



STATE OF NEW JERSEY

In the Matter of Stephen Rochester
and Algenoria Simpson, Police
Sergeant (PM5108N), East Orange

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

CSC Docket Nos. 2018-1440 and
2018-1506

Bypass Appeals

ISSUED: MAY 31, 2018 (CSM)

Stephen Rochester and Algenoria Simpson appeal the bypass of their names on the Police Sergeant (PM5108N), East Orange eligible list. These appeals have been consolidated due to common issues presented.

The appellants, non-veterans, took the subject promotional examination, achieved passing scores, and their names appeared the resultant eligible list. The appellants' names were certified to the appointing authority on September 28, 2017. Rochester's name was listed in the 3rd position on the certification and Simpson's name was listed in the 16th position on the certification. In disposing of the certification on January 17, 2018, the appointing authority bypassed the appellants, indicating that they were not available for the current positions, and appointed the eligibles 1st through 12th, 15th, 18th and 19th position on November 8, 2017.

On appeal to the Civil Service Commission (Commission), Rochester states that he was given 30 minutes notice to be at Police Headquarters for his interview. During his interview, he states that he was asked the timetable for his return to work from Family Medical Leave Act (FMLA) leave. Rochester indicates that he responded he had three options, physical therapy, minor surgery, or major surgery, which would determine his plan of action. He states that minor surgery would have returned him to work on January 2, 2018, but his actual return date of February 7, 2018, was not determined until after the promotions were made. Rochester claims it has been past practice of the appointing authority to promote officers who were unavailable for work that were out on FMLA leave. Further, he contends that the appointing authority violated the Rule of Three, that he has superior qualifications

than some of the others who were promoted, and that since the promotions occurred, one of those individuals has resigned and another was demoted. In support, he provides copies of his performance evaluations. Therefore, Rochester contends that he should be retroactively appointed from the subject list and receive back pay.

Simpson presents that he was listed in the 16th position on the certification, but he was bypassed in favor of lower ranking candidates. In a subsequent submission, he provides a copy of his DD-214 and asserts that he was the only veteran on the certification.

In response, the appointing authority states that based on the appointment date of November 8, 2017, both appellants were unavailable to work. With respect to Rochester, at the time it needed to fill the positions, it states that his expected return to work date from FMLA leave was January 3, 2018. Regarding Simpson, his expected return to work date was also January 3, 2018, but he actually returned on January 6, 2018. Therefore, since it had to move forward with the promotions to ensure public safety, it made 12 permanent appointments from the certification all effective November 8, 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)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. *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, provides that the appellant has the burden of proof to show by a preponderance of evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper. As long as that discretion is properly utilized, an appointing authority's decision will not be overturned.

N.J.A.C. 4A:4-7(a)3 states that an eligible may be removed from an eligible list for inability, unavailability or refusal of eligible to accept appointment.¹

Initially, since the appellants were non-veterans, it was within the appointing authority's discretion to select any of the top three eligibles on the certification. Although Simpson served in the military, he did not serve during one of the qualifying periods necessary to establish veterans preference. See *N.J.A.C.* 4A:5-1.1 *et seq.*

¹ Although the appellants could have been removed from the list, when it returned to certification, the appointing authority opted to request that their names be retained on the list due to their unavailability.

In the present matter, there is no dispute that the appellants were unavailable for appointment to the positions available on November 8, 2017 as they were on FMLA leave until January or February 2018. Further, the appointing authority indicated that due to public safety reasons, it needed to make all the appointments from the certification effective November 8, 2017. While Rochester claims that it has been past practice to appoint individuals who are out on FMLA leave from prior lists, other than his mere allegation, he has not provided any documentation or evidence to substantiate this assertion. Additionally, the FMLA only requires that an employee who returns from an authorized leave to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. In this regard, the FMLA specifically states that an employee utilizing such leave, upon return, is not entitled to any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave. *See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2614 (1993)*. Similarly, 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)*. Other than their mere allegations, the appellants have not presented any substantive evidence regarding their 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 legitimate reasons for the appellants' bypass which have not been persuasively refuted.

Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellants name was proper and the appellants have failed to meet their burdens of proof in this matter.

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
23RD DAY OF MAY, 2018

Deirdre L. Webster Cobb

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