



**STATE OF NEW JERSEY**

**DECISION OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of Thomas Wengerter,  
Fire Lieutenant (PM1172S), Linden

CSC Docket No. 2017-3666

Hearing Granted

**ISSUED:            MAY 4, 2018            (EG)**

Thomas Wengerter, represented by Douglas M. Long, Esq., appeals the bypass of his name on the Fire Lieutenant (PM1172S), Linden eligible list.

The subject eligible list promulgated on January 7, 2016 and expires on January 6, 2019. A certification was issued on March 28, 2017 (PL170421) indicating the appellant, a non-veteran, was the highest ranked eligible on the certification. In disposing of the certification, the appointing authority bypassed the appellant's name and appointed the number two, three and four ranked eligible on the certification. Thereafter, a certification was issued on March 9, 2018 (PL180315). The appellant was again the number one ranked eligible on the certification. In disposing of the certification, the appointing authority bypassed the appellant's name and appointed the second ranked eligible on the certification.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority has retaliated against him by bypassing his name for appointment to the Fire Lieutenant title due to his "blowing the whistle" on the appointing authority's abuse of governmental authority. The appellant explains that on or about November 27, 2015, the appellant brought "snap poppers" into work. One of the poppers went off and allegedly injured a co-worker. The appellant received a Preliminary Notice of Disciplinary Action (PNDA), which was later settled to a 336 hour suspension. Upon the appellant's return to work, he was served with a civil lawsuit by a co-worker concerning the November 27, 2015 incident. The appellant joined the appointing authority asserting differential treatment concerning the discipline he received. Further, the appellant alleges that

in January 2017, the Fire Chief, Joseph Dooley, assembled a special officers training for the top seven eligibles on the subject list. The appellant argues that he was not invited to this training, and when he questioned his omission, Dooley stated he was being skipped and that he would be skipped for the life of the list because Dooley would not promote anyone who had brought a lawsuit against the appointing authority. Moreover, the appellant claims that he continues to be retaliated against. Additionally, he contends that he was required to submit a back to work note after leaving work early due to illness when such a note went against the collective bargaining agreement. He was also disciplined for being 13 minutes late when the policy had been no discipline for lateness if the period of time was covered by someone else. Finally, the appellant asserts that he has been a Fire Fighter since 2009 and has been a well-regarded employee who received praise for his work and dedication to the department.

The appointing authority, despite being provided the opportunity, did not submit any evidence or arguments for the Commission to review.

## 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 allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. Moreover, it is noted that the appellant has the burden of proof in this matter. *See N.J.A.C.* 4A:2-1.4(c).

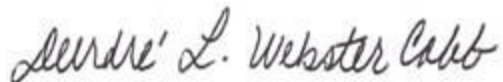
In a case where the motives for an employer's actions are questioned, an analysis of the justification to ascertain the actual reason underlying the actions is warranted. *See Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court 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 discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, the appellant appeared in the first position on the March 28, 2017 (PL170421) and March 9, 2018 (PL180315) certifications. The appellant argues that even though he was number one on the certifications and a well-regarded employee who received praise for his work and dedication to the department, he was bypassed in retaliation due to his lawsuit against the appointing authority. He alleges that he was told as much by Fire Chief Dooley and was told that he would be skipped for the life of the list. Thus, the appellant has established a prima facie case. The appointing authority has not provided any evidence or arguments in support of its bypass of the appellant's name on the subject certification nor has it responded to the appellant's allegations of retaliation. In view of the foregoing, this matter cannot be resolved on the basis of the written record. The Commission does not possess the full factual record with which to make a proper determination. Accordingly, the Commission finds it necessary to refer this matter to the Office of Administrative Law in order to develop a factual record as to whether the appellant's bypass for appointment on the March 28, 2017 (PL170421) and March 9, 2018 (PL180315) certifications of the Fire Lieutenant (PM1172S), Linden eligible list was based on legitimate reasons or whether the appointing authority evidenced invidious motivation in effecting the bypass.

### ORDER

Therefore, it is ordered that the matter of the appellant's bypass for appointment on the March 28, 2017 (PL170421) and March 9, 2018 (PL180315) certifications be transmitted to the Office of Administrative Law for a hearing as a contested case. It is further ordered that the appointment of the lower-ranked eligibles be designated conditional pending the outcome of this appeal.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 2ND DAY OF MAY, 2018



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