

STATE OF NEW JERSEY

In the Matter of Michael Ajayi,
 Quality Assurance Specialist, Health
 Services (PS1431K), Department of
 Human Services

**FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION**

CSC Docket No. 2018-3197

Bypass Appeal

ISSUED: DECEMBER 21, 2018 (JET)

Michael Ajayi appeals the bypass of his name on the Quality Assurance Specialist, Health Services (PS1431K), Department of Human Services, eligible list.

The appellant took the promotional examination for Quality Assurance Specialist, Health Services (PS1431K), achieved a passing score, and was ranked on the subsequent eligible list. The appellant's name was certified on February 6, 2018 (PS180137). In disposing of the certification, the appointing authority bypassed the appellant, who was the eighth ranked eligible on the certification, and recorded him as "Bypassed, unsatisfactory employment record." Specifically, the appointing authority issued a Preliminary Notice of Disciplinary Action (PNDA) on March 1, 2018, alleging that an investigation was conducted as a result of video footage from an incident revealing that an agitated patient who needed consistent monitoring was seen running away from staff and standing on a heater and chair. The patient attacked another patient which required a Code Blue, and resulted in the patient being placed in restraints. The appointing authority also alleged that the appellant failed to intervene in the incident and was seen having a conversation in the dayroom with another employee, and was uncooperative during the investigation. Moreover, the appointing authority alleged that the appellant arrived to work at 6:43 p.m. but initialed the assignment sheet as 6:30 p.m. and the Daily Sign in Record as 6:15 p.m. The appointing authority appointed a lower ranked candidate, Gracy Thekkumthala, who was the ninth ranked candidates on the certification, effective April 14, 2018. It is noted that the PS1431K list was certified three times and five appointments were made.¹

¹ The appellant's name also appeared on the PS170583 certification. It is noted that the appellant was listed on the PS170583 certification as "Retained, interested others appointed."

On appeal to the Civil Service Commission (Commission), the appellant asserts, among other things, that he has a stellar employment record, and he has consistently strived to exceed expectations and goes above and beyond in his assignments with respect to the patients, patient safety, dignity of life, and leadership qualities. The appellant adds that he has a passion for his work and effectively communicates with patients. He states that he shares knowledge with staff, reviews policies with them, and has not avoided difficult tasks. The appellant explains that he is not aware of the reasons the appointing authority relied on to remove his name from the list, and he continues to receive positive feedback from his colleagues. The appellant adds that, after interviewing for the position of Quality Assurance Specialist, Health Services in February 2018, he received a letter dated March 5, 2018, indicating that he would not be considered for the position due to his disciplinary record. In this regard, the appellant states that there was no disciplinary record at the time he interviewed for the position. The appellant explains that the PNDA was issued on March 1, 2018 and the suspension was served beginning on March 3, 2018, which was a year after the March 25, 2017 incident occurred. The appellant adds that he was not interviewed and there was no statement obtained from him with respect to the charges. The appellant contends that an error occurred as he was not provided with a late slip pertaining to his time. Moreover, the appellant asserts that his recollection of the incident is limited as the incident occurred over one year ago. In support, the appellant provides a copy of his employment evaluation and various letters of recommendation for review.

In response, the appointing authority maintains that the appellant was bypassed for an unsatisfactory employment record. Specifically, the appointing authority states that the PNDA was issued on March 1, 2018 and sought a 15 day suspension for the appellant regarding the March 25, 2017 incident.

In response, the appellant asserts that the PNDA was an attempt to prevent him from being appointed to the position. He explains that he received the PNDA after he applied and interviewed for the position. He adds that the appointing authority informed him that he was the individual for the job based on his education and experience. The appellant contends that he was disappointed to learn that his employment record was stained due to an episode that had happened in the prior year. In this regard, he states that it was the first time that he had heard about the allegation and he was not contacted or interviewed about it. The appellant states that the administrative charges against him were fabricated with the intention to avoid appointing him to the position.

Specifically, he questions why the PNDA was served a year after the incident occurred and he claims that it appears to be an effort to destroy his character and work record. In addition, the appellant questions the timing of the PNDA as it appears to be more than just coincidence. The appellant adds that, although the

PNDA alleged that he was observed in the dayroom with staff, did not provide proper medication to a patient, and no code was called at the time a patient injured another patient, the appointing authority did not provide proof of the charges against him. Further, the appellant states that there were four other nurses who were involved in the same incident and there is no proof that they were also disciplined. The appellant maintains that the individuals involved in the incident should have submitted statements to the appointing authority, but the appointing authority has provided no such statements in support of its claims. In this regard, the appellant states that there are inconsistencies with respect to the time the incident occurred and he questions which facility clock was reviewed in support of the allegations against him. The appellant adds that the facility cameras should not be used with respect to the disciplinary charges as they are not accurate in recording the treatment provided. The appellant explains that higher level nursing staff have not been involved with the disciplinary charges and those that have attempted to intervene on behalf of the nursing employees have been ignored. Moreover, the appellant explains that the allegations are baseless as it took 16 months for the appointing authority to issue the charges and it now intends to proceed with a suspension without conducting a proper investigation.

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)3ii (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. *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 on an eligible list was improper.

In this matter, the appellant has provided no substantial evidence to show that the bypass was improper. Initially, a review of this agency's records reveal that he has pending disciplinary charges against him. An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate's history and qualifications to determine the best candidate from a list of three eligibles, any of whom may be selected under *N.J.A.C. 4A:4-4.8(a)3*. In this regard, the appellant's pending disciplinary charges could be considered in determining whether he could be bypassed on the subject list. Absent an unlawful motive, appointing authorities are permitted to consider an individual's pending or disciplinary charges as a basis for bypassing the applicant. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004); *In the Matter of Michael Boylan* (MSB, decided October 22, 2003) (it was within the appointing authority's discretion to bypass the appellant due to two

discrimination complaints against him, which could have resulted in disciplinary charges after being transferred to OAL for a hearing); *In the Matter of Gary R. Kern, et. al.* (MSB, decided October 11, 2000) (appellant was not entitled to retroactive appointment when he was initially bypassed by the appointing authority due to pending disciplinary charges that were later dismissed). While the appellant questions the timing of the discipline, there is no evidence, other than his mere assertions, that the disciplinary action was taken solely to provide a reason for his bypass. Moreover, the Commission will not substantively review the circumstances regarding the appellant's misconduct in reviewing a bypass appeal. Disciplinary matters must be appealed following the proper procedures.² As such, the appellant's pending disciplinary charges are sufficient to bypass his name on the subject certification, especially when there is no evidence that the lower ranked candidates had any disciplinary records.

Moreover, 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 through review of the record indicates that the appointing authority's bypass of the appellant 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 19th DAY OF DECEMBER, 2018



Deirdre Webster Cobb
Chairperson
Civil Service Commission

² The Commission notes that the appellant is in a title covered by the Communication Workers of America. As such, it has no jurisdiction to review any challenge to that discipline. *See N.J.A.C. 4A:2-2.1(c) and (d).*

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