



STATE OF NEW JERSEY

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

In the Matter of John Bongiovanni,
Wage Collection Referee (PS3527N),
Department of Labor

Bypass Appeal

CSC Docket No. 2018-1652

ISSUED: MAY 25, 2018

(HS)

John Bongiovanni appeals the bypass of his name on the Wage Collection Referee (PS3527N), Department of Labor eligible list.

The appellant appeared as the first ranked non-veteran eligible on the subject eligible list, which promulgated on August 3, 2017 and expires on August 2, 2020. A certification was issued on August 21, 2017 (PS171385) with the appellant listed in the first position. In disposing of the certification, the appointing authority bypassed the appellant and the second listed non-veteran eligible and appointed the third, fourth and fifth listed non-veteran eligibles effective November 11, 2017.

On appeal to the Civil Service Commission (Commission), the appellant states that he has years of experience in resolving wage disputes and that all of his performance reviews have been excellent. The appellant states that the third listed eligible was the secretary for the Director of the Division of Wage and Hour Compliance and has no experience in resolving wage disputes. He sees no reason he should have been bypassed and argues that his bypass seems to invalidate the examination results.

In response, the appointing authority states that the third listed eligible could be appointed based on her admission to and passage of the examination, regardless of the previous position she held. The appointing authority states that the decision to bypass the appellant was made based on several points including an official written reprimand for conduct unbecoming a public employee based on a

workplace violence report. It maintains that it disposed of the certification in accordance with the “Rule of Three.”

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).

Initially, since the appellant, a non-veteran, was listed in the first position on the certification, it was within the appointing authority’s discretion to select any of the top three interested eligibles on the certification for each vacancy filled. The appellant contends that there was no reason he should have been bypassed. The appointing authority counters that the appellant received an official written reprimand for conduct unbecoming a public employee based on a workplace violence report. It is well established that disciplinary actions may be considered in bypassing an individual for appointment. *See In the Matter of Paul DeMarco* (MSB, decided April 6, 2005) (Appellant’s disciplinary action can be considered in determining whether he could be bypassed from the subject list). 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. Therefore, the appellant’s official written reprimand provided a sufficient basis to bypass him on the subject eligible list.

Additionally, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the “Rule of Three” to appoint a lower-ranked eligible absent any *unlawful* motive. *See N.J.A.C.* 4A:4-4.8(a)3; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, *Ocean City*, 207 *N.J.* 38, 49 (2011). *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). Moreover, the appellant does not possess a vested property interest in the position. In this regard, 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). The appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority’s discretion under the “Rule of Three.” Moreover, the appointing

authority presented a legitimate reason for the appellant's bypass that has not been persuasively refuted. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name was proper and the appellant has not met 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 23RD DAY OF MAY, 2018



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