

**CIVIL SERVICE**

**CIVIL SERVICE COMMISSION**

**Selection and Appointment**

**Disposition of a Certification**

**Proposed Amendment: N.J.A.C. 4A:4-4.8**

Authorized By: Civil Service Commission, Robert M. Czech, Chair/CEO.

Authority: N.J.S.A. 11A:2-6(d) and 11A:4-1 et seq.; and P.L. 2008, c. 29.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2012-020.

A **public hearing** concerning the proposal will be held on:

Thursday, February 9, 2012, at 3:00 P.M.

Civil Service Commission Room

44 South Clinton Avenue

Trenton, New Jersey

Please call Elizabeth Rosenthal at (609) 984-7140 if you wish to be included on the list of speakers.

Submit written comments by March 17, 2012 to:

Henry Maurer, Director

Merit System Practices and Labor Relations

Civil Service Commission

P.O. Box 312

Trenton, New Jersey 08625-0312

The agency proposal follows:

### **Summary**

The New Jersey Constitution mandates that "...[a]ppointments and promotions in the civil service. . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive...." Art VII, § 1, ¶ 2. Pursuant to N.J.S.A. 11A:4-8, which sets forth the "rule of three," an appointing authority is not required to hire the highest ranking candidate on an eligible list but, rather, has the discretion to choose from among the top three interested eligibles. Specifically, N.J.S.A. 11A:4-8 provides:

The commission shall certify the three eligibles who have received the highest ranking on an open competitive or promotional list against the first provisional or vacancy. For each additional provisional or vacancy against whom a certification is issued at that time, the commission shall certify the next ranked eligible. If more than one eligible has the same score, the tie shall not be broken and they shall have the same rank. If three or more eligibles can be certified as the result of the ranking without resorting to all three highest scores, only those eligibles shall be so certified.

A certification that contains the names of at least three interested eligibles shall be complete and a regular appointment shall be made from among those eligibles. An eligible on an incomplete list shall be

entitled to a provisional appointment if a permanent appointment is not made.

Eligibles on any type of reemployment list shall be certified and appointed in the order of their ranking and the certification shall not be considered incomplete.

The rule of three promotes merit and fitness principles by limiting the scope of an appointing authority's consideration of eligibles to the top three interested eligibles on an open competitive or promotional list. At the same time, the rule of three affords an appointing authority some latitude in making its hiring decisions, by not requiring the appointment of the highest ranking candidate. See *Terry v. Mercer County Bd. of Chosen Freeholders*, 86 N.J. 141, 149 (1981). This is in contrast to the statutory provision on reemployment lists, which requires the appointing authority to appoint candidates strictly in rank order. See N.J.S.A. 11A:4-8.

There is currently no statutory requirement that the appointing authority provide a statement of reasons to the Civil Service Commission (Commission) for bypassing a higher-ranked eligible. Turning to the legislative history, the statement of reasons requirement first appeared in civil service law in 1939; it remained as part of the statute through the next two revisions (1947 and 1974). Implementing rules required that the appointing authority provide a statement of reasons and notify all interested eligibles of the certification results. See *Local 518, N.J. State Motor Vehicle Emps. Union v. Div. of Motor Vehicles*, 262 N.J. Super.

598, 603 (App. Div. 1993). In 1986, the Legislature passed a new Civil Service Act and removed the statement of reasons requirement from the law. See N.J.S.A. 11A:4-8. However, following enactment of the 1986 law, civil service rules continued to require that a statement of reasons be included in a report to the Department of Personnel (DOP), (now Civil Service Commission), but the rules no longer required notification to eligibles. See *Local 518, supra*, at 603; N.J.A.C. 4A:4-4.8(b)4.

N.J.A.C. 4A:4-4.8, Disposition of a certification, provides at paragraph (b)4 that, in disposing of a certification of an eligible list under the rule of three, an appointing authority must provide a statement of reasons to the Civil Service Commission as to why an appointee was selected instead of a higher-ranked eligible, or an eligible in the same rank due to a tied score. This rule provision was intended to ensure that an appointing authority exercises its discretion under the rule of three (that the employer must choose from among the top three interested eligibles for a given vacancy) based on legitimate reasons. See 20 N.J.R. 327(a); 1183(a) at 1189. See also *Local 518, supra*, at 605. However, historically, the Commission has found that this requirement has done little to advance its original purpose. In particular, the appointing authority often provides very little information to the Commission about the reasons for a bypass and routinely uses phrases such as “best meets needs of the department” in support of its hiring decision. The Commission, thus, has determined that paragraph (b)4 is not only not required by the statute, but also has not fulfilled its intended function.

The only time the information provided by the appointing authority is effectively tested is during the appeal process, when an individual appeals his or her bypass. In those cases, the appellant has the burden of proof to show by a preponderance of the evidence that the appointing authority's decision to bypass appellant was improper. See N.J.A.C. 4A:2-1.4(c) and 4A:4-4.8. The appointing authority must demonstrate merit-based criteria for the bypass during the appeal process.

In *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 N.J. 38 (2011), the City reported to the DOP that it had bypassed Nicholas R. Foglio in favor of two lower-ranked eligibles because they "best met the needs" of the fire department. The Civil Service Commission rejected Mr. Foglio's appeal on the ground that he had not satisfied his burden of showing by a preponderance of the evidence that his bypass was improper; in particular, he had neither asserted nor proved discrimination or political animus. On appeal to the Superior Court, Appellate Division, the court affirmed the Commission's decision. The New Jersey Supreme Court granted the appellant's petition for certification.

The New Jersey Supreme Court found that the City's statement of reasons to the DOP was not specific and did not satisfy N.J.A.C. 4A:4-4.8(b)4. The Court reversed the Appellate Division's decision and remanded the matter to Ocean City to supply a "proper statement of reasons," four years after the bypass.

It is noted that, in *Foglio*, the appellant did not assert that Ocean City had bypassed him for an improper reason, but instead argued that the appointing

authority had failed to comply with the requirement in the rules to provide a statement of reasons. The statement of reasons under N.J.A.C. 4A:4-4.8(b) was not intended to eliminate appointing authority discretion or to vest a bypassed candidate with an additional cause of action to challenge his bypass. No right accrues to a candidate whose name appears on an eligible list under the rule of three other than the right to be considered for appointment. See *In re Crowley*, 193 N.J. Super. 197, 210 (App. Div. 1984); *Nunan v. N.J. Dep't of Pers.*, 244 N.J. Super 494, 497 (App. Div. 1990). The Commission believes that requiring a more detailed statement of reasons than that ordinarily provided would not further ensure that civil service appointments are made in accordance with merit and fitness. Rather, such a requirement is likely to lead to more litigation.

Accordingly, the Commission proposes to delete existing N.J.A.C. 4A:4-4.8(b)4. Despite the proposed amendment, it is noted that the appointing authority would still be required to use merit-based criteria in exercising its discretion under the rule of three. If a bypass is challenged on appeal, the appointing authority would remain obligated to demonstrate merit-based criteria for the bypass during the appeal process.

Additionally, technical changes to N.J.A.C. 4A:4-4.8 are needed pursuant to P.L. 2008, c. 29, in which the Department of Personnel was abolished and replaced with the Civil Service Commission, a State agency in but not of the Department of Labor and Workforce Development. Therefore, the reference in subsection (b) to the "Department of Personnel" with regard to notification by the appointing authority of

the disposition of the certification would be deleted and new language inserted referring to the “Civil Service Commission,” while a reference to “Department” would be changed to “Chairperson of the Commission or the Chairperson’s designee” as to who prescribes the manner of disposition notification. This technical change is also proposed for subsection (d), where reference to “Department” would be changed to “Chairperson of the Commission or the Chairperson’s designee,” concerning the extension of the due date for disposition of the certification under certain circumstances.

Finally, an additional technical amendment is proposed to N.J.A.C. 4A:4-4.8(d) to correct an improper cross-reference to the New Jersey Administrative Code. This subsection cross-references “N.J.A.C. 4A:8-1.1 et seq.” but the proper way to notate this cross-reference is “N.J.A.C. 4A:8,” and such update is proposed.

As the Commission has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

### **Social Impact**

A positive social impact is anticipated as a result of the proposed amendment. The Civil Service Act of 1986 repealed the statement of reasons requirement from the statute, emphasizing the discretion given the appointing authority in choosing from among the top three interested eligibles. The proposed deletion of N.J.A.C. 4A:4-4.8(b)4, which currently requires an appointing authority to provide a statement of reasons to the Commission for a bypass, would eliminate an

unnecessary bureaucratic review process. The sufficiency of the statement of reasons has not been reviewed by the Commission each time the rule of three is utilized, and need not be reviewed unless the bypass is challenged on appeal. Under the proposed amendment, eligibles would still be able to file bypass appeals, while appointing authorities would be relieved of work in the certification process that does not help to ensure merit and fitness.

### **Economic Impact**

A positive economic impact is anticipated as a result of the proposed amendment. The elimination of the statement of reasons, which is not required by statute and which clearly has not served its intended purpose, will discourage unnecessary litigation and result in savings to the appointing authority and to the State. It is anticipated that the certification disposition process would work more efficiently at both the appointing authority and Civil Service Commission levels, thereby benefiting those agencies, as well as New Jersey taxpayers.

### **Federal Standards Statement**

A Federal standards analysis is not required because the proposed amendment pertains to the eligible list certification disposition process in New Jersey civil service employment and is not subject to any Federal standards or requirements.

### **Jobs Impact**



It is not anticipated that the proposed amendment would cause the generation or loss of jobs. The proposed amendment pertains to the eligible list certification disposition process in New Jersey civil service employment.

### **Agriculture Industry Impact**

It is not anticipated that the proposed amendment would have any agriculture industry impact. The proposed amendment pertains to the eligible list certification disposition process in New Jersey civil service employment.

### **Regulatory Flexibility Statement**

A regulatory flexibility analysis is not required since the proposed amendment would have no effect on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendment pertains to the eligible list certification disposition process in New Jersey civil service employment.

### **Housing Affordability Impact Analysis**

Since it concerns the eligible list certification disposition process in New Jersey civil service employment, the proposed amendment would have no impact on the number of housing units or the average cost of housing in New Jersey.

### **Smart Growth Development Impact Analysis**

Since it concerns the eligible list certification disposition process in New Jersey civil service employment, the proposed amendment would have no impact on smart growth or on new construction within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan.

**Full text** of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

#### SUBCHAPTER 4. CERTIFICATION FROM ELIGIBLE LISTS

##### 4A:4-4.8 Disposition of a certification

(a) Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

1. Appoint the eligible whose name has been certified from the special reemployment list;

2. Appoint the eligible whose name has been certified from regular or police or fire reemployment lists; or

3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:

i. Disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list;

ii. If the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed; and

iii. See N.J.A.C. 4A:4-2.15(i) for tie scores.

(b) The appointing authority shall notify the [Department of Personnel] **Civil Service Commission** of the disposition of the certification by the disposition due date in the manner prescribed by the [Department] **Chairperson of the Commission or the Chairperson's designee**. The disposition due date may be

extended beyond the expiration date of the eligible list to fill current vacancies. Under no circumstances shall a disposition due date be extended beyond the expiration date of the eligible list when vacancies do not exist. An anticipated vacancy shall not be considered the same as an existing vacancy. The report of disposition of the certification shall include:

1. Name of the eligibles to be permanently appointed;

2. The effective date of the requested permanent appointments;

3. In local service, the appointee's salary;

[4. 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 tied score;]

[5.] 4. In situations where an appropriate list is used, the title and functions of the appointee's employment; and

[6.] 5. Any other requested information.

(c) Failure to dispose by the due date may result in constructive appointment or other remedial action as set forth in N.J.A.C. 4A:10-2.

(d) If the certification will result in the displacement of a provisional employee who has permanent status, and it is necessary to institute layoff procedures, the [Department] **Chairperson of the Commission or the Chairperson's designee** may, upon written request from the appointing authority, extend the time for disposing of the certification for an additional 45 days. See N.J.A.C. 4A:8[-1.1 et seq.] for layoff procedures.

(e) See N.J.A.C. 4A:10-2.2 for penalties for failure to appoint from a complete certification.