

examination. Thereafter, his name was re-certified to the subject certification, where he was the first ranked candidate.¹

Subsequently, the appellant indicates he was informed by the Fire Chief that he was not being considered for the position; however, the Fire Chief stated that he could not provide him an explanation as he was not part of the interview. Consequently, he attempted to contact the Business Administrator, who was part of the interview, but he never received a call back with an explanation for his bypass. The appellant believes that he was bypassed because the appointed candidate's cousin is a Fire Captain and union representative, her father was a Fire Captain and union representative, her brother is a Hoboken Police Officer, and her mother works in City Hall and knows the Business Administrator. Additionally, he states that the appointed candidate's father works directly with the Hoboken Board of Education and her husband is an Assistant Manager with a water company that has a contract with Hoboken. The appellant also asserts that the appointing authority has a poor history of hiring African-American candidates as only two out of 125 Fire Fighters are African-American.

In response, the appointing authority, represented by Mark A. Tabakin, Esq., states that the appellant has failed to make a *prima facie* showing that his bypass was improper through discrimination, retaliation, or other unlawful motive as he has not provided any evidence that he has superior qualifications than the appointed candidate or that the other candidate was chosen due to disqualifying conflicts of interest. Instead, it asserts that it properly exercised its discretion under the Rule of Three.

The appointing authority presents that it hired an independent company to conduct a background investigation of the appellant and the other candidates. The investigation revealed that the appellant had been arrested on five separate occasions, which included, between 2007 and 2013, an arrest for simple assault and a conviction for disorderly conduct. Additionally, his driver's license had been suspended in 2014 and 2016. Further, on August 30, 2018, the appellant was issued a driver's license listing his address being in [REDACTED] at the address where his girlfriend and one of his children reside. Thereafter, on September 13, 2018, he was issued a new driver's license listing his mother's address in [REDACTED] as his address. On his application, the appellant listed that he lived in Paterson from July 2018 through September 2018 and that in 2018, he was registered to vote in [REDACTED] County on August 30, 2018 and it was changed back to [REDACTED] County on or about October 1, 2018. Moreover, the investigation revealed that he has significant financial debt, including student loan debt, which included previously defaulting on his student loans, having at least one monetary debt turned over to a collection

¹ This agency's records indicate that prior to the subject certification, his name was in the 22nd position on certification OL171142 and was not reachable for appointment, in the third position on certification OL180858, which was cancelled by this agency, and in the third position on certification OL180859 and there were no appointments.

agency and once having his wages garnished for owing child support. Therefore, the appointing authority argues that these were legitimate reasons for bypassing his name in favor of another candidate.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7 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 no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) 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 from an eligible list was improper.

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 action is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison, supra* at 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 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 motive.

In the instant matter, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment. Therefore, the appellant, the first positioned candidate on the subject certification, and the appointed candidate, the third positioned candidate, were reachable for potential appointment. Nevertheless, the appellant alleges that based on his physical and mental abilities, he should have been appointed to the subject title as he believes that he was the more qualified candidate. He argues that he was not appointed due to nepotism as the appellant asserts that the appointed candidate was appointed due to having family members working or having business connections with Hoboken. The appellant also contends that the appointing authority has a poor record of hiring African-American candidates. However, even assuming, *arguendo*, that the appellant was more qualified than the appointed candidate, as long as the bypass was not based on an unlawful or invidious motivation, it was within the appointing

authority discretion to bypass him under the “Rule of Three.” *See In the Matter of Michael Cervino* (MSB, decided June 9, 2004).

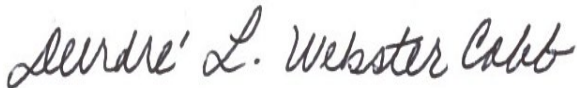
Here, the appointing authority presented legitimate business reasons for his bypass. Specifically, it presents that the appellant was arrested five times between 2007 and 2013, which included a simple assault arrest and a conviction for disorderly conduct. Additionally, his driver’s license was suspended in 2014 and 2016. As such, the appellant had multiple recent negative interactions with the law, including after the August 31, 2015 closing date. Therefore, the appointing authority had a legitimate business concern that the appellant lacked the judgment necessary to be a Fire Fighter. Moreover, the appellant did not establish a *prima facie* case of nepotism or racism by a preponderance of the evidence where, other than mere allegations, he did not present any substantive evidence regarding the bypass that would lead the Civil Service Commission to conclude that the bypass was improper or an abuse of the appointing authority’s discretion. *See In the Matter of Chirag Patel* (CSC, decided June 7, 2017).

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 1ST DAY OF JULY, 2020



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