

B-13



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Piotr Zagaja,
Police Sergeant (PM2748L),
Borough of Wallington

CSC Docket No. 2015-1193

List Bypass Appeal

ISSUED: JUN 19 2015

(DASV)

Piotr Zagaja, represented by Michael L. Prigoff, Esq., appeals the attached decision of the Division of Classification and Personnel Management (CPM), which upheld the bypass of his name on the Police Sergeant (PM2748L), Borough of Wallington, eligible list.

The appellant, a nonveteran, appeared on the subject eligible list, which promulgated on June 3, 2010 and expired on June 2, 2014.¹ The only certification of the eligible list was issued on May 7, 2014 containing six names. In disposing of the certification, the appointing authority appointed the first, third, fourth, and fifth ranked eligibles effective May 22, 2014. The appellant, who ranked second, was bypassed. The sixth ranked eligible was also not appointed. The appellant appealed his bypass to CPM. However, CPM determined that the appointing authority properly disposed of the certification pursuant to the "Rule of Three." *N.J.S.A. 11A:4-8* and *N.J.A.C. 4A:4-4.8(a)3*.

On appeal to the Civil Service Commission (Commission), the appellant asserts that "[d]espite being far and away the best candidate" for the Police Sergeant position, he was bypassed for appointment in order "to reward [the] political friends of the Mayor and Council President." He sets forth his qualifications, which include over 17 years of seniority as a Police Officer, a Bachelor's degree in Criminal Justice with honors, no disciplinary history, service as an "Officer in Charge" 36 times in a six-month period, and responsibility for the

¹ The eligible list was originally to expire on June 2, 2013, but was extended for one year.

Uniform Crime Reports which are usually prepared by a Police Lieutenant. In contrast, the appellant states that the third ranked eligible, Mark Wyzykowski, has 16 or 17 years of seniority as a Police Officer and attended trade school; the fourth ranked eligible, Paul Stolarz, possesses only nine years of seniority as a Police Officer and no college education; and the fifth ranked eligible, Tomasz Kruk, has 13 or 14 years of seniority as a Police Officer, a high school diploma, and disciplinary action for abuse of sick time. Therefore, the appellant contends that he is clearly the best qualified candidate, and the "facts" demonstrate that he was bypassed "purely for political or discriminatory reasons." In that regard, he states that the acting Police Chief's letter, which requested only two Police Sergeant positions to be filled, was not reported to the public by Mayor Walter G. Wargacki or the Council, which eventually appointed four Police Sergeants. In the past 18 years, the appointing authority never utilized the "Rule of Three" for Police Sergeant promotions. Further, the appellant states that there are currently seven Police Sergeants, despite that the Table of Organization only specifies six Police Sergeant positions. He presents the Borough Ordinance, which indicates that the Police Department is to consist of one Police Chief and/or one Police Director, one Police Captain, four Police Lieutenants, six Police Sergeants, one Deputy Police Chief, and 13 "patrolmen [one (1) of whom shall be able to speak and understand the Polish language] and such other officers, special officers and employees as the Council may, from time to time appoint The filling of a vacancy shall be within the sole discretion of the Mayor and Council."

Moreover, the appellant contends that he was given three hours' notice for his interview, which was conducted without the Borough Administrator, contrary to the Borough's Personnel Policies and Procedures Manual. The appellant submits a copy of the manual, which indicates that "[t]he Borough Administrator or Department Head will coordinate the interview process including the scheduling of applicants, development of interview questions and standards to measure candidate responses." However, in the appellant's case, he states that Mayor Wargacki asked most of the questions during the 15-minute interview, including where the appellant lived, his home life, if he volunteered to coach, a hypothetical question as to making an illegal change in a report, and how to make the department more efficient. Additionally, the appellant indicates that the four Democratic members of the Council and Mayor Wargacki held "an illegal meeting," at which time the decision on the appointments was "probably" made. Furthermore, the appellant asserts that Stolarz, the fourth ranked eligible, is a former employee and close friend of Mayor Wargacki. Kruk, the fifth ranked eligible, is the brother of Council President Roman Kruk. Council President Kruk is also the president of junior football in Wallington and used to coach little league, whose president is another Democratic Councilman. The appellant emphasizes that one person had to be bypassed in order to reach Kruk, who also sponsors victory parties at his home for Democratic candidates. In addition, the appellant states that he is the only eligible who is a first generation immigrant from Poland. In support of his appeal, the

appellant submits his certification, attesting to the foregoing information. The appellant requests that if the appointing authority disputes any of his "sworn factual allegations," his appeal be transmitted to the Office of Administrative Law (OAL) for a hearing so that he may be able to subpoena the necessary proofs and witnesses.

In response, the appointing authority, represented by Little E. Rau, Esq., presents the certification of Mayor Wargacki, which it contends establishes that the appellant's "objections are supposition only and without any true substance." Mayor Wargacki states that he has been the Wallington Mayor and appointing authority for 23 years and has been involved in conducting interviews and making promotions of police personnel. He explains that it was decided that four Police Sergeant positions would be filled, "accounting for one vacancy that would be left when [Police] Sergeant [Edward] Jacoby retired in June 2014." It is noted that the County and Municipal Personnel System (CAMPS) indicates that there are currently seven Police Sergeants in the Borough of Wallington, which include Jacoby.² Mayor Wargacki indicates that he interviewed the appellant, in the presence of members of the 2014 Police Committee, which consisted of two Councilmen, both Democrats, and Police Chief Carmello Imbruglia, who was then a Police Captain and the Officer in Charge. Mayor Wargacki notes that Council President Kruk, who is also on the Police Committee and a Democrat, recused himself from the entire promotional process, thereby dispelling any "implication of impropriety." He emphasizes that Tomasz Kruk's relationship as brother to the Council President played no part in the promotional process. Moreover, Mayor Wargacki asserts that all candidates were given the same amount of time prior to their interview and were asked the same questions during their interview. He first made his recommendation to the Council during a "work session" and then following that work session, the Council ratified the promotions at its regular meeting. Thus, Mayor Wargacki disputes that there was an unlawful meeting as asserted by the appellant.

Additionally, Mayor Wargacki contends that the manual that the appellant submits is not applicable to promotions in the Police Department. Further, he responds that Stolarz is not a "close friend" of his. Stolarz is a friend of his son and previously worked with his son in a business that his son now operates. In addition, Mayor Wargacki contends that the appellant's assertion that he was discriminated against because he is an immigrant from Poland is meritless. He states that the appellant is more fluent in Polish, the first language of many residents of Wallington, than the other candidates. He viewed this to be a positive factor. Mayor Wargacki also indicates that he is of Polish heritage and so are many of the appellant's fellow officers and the eligible candidates on the subject certification. Regarding the reason for the appellant's bypass, Mayor Wargacki

² However, the Division of Pensions and Benefits has confirmed that Jacoby was approved for retirement effective July 1, 2014.

states that he found the appellant's "demeanor to be less enthusiastic than the other candidates" during the interview and he did not participate in community activities even though he is a resident of Wallington. Mayor Wargacki emphasizes that he did not consider any of the eligibles' political affiliation or ethnicity in the selection process.

Therefore, based on Mayor Wargacki's certification, the appointing authority submits that it properly exercised its discretion, pursuant to the "Rule of Three," to bypass the appellant for appointment. It maintains that the appellant cannot demonstrate a *prima facie* case of discrimination since he has not shown a causal connection between any purported protected class and his bypass. It notes that no nepotism occurred since Council President Kruk recused himself from the promotional process. There was also no bias based on a "close relationship" since Mayor Wargacki certified that he was not a close friend of Stolarz. Finally, the appointing authority contends that there is no material and controlling dispute of fact which requires a hearing at the OAL. Accordingly, it maintains that the appellant's request for a hearing should be denied.

It is noted that the appellant did not reply to the appointing authority's response.

CONCLUSION

Initially, the appellant requests a hearing on this matter should the appointing authority dispute any of his "sworn factual allegations." However, list bypass appeals are treated as reviews of the written record. See *N.J.S.A. 11A:2-6(b)*. 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)*. No material issue of disputed fact has been presented in the instant matter which would require a hearing. See *Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

Additionally, *N.J.S.A. 11A:4-8*, *N.J.S.A. 11A:5-7*, and *N.J.A.C. 4A:4-4.8(a)3* 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 disposition of the certification, *N.J.A.C. 4A:4-4.8* no longer required that 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.³ *N.J.A.C. 4A:2-1.4(c)* provides that the appellant has the burden of proof in this matter.

³ The rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*. As such, the appointing authority was not required to provide a statement as to why it appointed lower ranked eligibles on the May 7, 2014 certification. See e.g., *In the Matter of Nicholas R. Foglio*,

Moreover, 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 actions is warranted. See *Jamison v. Rockaway Township Board of Education*, *supra*. In *Jamison*, at 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 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 discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer then has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

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)3*. 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).

In the instant matter, the appellant alleges that he was bypassed due to political reasons and his status as a first generation Polish American. However, other than his mere allegations, the appellant has not presented any substantive evidence that would lead the Commission to conclude that his bypass was improper or an abuse of the appointing authority's discretion under the "Rule of Three." The appointing authority presents legitimate, non-discriminatory reasons for the appellant's bypass, which have not been refuted. In that regard, the appointing authority answers the appellant's "sworn factual allegations," explaining that Tomasz Kruk's relationship as brother to Council President Kruk played no part in the promotional process since the latter recused himself from the entire promotional process. Additionally, it does not appear that there was an unlawful meeting among the Democrats in the Council regarding the promotions. Further, the

Fire Fighter (M2246D), *Ocean City*, 207 *N.J.* 38 (2011). Regardless, on appeal, the appointing authority has provided its reasons.

appellant has not proven that Stolarz was a close friend of Mayor Wargacki. Rather, he was the friend of Mayor Wargacki's son. In addition, the appellant has not presented a clear causal connection between his bypass and his status as a first generation Polish American. The appointing authority presents persuasive arguments to the contrary. Notably, the appellant's ability to speak Polish more fluently than the other candidates was considered a positive factor. Indeed, the Borough Ordinance reflects this as a desirable skill, since it requires at least one Police Officer "to speak and understand the Polish language."

Furthermore, the appellant has not disputed that all candidates were given the same amount of time prior to their interview and were asked the same questions during their interview. It is emphasized 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"). However, interviews, whether structured or not, are not required. It is within the appointing authority's discretion to choose its selection method, *i.e.*, whether or not to interview candidates and ask hypothetical questions. *See e.g., In the Matter of Angel Jimenez* (CSC, decided April 29, 2009); *In the Matter of Abbas J. Bashiti* (CSC, decided September 24, 2008); *In the Matter of Paul H. Conover* (MSB, decided February 25, 2004); *In the Matter of Janet Potocki* (MSB, decided January 28, 2004). So long as the hiring decision is in compliance with *N.J.A.C. 4A:4-4.8(a)3*, the Commission cannot find that the interview was conducted inappropriately. In the instant matter, but for the fact that the Borough Administrator was not present during the interview, the appellant does not challenge the interview itself. *See e.g., Conover, supra* (The appellant failed to present any substantive evidence that he was interviewed in an unlawful manner or was asked unlawful questions. The record also did not establish that the appellant was subject to a more rigorous interview, and thus, the appellant's appeal of his bypass on a Police Lieutenant eligible list was denied). Rather, as noted above, the candidates were asked the same questions.

In addition, the appointing authority indicates that the manual that the appellant presents is not applicable to police promotions. Accordingly, it is of no consequence that the Borough Administrator was not present at the appellant's interview. Moreover, the Borough Ordinance clearly states that "[t]he filling of a vacancy shall be within the sole discretion of the Mayor and Council." Thus, regardless of whether the acting Police Chief only requested two positions to be filled, the appointing authority has the discretion to appoint additional police

personnel in accordance with the Borough Ordinance. However, the appellant asserts that the appointments of the four Police Sergeants exceeded the number of positions allowed under the Borough Ordinance. Agency records indicate that there are seven Police Sergeants. Jacoby's retirement, however, was approved for July 1, 2014. Thus, the appointing authority is advised to correct Jacoby's records in CAMPS if he actually retired. Nonetheless, the four appointments occurred on May 22, 2014, prior to July 1, 2014, which would mean that there were seven Police Sergeants when the specified number of Police Sergeants positions was six. However, the Borough Ordinance further states that the Police Department may consist of "other officers, special officers and employees as the Council may, from time to time appoint." Under these circumstances, there does not appear to be a violation of N.J.S.A. 40A:14-118, which would require a rescission of an appointment. See e.g., *In the Matter of Todd Kelly, et al.* (CSC, decided May 6, 2015) (Commission invalidates a third appointment and orders the proper disposition of a Police Lieutenant, City of Elizabeth, certification, finding that, per the City ordinance, only two Police Lieutenant vacancies existed which could be filled). In that regard, N.J.S.A. 40A:14-118 permits a governing body to create and staff police departments and mandates that positions can only be created in accordance with this statutory provision. In *Reuter v. Borough of Fort Lee*, 167 N.J. 38, 43 (2001), the New Jersey Supreme Court declared "[t]hus, from today forward no appointment may be made to any police department position not created in accordance with N.J.S.A. 40A:14-118." Compare, *In the Matter of Mark Competello* (MSB, decided January 25, 2006), *aff'd on reconsideration* (MSB, March 22, 2006). See also, *Larry S. Loigman v. Township of Middletown*, Docket No. A-906-02T3 (App. Div. November 7, 2003) (Appellate Division concluded that subsequent adoption of Township ordinance retroactively ratified Police Officer appointments effected in violation of *Reuter v. Borough of Fort Lee*, *supra*, which precludes appointments of police personnel not created by ordinance). See also, *In the Matter of Police Captain (PM3536B), City of Hoboken* (MSB, decided January 28, 2004).

Therefore, under these circumstances, the Commission finds that the selection of lower-ranked candidates based on performance during the interview was not arbitrary and provides a legitimate reason for the appellant's bypass. Accordingly, 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. 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. See N.J.A.C. 4A:4-4.8(a)3. In reviewing this matter, the Commission has not found that the appellant's bypass was due to invidious reasons. The fact that the appointing authority has not previously utilized the "Rule of Three" in Police Sergeant promotions, but did so in the appellant's case, does not evidence invidious motives. It is noted that the appellant does not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the

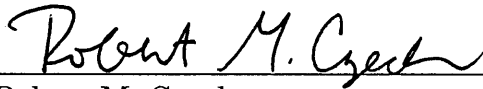
candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name on the Police Sergeant (PM2748L), Borough of Wallington, eligible list was proper and the appellant has failed to meet 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 17TH DAY OF JUNE, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: Piotr Zagaja
Michael L. Prigoff, Esq.
Littie E. Rau, Esq.
Mayor Walter G. Wargacki
Witold T. Baginski
Kenneth Connolly
Joseph Gambino



Chris Christie
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
DIVISION OF CLASSIFICATION AND PERSONNEL MANAGEMENT
P. O. Box 314
Trenton, New Jersey 08625-0313

Robert M. Czech
Chair/Chief Executive Officer

September 30, 2014

Michael L. Prigoff
Lebson & Prigoff, LLC

RE: Piotr Zagaja – Title: Police Sergeant
Jurisdiction: Borough of Wallington - Symbol: PM2748L
Certification No: PL140456 - Certification Date: 5/7/2014

Dear Mr. Prigoff:

This is in response to your correspondence contesting the bypass of your client's name on the referenced certified list of eligibles.

The Appointing Authority disposed of the certification indicating the selection of a lower ranked eligible and bypassed your client's name in accordance with N.J.A.C.4A: 4-4.8, which permits an appointing authority to make an appointment, from among the three highest ranked interested eligibles (Rule of Three). This rule is subject to the statutes governing veteran's preference when applicable.

It should be noted that effective May 7, 2012, a portion of N.J.A.C.4A:4-4.8 was repealed and the Appointing Authority is no longer required to provide a statement of reason when a lower or tied rank eligible is selected.

After a thorough review of our records and all the relevant material submitted, we find that no merit system rules were violated in disposing of the certification. Therefore, the Appointing Authority's decision to bypass your client's name has been sustained and your appeal is denied. Please be advised that PM2748L expired on June 2, 2014 and there will be no further certifications issued from this eligible list.

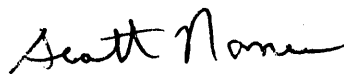
In accordance with Civil Service Rules, you may appeal this decision to the Division of Appeals and Regulatory Affairs within 20 days of the receipt of this letter. You must submit all proofs, arguments, and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Michael L. Prigoff
RE: Piotr Zagaja
September 30, 2014
Page 2

Pursuant to P.L. 2010 C.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, C. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees. Address all appeals to:

Henry Maurer, Director
Division of Appeals and Regulatory Affairs
Written Appeals Record Unit
PO Box 312
Trenton, NJ 08625-0312

Sincerely,
For the Director,

A handwritten signature in black ink, appearing to read "Scott Nance", is written over the typed name.

Scott Nance, Supervisor
Certification Unit

c: Mark S. Ruderman, Borough Labor Counsel