given to individual test scores as it is not required to select the candidate with the highest score. Therefore, as long as the appointing authority has a legitimate reason for bypassing a candidate, it will not violate the New Jersey State Constitution by failing to select a higher ranked candidate. *See In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984). Additionally, the appointing authority asserts that in *Foglio, supra,* the Supreme Court held that an appointing authority must provide a specific legitimate reason for bypassing a higher ranked eligible, rather than a mere boilerplate statement, such as "best suited." Further, it argues that despite the appellant's arguments to the contrary, USERRA does not override an employer's discretionary choice as to which employee to promote. The appointing authority maintains that it appropriately utilized its management discretion in appointing Sarinelli, one of the top three interested eligibles and it notes that it provided a specific legitimate reason for his appointment. Specifically, it appointed Sarinelli to the position Police Captain in the Services Division due to his greater experience in all areas of the Services Division and his intimate knowledge and experience in all matters involving internal affairs. In this regard, it notes that Sarinelli has four years of experience as a Detective Bureau supervisor, four years of experience as a Services Division supervisor and four years of experience in internal affairs.

Further, under *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (1990), where a burden-shifting framework under which to review

cases in which dual motives are cited for an eligible's bypass is articulated, it asserts that the initial burden of proof in such a case rests on the appellant who must establish a *prima facie* case of discrimination, the burden of going forward, but not the burden of persuasion, then shifts to the appointing authority to articulate a legitimate non-discriminatory reason for the decision. Once the appointing authority produces evidence to meet its burden, the burden shifts back to the appellant who must then show that the proffered reasons are pretextual or that the improper reason more likely motivated it.

The appointing authority also maintains that the appellant is attempting "another bite at the apple" by rehashing prior facts from a lawsuit in which he also alleged he was discriminated against on the basis of his military service. However, the appointing authority notes that on March 11, 2010, the appellant entered into a settlement agreement with it, regarding his allegations of discrimination due to his military service and that pursuant to that agreement, the facts associated with it would not be discussed nor included in any new litigation. Specifically, paragraph three of the agreement notes, in part, that the appellant:

> . . . for himself and on behalf of his successors . . . (individually and collectively referred to herein as "Releasors"), does hereby fully and forever release, remit, acquit, remise, hold harmless and discharge (the "Release") the Morristown Defendants [which included Morristown and the Police Chief], NJIIF [the New Jersey Intergovernmental Insurance Fund] as well as the Morristown Defendants' and the NJIIF's past and present officials, agents, attorneys, departments, officers, employees and volunteers (for individuals, said Release runs to them in their official and personal capacities), and all of their respective heirs, successors and assignees (hereinafter, individually and collectively referred to as "Releasees"), jointly and individually, from any and all liabilities, claims, causes of action, employment practices complaints, grievances, charges, appeals, complaints, obligations, costs, losses, damages, injuries, attorneys' fees, and other legal responsibilities (collectively, referred to as "claims"), of any form or kind whatsoever, whether vested or contingent, which Releasors have or may have or could have asserted against any of the Releasees from the beginning of time through the date of the Agreement, including but not limited to any claims in law, equity, contract, tort, public policy, any Claims or causes of action for breach of contract, breach of collective bargaining agreement, negligence, retaliation, harassment and/or discrimination based upon, among other things, disability, military service . . . failure to promote . . . any claims which were raised or could have been raised in the Complaint, or any claims under the United States Constitution . . . [USERRA], the New Jersey Law Against Discrimination, . . . the New Jersey Constitution, or any other federal, state or local statute, regulation, ordinance or law whether known or unknown, unforeseen, unanticipated, unsuspected or latent, and any Claims which were

> raised or could have been raised in the Action, whether known or unknown . . . Notwithstanding anything set forth herein to the contrary, the Releasees do not waive any defenses or affirmative defenses in any pending or future litigation or claim, including but not limited to the entire controversy doctrine, estoppels, joinder, etc., whether with regard to the Pending Actions or otherwise.

Additionally, paragraph four of the agreement notes, in part, that the appellant "promises and agrees that he will not file, re-file, appeal, initiate, or cause to be filed, refilled [sic] or initiated any claim, suit, action or other proceeding based upon, arising out of, or related to any Claims released herein." However, the appointing authority notes that if the appellant can raise issues that were disposed of as part of the settlement, then the Commission must take note that the settlement agreement also references the appellant's inappropriate actions in audio taping his supervisor, which clearly demonstrates his unfitness for a leadership role.

In response, the appellant initially notes that the appointing authority does not dispute that the appeal of his bypass was timely filed. He argues that even if the appeal of his veterans' status was not timely filed, he has presented "overwhelming" proof of his discrimination and that his bypass was "arbitrary, capricious and unreasonable."

Additionally, the appellant asserts that despite the appointing authority's arguments to the contrary, his claim is not barred by the settlement agreement, since his claim concerns a current claim of discrimination, *i.e.*, his bypass, and he is not seeking damages for the past discrimination. The appellant argues that the past facts of discrimination may be used to demonstrate the Police Chief's "predilection for discrimination." Moreover, he maintains that the Police Chief has ignored the settlement agreement and has continued his discrimination of the appellant, as evidenced by the appellant's affidavit. A review of the affidavit indicates that although the appellant references numerous incidents prior to the date of the settlement agreement, none of the specific incidents appear to have occurred after March 11, 2010. The appellant maintains that the probative value of the prior discrimination referenced by the settlement agreement outweighs the harm that would come from its disclosure, and therefore, the Commission must consider it as evidence and not deny him the benefit and protection of his federal and State civil rights. The appellant notes that the settlement agreement does not bar all disclosures, as it allows for the limited disclosure to "accountants and/or tax advisor, or the extent otherwise required by law," and therefore, his disclosure in this matter is not prohibited. Furthermore, he maintains that since paragraph 12 of the agreement allows him to file a "grievance" with regard to "facts arising following the date of this agreement," he is not precluded from the instant appeal.

The appellant argues that he is entitled to a hearing at the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 10:6-1.3(a). Specifically, he argues that he has a "constitutional right to be promoted" as he has presented a *prima*

facia case of discrimination based on his military service. Moreover, he argues that the only way for the facts to not be in dispute, is if the appointing authority acknowledges the discrimination he has been and continues to be subjected to. However, he notes that the appointing authority has not done so. Rather, it has merely "dredge[d] up the 'rule of three' " and claims that Sarinelli was promoted because he was "more qualified." The appellant argues that the appointing authority's claim is clearly pretextual and it only made that claim since it believes the Commission is "gullible" enough to accept it. In this regard, he asserts that the only way for the Commission to accept the appointing authority's reason for his bypass is if it totally ignores the uncontested evidence of his past discrimination. Furthermore, the appellant indicated in his affidavit that as Sarinelli's "mentor" he was clearly the better choice for appointment since he had "out-scored" Sarinelli on the subject examination, possessed more time in grade at all levels and that Sarinelli "always" comes to him with supervisory questions and legal interpretations.

In response, the appointing authority reiterates that it has presented a legitimate reason for its appointment of Sarinelli and that the appellant cannot overcome this reason simply be raising stale claims which have been resolved by the settlement agreement. In this regard, it asserts that it determined that Sarinelli's experience in internal affairs was a particularly important factor in finding him to be more qualified that the appellant. In particular, it asserts that Sarinelli has greater experience, qualifications and an understanding of how the internal affairs process works. The appointing authority notes that since it has demonstrated a legitimate, non-discriminatory reason for the appellant's bypass, under *Jamison, supra*, the burden then shifts back to the appellant to prove that its reasons were merely pretextual for discrimination. The appointing authority argues that although the appellant claims that he was not provided the same opportunities due to past discrimination, those claims should be rejected since he entered into a Settlement Agreement which fully disposed of those matters and it further precludes the appellant from raising any future claims past on those past allegations. Secondly, the appellant has presented no argument or evidence which demonstrated that either he or the other candidate possessed the extensive experience Sarinelli possesses with respect to internal affairs. Moreover, the appointing authority argues that to allow a lack of connection between an employment decision and the alleged discriminatory conduct complained of would allow an appellant to establish pretext in every future decision where there were past allegations of discrimination.

Additionally, the appointing authority argues that the appellant is not entitled to a hearing and has not provided sufficient evidence which establishes that a hearing is necessary. Although the appellant claims an entitlement to a hearing based on the past allegations of discrimination, all of those allegations were settled by the settlement agreement. The appointing authority posits that since the appellant lacks any evidence that its reasons for the appellant's bypass were pretextual, he merely attempts to focus the instant matter on past allegations which have been settled. Moreover, the appointing authority notes that although

the appellant claims that this matter is "required by law" to be handled by a hearing pursuant to *N.J.A.C.* 10:6-1.3(a), he has failed to explain why. Further, it notes that the appellant completely ignores the requirements for a hearing set forth in *N.J.A.C.* 4A:2-1.1(d), which is specific to matters before the Commission.

Finally, the appointing authority reiterates that despite the appellant's arguments to the contrary, the regulations concerning make-up examinations are not at odds with or in conflict with the statute regarding the establishment of veterans' preference for examinations. In this regard, the appointing authority argues that that *N.J.S.A.* 11A:5-1(b) was not intended to apply to make-up examinations. If *N.J.S.A.* 11A:5-1(b) was meant to render *N.J.A.C.* 4A:4-2.9(d) inoperable, that issue would have been addressed in either the statute itself or in the legislative history. Rather, the statute was meant to address the situation where a promotional examination, and the resulting issuance of the list, occurs months after an application date, to allow applicants more time to establish veterans' preference.

CONCLUSION

Initially, the appellant requests a hearing in this matter. 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 which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). For the reasons discussed below, no material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978). Further, it is noted that *N.J.A.C.* 10:6-1.3(a) applies solely to hearings granted based on determinations made by the Department of Human Services, and does not pertain to this matter.

N.J.A.C. 4A:2-1.1(b) provides that an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. One of the issues the appellant presents is a challenge to his veterans' status on the subject eligible list. The appellant was notified on June 3, 2011, that his name had been added to the subject eligible list as a non-veteran eligible. However, his appeal was not postmarked until July 22, 2011, more than 20 days from the date he knew of the action being appealed. The purpose of time limitations is not to eliminate or curtail the rights of appellants, but to establish a threshold of finality. In the instant case, the delay in filing the appeals does not unreasonably exceed that threshold of finality. Moreover, the appellant indicates in his appeal that he had contacted both this agency and DMVA regarding this issue prior to filing this appeal.

The ultimate issue in this matter is whether the appellant's veterans' preference was properly applied. *N.J.S.A.* 11A:5-1(b) provides in part that:

> "Veteran" means . . . any soldier, sailor, marine, airman, nurse or army field clerk, who has served in the active military or naval service of the United States and has been discharged or released under other than dishonorable conditions from that service in any of the following wars or conflicts and who has presented to the Adjutant General of the Department of Military and Veterans' Affairs sufficient evidence of the record of service *and received a determination of status no later than eight days prior to the issuance of an employment list, for which that individual received a passing score on an examination* (emphasis added):

See also, N.J.A.C. 4A:5-1.1(b)12. Additionally, *N.J.S.A.* 11A:5-1.1 provides that:

> The Adjutant General of the Department of Military and Veterans' Affairs shall be responsible for determining whether any person seeking to be considered a "veteran" or a "disabled veteran" under *N.J.S.A.* 11A:5-1, for the purpose of receiving civil service preference, meets the criteria set forth therein and adjudicating an appeal from any person disputing this determination. The determination of the Adjutant General shall apply only prospectively from the date of initial determination or date of determination from an appeal, as appropriate, and shall be binding upon the [Civil Service Commission].

See also, N.J.A.C. 4A:5-1.3. Moreover, *N.J.A.C.* 4A:4-2.9(d) provides that:

> Employees returning from military leave shall have an opportunity to take promotional examinations that have not yet been administered, or make-up examinations for active promotional lists for which they were eligible while on military leave. If the eligible passes the examination, his or her name will be placed on the eligible list, for prospective appointment only, based upon the score obtained, as if the examination had been taken when originally held.

The appellant argues that the Legislature amended *N.J.S.A.* 11A:5-1(b) to extend the time period in which returning military service members could establish veterans' preference and that by adding the phrase "that individual," the statute ties the date the veterans' status must be established to a particular individual and not to an "original" list or a "prior" list. Although the Commission agrees that the amendment extended the time in which an applicant must establish veteran's preference, it does not agree that the time in which to do so is tied to an individual and not to a particular eligible list. In this regard, pursuant to *N.J.S.A.* 11A:5-1.1 and *N.J.A.C.* 4A:5-1.3, veterans' preference is only to be applied prospectively. For the appellant, that meant that veterans' preference would only be applied to eligible lists issued no later than eight days after the Adjutant General's determination of veterans' status. In the instant matter, the subject eligible list issued on March 24, 2010 and the determination of the appellant's veterans' status was made in January

2011. Therefore, it is clear that the appellant's veterans' status may only be applied prospectively.

Additionally, although the appellant claims that there is a conflict between *N.J.S.A.* 11A:5-1(b) and *N.J.A.C.* 4A:4-2.9(d), *N.J.S.A.* 11A:5-1.1 and *N.J.A.C.* 4A:4-2.9(d) clearly provide that the determination of veterans' status is to be applied prospectively. The amendment to *N.J.S.A.* 11A:5-1(b) provided an applicant additional time to qualify for veterans' status. Specifically, the cutoff date for the determination was moved from the closing date of the examination to eight days prior to the *issuance* of the subject eligible list. *See In the Matter of Daniel Donnerstag* (CSC, decided August 17, 2012) (Permitting eligibles to establish the preference eight days prior to the issuance of eligible lists expanded the window of opportunity for veterans to enjoy the benefits of that preference for examinations, but also ensured that appointing authorities would be able to rely on the issued lists, without the lists being continuously updated with changed rankings of eligibles who established veterans' preference after the list was issued). Moreover, the Commission has previously determined that the "issuance" of the eligible list referenced by *N.J.S.A.* 11A:5-1(b) refers to the issuance date of the eligible list, and not to when a specific eligible is added to the eligible list after taking a make-up examination. *See In the Matter of Russell Surdi* (CSC, decided March 7, 2012) (Appellant who did not establish veterans' preference within eight days of list issuance, who took a make-up examination for the title after he had established veterans' preference, not entitled to veterans' preference on the subject list). *See also, In the Matter of John Fasanella*, Docket No. A-4455-07T1 (App. Div. December 5, 2009). Furthermore, USERRA was not designed to expand the appellant's employment rights on return from active military service, but only to preserve those rights he possessed at the time his active military service began, as well as those that would accrue during his absence. *See Fasanella, supra*.

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. At the time of the PS110019 certification, *N.J.A.C.* 4A:4-4.8(b)4 stated that in disposing of a certification, an appointing authority must, when bypassing a higher ranked eligible, give 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.[5] *See also, Foglio, supra* (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). *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. Additionally, in cases of this nature where dual motives are asserted for

[5] At its meeting of April 4, 2012, the Commission approved the adoption of an amendment to *N.J.A.C.* 4A:4-4.8, Disposition of a certification, which deleted the requirement for a statement of reasons, paragraph (b)4 of the rule. The rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*.

an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. In *Jamison*, *supra* at 436, 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 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-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 would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, other than his mere allegations, the appellant has not presented any substantive evidence that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." *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). Further, the appellant did not possess a vested property interest in the position. 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). Moreover, the appointing authority presented legitimate, non-discriminatory reasons for the appellant's bypass, which have not been refuted. In this regard, although the appellant argues that he is more qualified due to his military service, advanced degrees and his long term employment, he does not dispute that Sarinelli possesses more experience than him in the Internal Affairs division, where the vacancy is located. Rather, the appellant argues that the Commission should simply rely on his allegations that he had been discriminated against in the past and therefore, any reason provided for the appointing authority must have been manufactured. However, as noted by the appointing authority, the appellant entered into a voluntary settlement agreement with the appointing authority that completely disposed of all claims. Specifically, paragraph three of the settlement agreement provided that the appellant "fully and forever" releases the appointing authority and the Police Chief from "any and all" claims "whether vested or contingent" through the date of the agreement, including all discrimination claims under USERRA, LAD, New Jersey State Constitution, or any other federal or State statute or regulation, "whether known or unknown, unforeseen, unanticipated, unsuspected or latent." Additionally, paragraph four of the agreement specifically

provides that the appellant "promises and agrees that he will not file, re-file, appeal, initiate, or cause to be filed, refilled [sic] or initiated any claim, suit, action or other proceeding based upon, arising out of, or related to any Claims released herein." Although the appellant correctly notes that the settlement agreement allows for limited disclosure, that disclosure is limited to situations involving tax consequences. Therefore, the appellant may not raise any discrimination claims that were resolved by the settlement agreement in order to establish that his bypass was discriminatory.

The appellant claims that the discrimination has continued as evidenced by the Police Chief and the appointing authority giving him an unfavorable schedule, placing him in an administrative position and stripping him of his supervisory duties, assigning him to a sub-standard office next to the bathroom and assigning non-police duties upon his return from active military duty, in violation of USERRA. However, the Court in *Crews, supra*, noted that although USERRA protects employees from "materially adverse actions [which] include termination, demotion accompanied by a decrease in pay, or a material loss of benefits or responsibilities, [it did] not include 'everything that makes an employee unhappy'." *See Crews at* 869 (quoting *Lapka v. Chertoff*, 517 *F.3d* 974, 986 (7th Cir. 2008)). Therefore, since the appellant was returned to his title, with commensurate pay, the mere fact that it was to an assignment or shift he did not like, does not appear to provide a cause of action under USERRA, at least in regard to his bypass. Other than the appellant's mere allegations, he has not established that the appointing authority's reasons for its appointment of Sarinelli were pretrextual. Moreover, despite the appellant's assertions to the contrary, the appointing authority did not "only" provide its reasons for Sarinelli's appointment after the appellant's appeal. Rather, the record indicates that the appointing authority indicated, when it returned the certification, that it appointed Sarinelli due to his extensive experience in internal affairs. Further, although the appointing authority was required to provide this agency with a statement of reasons for the appointment of a lower ranked eligible at the time of the subject certification, it was not required to provide that reason to the individual bypassed until the appeal process is initiated. *See In the Matter of Brian McGowan* (MSB, decided April 6, 2005). *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). Nevertheless, in the context of this appeal, the appellant had an opportunity to learn the reasons for his bypass, and to dispute those reasons.

Therefore, since the appellant's assertions of discrimination are unsupported in the record, he has not established by a preponderance of the evidence a *prima facie* case as outlined above. Accordingly, the appellant has not met his burden of proof that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three."

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.