



STATE OF NEW JERSEY

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

In the Matter of Craig G. Howlett,
Police Sergeant (PM0721P), and Lori
A. Soares, Police Captain (PM1255T),
Borough of Roselle

List Bypass Appeals

CSC Docket Nos. 2019-687 and 2019-
688

ISSUED: DECEMBER 21, 2018 (SLK)

Craig G. Howlett and Lori A. Soares, represented by Maurice W. McLaughlin, Esq., appeal their respective bypasses from the Police Sergeant (PM0721P), Borough of Roselle (Roselle) and Police Lieutenant (PM1255T), Roselle, eligible lists. These appeals have been consolidated due to common issues presented.

By way of background, Howlett, a nonveteran, appeared on the PM0721P eligible list, which promulgated on August 7, 2014 and expired on May 23, 2018. Initially, Howlett was certified on August 8, 2014 (PL140948). Howlett was in the seventh position on PL140948, which was disposed of on November 20, 2014. However, Howlett was not reachable for appointment. Thereafter, Howlett was certified on April 2, 2015 (PL150368). Howlett was in the fourth position on PL150368, which was disposed of on June 15, 2015 with the second positioned eligible being appointed. Additionally, Howlett was certified on July 20, 2015 (PL150832). Howlett was in the second position on PL150832, which was disposed of on September 8, 2015 with the first positioned eligible being appointed. Howlett was next certified on October 21, 2016 (PL161246). Howlett was the first positioned eligible on PL161246, which was disposed of on November 18, 2016 with the third positioned eligible being appointed. Subsequently, Howlett was certified on February 3, 2017 (PL170170). Howlett was the first positioned eligible on PL170170, which was disposed of on May 24, 2017 with the second and third positioned eligibles being appointed. Finally, Howlett was certified on October 31, 2017 (PL171316). Howlett was in the first position on PL171316, which was disposed of on December 12, 2017, indicating his appointment effective November 13, 2017.

Soares, a nonveteran, appeared on the PM1255T eligible list, which promulgated on April 6, 2016 and expires on April 6, 2019. Initially, Soares was certified on October 21, 2016 (PL161247). Soares was in the third position on PL1612147, which was disposed of on November 18, 2016 with the fourth positioned eligible being appointed. Thereafter, Soares was certified on February 3, 2017 (PL170171). Soares was the second positioned eligible on PL170171, which was disposed of on May 24, 2017 with the first and third positioned eligibles being appointed. Finally, Soares was certified on October 31, 2017 (PL171315). Soares was the first positioned eligible on PL171315, which was disposed of on December 12, 2017, indicating her appointment effective November 13, 2017.

Upon the appellants' initial appeals in April 2017, the Division of Appeals and Regulatory Affairs (DARA) issued January 9, 2018 letters to Howlett and Soares indicating that their appeals were moot as the appointing authority provided legitimate business reasons for their bypasses. In response, Howlett and Soares filed appeals in the Superior Court of New Jersey, Appellate Division, and the Appellate Division remanded the matters to the Civil Service Commission (Commission) and did not retain jurisdiction.

On appeal, Howlett states that he was bypassed on PL161246¹ in March 2017 and on PL170170 in April 2017 and Soares states that she was bypassed on PL161247 in November 2016. Howlett's appeal was received by this agency on April 28, 2017 and Soares' appeal was received on April 18, 2017. In a separate letter that was dated May 9, 2017, Soares indicates that she is also appealing her bypass on PL170171. Both appellants assert that their interview processes were inconsistent, undefined and random and not all candidates were required to interview. Therefore, they believe that the appointing authority did not have a legitimate reason for their bypasses. Additionally, the appellants highlight that this agency's online frequently asked questions for job seekers indicates that candidates who receive a Disposition Notice would be informed that they were bypassed. However, they state that they never received this notice.²

¹ In response to Hewlett's appeal of his bypass on PL161246, which was disposed of on November 18, 2016 and an appointment was made on December 1, 2016, DARA advised him that his appeal was untimely and could not be considered. However, it advised that his appeal of his bypass on PL170170 could continue.

² It is noted that the section referred to does **not require** a Disposition Notice to be sent for a bypass. Rather, it indicates that such a notice, *inter alia*, can be used to notify an eligible he or she has been bypassed. In this regard, such notices are sent by this agency and not an appointing authority, which is not required to send any notice of a bypass. Further, such notices are only sent by this agency when a bypass is due to a temporary condition that may be resolved in the future such as where an eligible does not currently possess something required for the position (*e.g.*, has a suspended license, *etc.*). Such "bypasses" are permitted and less punitive than removing an eligible from the list since, if the condition causing the current bypass resolves in the future, the eligible will still be able to be considered on subsequent certifications. Where bypasses are solely due to the appointment of lower-ranked eligible based on an appointing authority's assessment that the lower-

With respect to the appeals of the certifications that were timely, the appointing authority, represented by Rachel M. Caruso, Esq., presents that three members of the Borough Council (Council), making up the public safety committee (committee) or their designees, interviewed candidates who were reachable under the “Rule of Three.” The committee used the interview process that it had in place since July 2014. It indicates that this interview process has taken place for every promotional cycle since 2014, except one time in October 2014 due to staffing needs necessitating promotions to occur in a more expedited manner. As two promotions were anticipated for each position, in accordance with the “Rule of Three,” four eligibles were interviewed by the committee for each position and they were each asked the same 10 questions. Candidates were graded on a scale of zero to five for each question. Each candidate who the Police Chief recommended received an additional five points. After tallying the score sheets, the appointing authority presents that other candidates scored higher than the appellants and those candidates were appointed.

In response, the appellants present that they have excelled in their various assignments as Police Officers with the appointing authority. Further, despite their exceptional experience and the Police Chief’s recommendations, they were bypassed. With respect to the actual interview process, Howlett notes that although the Police Chief was present during the interview, he was not allowed to answer questions. Additionally, Howlett claims that the interview was not done to evaluate the abilities of the candidates up for promotion. Instead, Howlett believes that the appointing authority used the interview process to circumvent deserving candidates to promote those who are politically connected either by monetary donations or personal relationships with local politicians. Soares argues that she was not given the proper notice of her bypass and appeal rights, which demonstrates the appointing authority’s bad faith. Further, she argues that her appeal of PL161247 was timely as she appealed within 20 days as to when she received notice that she was bypassed. Both appellants argue that their bypasses were contrary to the legislature’s intention that promotions be based on merit. Both appellants state that the appointing authority cannot point to anything that supports its decisions to bypass them.

Additionally, Howlett asserts that the appointing authority cannot dispute that the Police Chief has asserted that his bypass was not warranted. In this regard, Howlett submits a letter from the Police Chief in support of his appeal. This letter also indicates the Police Chief supports Soares’ appeal as well. The Police Chief asserts that the appointing authority has instituted an interview process as a way of circumventing the eligible list by selecting candidates that are politically connected. While the Police Chief acknowledges that the candidates that were selected are fine officers, he indicates that there was no reason to bypass the

ranked eligible is more suitable based on factors such as qualifications, training, interviews, *etc.*, no Disposition Notice is provided.

appellants, who have impeccable service records. The Police Chief claims that the appointing authority has not developed a policy for the interview process and the officers are not aware of the process and how it affects their eligibility for promotion. He indicates that he is not allowed to participate in the interview process. Further, the Police Chief states that one of the interviewers commented that there are no right or wrong answers to the interview questions. Therefore, he questions how the candidates can be scored properly.

In response to Howlett, the appointing authority presents that only it has the authority to appoint, promote or remove employees. Therefore, while the Police Chief is entitled to his opinion, it asserts that his opinion should not be considered as it not relevant to the promotional process. Further, it disagrees with the Police Chief's assertion that the appointing authority has not developed an interview process or that the officers were not aware of this process as it has been using the same interview process since 2014. Also, the appointing authority has provided correspondence to both the union and the Police Chief explaining this process. Additionally, it notes, that while it is not bound to do so, it does reward candidates with five additional points based on the Police Chief's recommendations. Moreover, Howlett has not submitted any evidence that the candidates that were selected were based on political considerations. The appointing authority highlights that political donations are public record and a search of the available online databases do not reveal that any of the selected candidates made political donations to local elected officials. Additionally, it argues that Howlett has not presented any factual argument to support his contention that his bypass was arbitrary or capricious. The appointing authority notes that one of the selected candidates was also recommended by the Police Chief, which it presents as evidence that it considered all factors that involved merit and fitness. It emphasizes that Howlett's bypass was based on the scoring sheets from the interview and in accordance with its discretion under the "Rule of Three." Moreover, the appointing authority argues that his appeal is moot as he was appointed to the title of Police Sergeant, effective November 13, 2017.

In response to the timeliness of Soares' appeal of her bypass on certification PL161247, the appointing authority states that it publicly announced the appointment of the selected eligible in December 2016 and Soares should have reasonably known that she was bypassed at that time. Therefore, it argues that her appeal in April 2017 was untimely. Concerning her bypass on PL170171, the appointing authority presents that she scored lower on the interview than the selected candidates and she has not presented any facts to support her burden to prove that her bypass was unlawful, arbitrary or capricious. Additionally, it argues that Soares' appeal is moot as she was appointed as a Police Lieutenant, effective November 13, 2017.

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)3 allow an appointing authority to select any of the top three interested eligibles (“Rule of Three”) on a promotional list, provided that no veteran heads the list. In bypass appeals, the appellant has the burden of proof. See *N.J.A.C.* 4A:2-1.4(c). Additionally, when bypassing a higher ranked eligible, *N.J.A.C.* 4A:4-4.8 no longer requires an appointing authority to provide 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 As such, the appointing authority was not required to provide this agency with a statement as to why it appointed lower ranked eligibles over the appellants. See *e.g.*, *Foglio, supra* (The Supreme Court held that, as bypassing a higher ranked eligible is facially inconsistent with the principles of merit and fitness, the appointing authority must justify its selection of a lower ranked eligible with a specific reason).⁴ Moreover, it is well established that the appointing authority is not obligated to provide a candidate with the reasons why the lower ranked candidates were appointed. See *Local 518, New Jersey State Motor Vehicle Employee Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles*, 262 *N.J. Super.* 598 (App. Div. 1993) and *In the Matter of Brian McGowan* (MSB, decided April 6, 2005).

Additionally, *N.J.A.C.* 4A:2-1.1(b) provides that an appeal must be made within 20 days after the appellant has notice or should have reasonably have known of the decision, situation, or action being appealed. As the appointment on certification PL161247 was announced by public notice in December 2016 and Soares’ appeal of her bypass on this certification was not until April 2017, her appeal was untimely. Further, the record is unclear if Howlett is still pursuing his bypass on PL161246. Regardless, as the appointment on this certification was made public in December 2016 and his appeal of this bypass was not received until April 2017, Howlett’s appeal of his bypass on this certification was untimely.

Further, while both appellants have been appointed, Howlett’s appeal of his bypass on PL170170 and Soares’ appeal of her bypass on PL170171 will be addressed since they could be entitled to retroactive relief if their prior bypasses were improper. Regardless, for the reasons set forth below, there is no evidence that their bypasses on any certification were 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 actions is

³ The rule amendment was effective May 7, 2012.

⁴ For subsequent history, see *In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012), *on temporary remand* (CSC, decided November 7, 2012) (On remand from the Supreme Court, the Commission found that appointing authority provided a proper statement of reasons when bypassing the appellant when it indicated that based on its interviews, the appointees demonstrated the maturity and temperament for the position. Subsequently, however, the Commission acknowledged a settlement providing for Foglio’s appointment).

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.

As set forth above, 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).

A review of this matter does not indicate that the appointing authority abused its discretion in bypassing Howlett on PL170170 and Soares on PL170171. In both matters, the appointing authority relied on an interview process that has been in place since 2014. The process involved the public safety committee, which consisted of three interviewers from the Council, asking the candidates for the same position the same 10 pre-set interview questions. Further, each candidate received a score between zero to five for each question. Additionally, five points were added to each candidate that was recommended by the Police Chief and the candidates with the highest tallied scores were selected. It is emphasized that appointing authorities are permitted to interview candidates and base their hiring decision on the interview so long as it adheres to the “Rule of Three.” 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"). 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 interviews were conducted inappropriately. In the present case, there is no credible evidence in the record that the questions were geared to the appointment of a specific individual or individuals. All candidates were asked the same questions. Indeed, while the Police Chief criticizes the interview process, he notes that the appointed eligibles are "fine" officers. Furthermore, as indicated above, his recommendations of the appellants were given weight during the interview process. However, the Police Chief is not the appointing authority, which may exercise selection discretion.

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 bypass of the appellants. Even assuming, *arguendo*, that the appellants are more qualified for the positions at issue, the appointing authority still has selection discretion under the "Rule of Three," absent any unlawful motive. In reviewing this matter, the Commission has not found that the appellants' bypasses were due to invidious reasons. Additionally, Howlett, other than his mere allegations, does not present any evidence that lower ranked eligibles, who were reachable for appointment on the subject certifications, were appointed based on political considerations. It is emphasized that the appellants do 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).

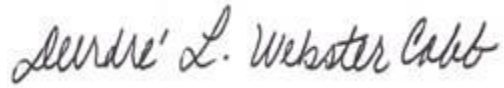
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of Howlett on the October 21, 2016 (PL161246) and on the February 3, 2017 (PL170170) certifications and Soares on the October 28, 2016 (PL1612147) and February 3, 2017 (PL170171) certifications were proper and the appellants have failed to meet their burden of proof.

ORDER

Therefore, it is ordered that these appeals 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



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