

B-13



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Police Officer  
(S9999R), Borough of Lincoln Park

Request for Enforcement

CSC Docket No. 2015-3221

ISSUED: NOV 09 2015 (DASV)

The Division of Agency Services (Agency Services) requests that the Civil Service Commission (Commission) order the Borough of Lincoln Park to return the November 14, 2014 certification (OL141501) of the eligible list for Police Officer (S9999R) for proper disposition.

By way of background, the subject eligible list<sup>1</sup> was certified to the Borough of Lincoln Park on November 14, 2014 (OL141501) and was due to be disposed of by May 14, 2015. Thiago da Silva, a veteran, was ranked number one on the certification. The appointing authority returned the certification to Agency Services on February 2, 2015, seeking to retain da Silva's name for future consideration because he was unavailable for appointment due to his overseas military deployment. The appointing authority advised that it had appointed Christopher Mulhearn and Jennifer Hesse, a veteran and a nonveteran ranked two and three, respectively, effective January 18, 2015. It is noted that on December 9, 2014, da Silva e-mailed the appointing authority, confirming that he was currently overseas and would not return until mid to late June 2015. However, he stated that he was interested in a position and he had already received police academy training,

Upon receipt of the certification, Agency Services notified the appointing authority that the disposition could not be approved because it could not "bypass" a veteran for a nonveteran candidate. In response, the appointing authority indicated that it received legal advice from its labor counsel, stating that it could appoint

<sup>1</sup> The Police Officer (S9999R), Lincoln Park, eligible list does not expire until May 1, 2016.

other individuals as long as da Silva was kept on the subject eligible list for future consideration. Agency Services referred this matter to the Commission for enforcement.

In the instant matter, the appointing authority, represented by Avis Bishop-Thompson, Esq., asserts that it properly returned the subject certification noting the unavailability of da Silva based on several factors: its inability to complete da Silva's background investigation due to his incomplete application; its inability to extend a conditional offer of employment because of the incomplete background investigation; da Silva had not undergone the medical and psychological examinations; and there were economic and public safety reasons which required the appointing authority to immediately appoint two lower-ranked eligibles. The appointing authority explains that, by e-mail dated December 4, 2014, da Silva was notified that the top three candidates would be issued applications and an investigation of his background would commence after it received the completed application. Da Silva returned the application on December 15, 2014 and signed a release form regarding his investigation. However, the appointing authority indicates that da Silva submitted an incomplete application. He failed to include an address for 2010 and 2011 and had omissions and/or incomplete information regarding his prior employment, his disciplinary history in the military, and additional information regarding his "reputation." Thus, it maintains that it was unable to extend him a conditional offer of employment, and in turn, it could not schedule him for medical and psychological examinations. Moreover, the appointing authority contends that it needed to hire two Police Officers due to retirements that occurred on December 31, 2014, in order to avoid significant overtime costs and to provide needed police services to residents. Thus, by letter dated January 7, 2015, da Silva was notified by the Police Chief that "after having reviewed [his] credentials, we have decided to pursue other candidates." Additionally, da Silva was notified by e-mail, dated January 20, 2015, that the position had been filled and he would remain eligible for the next vacancies. Da Silva inquired as to why he was not hired, but the record does not indicate whether the appointing authority responded to him.

Furthermore, the appointing authority argues that the controlling regulation, *N.J.A.C. 4A:4-4.6*, provides it with the discretion to consider da Silva as available, but does not mandate an appointment. Further, it emphasizes that it needed to immediately appoint two individuals due to fiscal and staffing concerns. The Lincoln Park Police Department only has 23 sworn officers. The subject certification was due to be disposed of by May 14, 2015, prior to da Silva's return from deployment. Moreover, while da Silva had completed the alternate route program with the Morris County Police Academy, the appointing authority stresses that da Silva had not completed the application process. However, it states that da Silva remains as the number one eligible, and upon completion of his background investigation, it would interview him, extend a conditional offer of employment, and

send him for medical and psychological examinations. If he passes, the appointing authority states that it would appoint him and he would have the same rights and privileges as if he had served continuously from January 8, 2015, the effective date of the appointments of the lower-ranked eligibles. In support of its position, the appointing authority submits the certification of the Borough Administrator, da Silva's employment application, and various e-mails, letters, and a signed release form.

### CONCLUSION

*N.J.S.A.* 11A:5-6, *N.J.A.C.* 4A:4-4.8(a)3i and *N.J.A.C.* 4A:5-2.1 provide that on open-competitive lists, disabled veterans and then veterans *shall be appointed* in their order of ranking (emphasis added).

*N.J.A.C.* 4A:4-4.6 provides:

(a) Interested eligibles on military leave shall continue to be certified. **The appointing authority may consider such eligibles immediately available for appointment even though reporting for work may be delayed.**

(b) On return from military duty, **an appointed eligible shall, after successful completion of the working test period, have the same rights, privileges and obligations as if the eligible had served continuously in the title from the original effective date of appointment** (emphasis added).

In the instant matter, the appointing authority argues that it was not required to appoint da Silva since he was unavailable due to his military deployment and he did not complete pre-employment processing. It maintains that, based on the need to expeditiously appoint eligibles, it appointed two lower-ranked eligibles. However, although da Silva was deployed, as an interested veteran, unless the appointing authority can properly remove his name from the subject eligible list pursuant to *N.J.A.C.* 4A:4-4.7,<sup>2</sup> da Silva is entitled to be appointed and cannot be bypassed. See *N.J.S.A.* 11A:5-6, *N.J.A.C.* 4A:4-4.8(a)3i and *N.J.A.C.* 4A:5-2.1. He also cannot be deemed unavailable. See *N.J.A.C.* 4A:4-4.6. Thus, as there was no request for his removal at the time of the initial certification disposition, da Silva should have been recorded as appointed on the certification effective January 8, 2015. However, this appointment is considered conditional, pending passing the pre-employment processing for the position, which includes the background investigation and the medical and psychological examinations. In other words, the appointing authority should have returned the subject certification,

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<sup>2</sup> The name of an eligible may be removed from an eligible list for various reasons as set forth in *N.J.A.C.* 4A:4-4.7.

noting da Silva's appointment. Thereafter, once the appointing authority had the opportunity to fully complete da Silva's background investigation upon his return from military duty, including reviewing da Silva's employment application and sending him for medical and psychological examinations, if there was any basis for removal, it could have requested an amendment to the subject certification and provided Agency Services with the appropriate reason for removal and supporting documentation. If a removal was approved, da Silva would then have had an opportunity to appeal his removal.

Additionally, *N.J.A.C.* 4A:4-4.6 does not preclude an appointing authority from appointing a lower-ranked eligible in the interim based on the needs of its agency. However, unless there is an available position for the lower-ranked eligible, upon a veteran's return from military duty, the eligible must be displaced since the veteran's appointment is mandated and the eligible's appointment is considered an interim appointment. In that regard, *N.J.A.C.* 4A:4-1.6(b)1 provides in relevant part that when an appointing authority makes an appointment to a specific title in local service, an interim appointment shall be made where the position/title is held by a permanent employee who is on a leave of absence.<sup>3</sup> Moreover, *N.J.A.C.* 4A:4-1.6(f) states in relevant part that any interim appointment shall remain in effect only during the period of time that the permanent employee is on an approved leave of absence. Accordingly, since the record indicates that there were only two available positions, the appointing authority should have disposed of the certification, recording the appointment of da Silva, as set forth above. It should have also indicated the appointment of Mulhearn and the interim appointment of Hesse, effective January 8, 2015, and provided the reason for the interim appointment, namely da Silva's military deployment.

Therefore, based on the foregoing, the Borough of Lincoln Park is ordered to properly dispose of the subject certification within 30 days of the issuance of this decision. However, since the record indicates that da Silva returned from military duty in June 2015, the appointing authority is directed to complete its investigation and if da Silva successfully completes pre-employment processing, his appointment is mandated. Further, upon successful completion of his working test period, his January 8, 2015 permanent appointment date shall be recorded for salary-step placement and seniority-based benefits. See *N.J.A.C.* 4A:4-4.6(b). The appointing authority must also note on the certification that Mulhearn had been appointed, effective January 8, 2015, and Hesse was serving an interim appointment effective January 8, 2015. If there is not an additional available position, Hesse, who is the third-ranked eligible on the certification and a nonveteran, shall be displaced by da Silva and her interim appointment must be terminated. If there is an additional

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<sup>3</sup> Despite that a newly appointed Police Officer is not considered permanent until he or she completes the one-year working test period pursuant to *N.J.A.C.* 4A:4-5.2(d)1, the rule on interim appointment applies since the appointment is anticipated to become permanent and, in the instant matter, da Silva would be considered to be on a military leave of absence.

current vacancy, the appointing authority may request a new certification to allow it to permanently appoint Hesse with a current date of permanent appointment. Alternatively, the appointing authority may provide Agency Services with a legitimate reason and documentation to remove da Silva's name from the subject eligible list and note the appointments of Mulhearn and Hesse effective January 8, 2015.

Lastly, the Commission is specifically given the power to assess compliance costs and fines against an appointing authority, including all administrative costs and charges, as well as fines of not more than \$10,000, for noncompliance or violation of Civil Service law or rules or any order of the Commission. *N.J.S.A. 11A:10-3; N.J.A.C. 4A:10-2.1(a)2. See In the Matter of Fiscal Analyst (M1351H), Newark, Docket No. A-4347-87T3 (App. Div. February 2, 1989).* In the instant matter, the appointing authority failed to properly dispose of the certification within the given time. Therefore, the Commission orders that the costs incurred by this agency in the compliance process be assessed against the Borough of Lincoln Park in the amount of \$1,000, pursuant to *N.J.S.A. 11A:10-3 and N.J.A.C. 4A:10-3.2(a)5*, to be remitted within 30 days of the issuance of this order. Additionally, if the appointing authority does not adhere to the above-noted timeframe for the proper certification disposition without an approved extension of time, it shall be assessed a fine in the amount of \$100 per day, beginning on the 31st day from the receipt of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

### ORDER

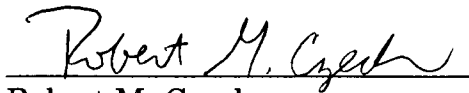
Therefore, it is ordered that the appointing authority properly dispose of the certification as set forth above within 30 days.

Moreover, the Commission orders that the costs incurred by this agency in the compliance process be assessed against the Borough of Lincoln Park in the amount of \$1,000, pursuant to *N.J.S.A. 11A:10-3 and N.J.A.C. 4A:10-3.2(a)5*, to be remitted within 30 days of the issuance of this order.

If the appointing authority does not adhere to the above-noted timeframe for the proper certification disposition without an approved extension of time, it shall be assessed a fine in the amount of \$100 per day, beginning on the 31st day from the receipt of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

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 5<sup>TH</sup> DAY OF NOVEMBER, 2015



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