



STATE OF NEW JERSEY

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

In the Matter of Stacey Williams,
Police Captain (PM1322T),
Borough of Roselle

CSC Docket No. 2017-3639

List Bypass Appeal

ISSUED: JULY 19, 2018 (DASV)

Stacey Williams appeals the bypass of his name on the February 3, 2017 certification of the Police Captain (PM1322T), Borough of Roselle, eligible list.

By way of background, the appellant, a nonveteran, appeared on the subject eligible list, which promulgated on April 21, 2016 and expires on April 20, 2019. The appellant and three candidates were certified on February 3, 2017. The appellant ranked second on the certification, which was disposed of and approved on May 24, 2017. In disposing of the certification, the appointing authority bypassed the first ranked eligible and the appellant pursuant to the "Rule of Three," *N.J.A.C. 4A:4-4.8(a)3*. It appointed the third ranked eligible effective March 20, 2017. The remaining eligible was not reachable on the certification and remains on the eligible list. It is noted that the appellant was previously bypassed on the October 21, 2016 certification of the subject eligible list. He pursued an appeal of that bypass, along with his appeal of the February 3, 2017 certification, by letters postmarked May 17, 2017. However, since his appeal was filed beyond the 20-day time period to file an appeal, the matter of his bypass on the October 21, 2016 certification was untimely and could not be considered. *See N.J.A.C. 4A:2-1.1(b)*. Additionally, a third certification of the subject eligible list was issued on February 5, 2018. The appellant was ranked second on that certification and was appointed effective February 26, 2018. Notwithstanding his appointment, the appellant maintains that he was improperly bypassed on the February 3, 2017 certification.¹

¹ It is noted that the appointing authority argued that the appellant's appeal of the bypass of his name on the February 3, 2017 certification was also untimely. However, the certification was not disposed of and approved until May 24, 2017, and thus, the appellant's May 17, 2017 appeal was

On appeal to the Civil Service Commission (Commission), the appellant contends that he never received the scores from his interview with the appointing authority and its representatives, nor did he receive notice of his bypass. He alleges that his bypass was an act of retaliation/reprisal from Council members who “were upset” with his decision not to place an individual under arrest. The appellant indicates that he advised the Council members that the Police Department could not arrest any individual without probable cause. Moreover, he claims that Council members retaliated against him because he did not recommend a Police Officer candidate for appointment as a result of the candidate’s background investigation. He notes that there was never a time when a background investigator was called to present his or her findings to the Public Safety Committee for a Police Officer candidate that was not recommended for hire. However, he was requested to do so. The appellant indicates that the candidate was an elected member of the Roselle Board of Education. The appellant states that he has an “impeccable service record” and is well respected in his community. Therefore, he believes that the reasons for his bypass as a Police Captain was due to the aforementioned incidents. In support of the appellant’s appeal, the Police Chief submits a letter of recommendation. He states that the officer who was appointed ahead of the appellant is a “fine” officer, but there was no reason to bypass the appellant. The Police Chief also alleges that the appointing authority has instituted an interview process “as a way of circumventing the Civil Service Eligible List” and utilizes the “Rule of Three,” *N.J.A.C. 4A:4-4.8(a)3*, to select candidates who are politically connected. The Police Chief notes that although he is present at the interviews, he is “not allowed” to take part in the interview process. He further notes that there is no policy in place for Police interviews.

In response, the appointing authority, represented by Rachel M. Caruso, Esq., argues that the appellant’s appeal should be dismissed pursuant to the “Rule of Three,” as it exercised its selection direction to appoint a lower ranked candidate. Moreover, it maintains that it was not required to advise the appellant of the reasons for his bypass. As such, the appointing authority submits that the allegation is of no consequence to the appeal. Nonetheless, it explains that it conducted interviews of all eligibles who were reachable on the certification. The interviewers were members of the Borough Council, consisting of the Public Safety Committee. The appellant and the other interviewees were asked the same 10 questions, which has been submitted for the Commission’s review, and were graded on a scale of zero to five. Additional points were given for presentation, and five points was given to the candidate whom the Police Chief recommended. The appointing authority submitted the final tally scoring sheet, which reveals that the appellant scored second with a score of 145 and was the Police Chief’s

timely. It is well settled that an appointment from a certification is not valid or final until it is approved by this agency. See *Thomas v. McGrath*, 145 N.J. Super. 288 (App. Div. 1976) (Morgan, J.A.D. dissenting), *rev’d based on dissent*, 75 N.J. 372 (1978); *Adams v. Goldner*, 79 N.J. 78 (1979); and *In the Matter of Donald Gates* (MSB, decided June 6, 2007).

recommendation. The appointing authority chose the third ranked candidate on the certification as he scored 156, the highest during the interview process. The first ranked eligible on the certification scored 140.

Regarding the appellant's allegations of retaliation, the appointing authority asserts that the claims were "born from [the appellant's] fictionalization of the events he described." It states that although the appellant attended the Public Safety Committee, no member of the Council requested that the appellant present any information concerning the Police Officer candidate in question. Moreover, it submits that the other incident that formed the basis of the appellant's retaliation claim was also fictionalized. The appellant did advise a Councilwoman that the Police Department could not make any arrests, but he informed her that she could move forward with a private complaint. The Councilwoman did in fact utilize that process and successfully prosecuted a citizen who had been cyber harassing her. It is noted that the appointing authority submits certifications from the Assistant Borough Administrator² and the Councilwoman, who interviewed the appellant, and they attest to the truth of the foregoing statements. The Assistant Borough Administrator also states that while the appellant's responses and presentation during the interview were acceptable, the lower ranked candidate "presented more senior qualifications, making him worthier of promotion to the title of Captain at this time." Moreover, the Councilwoman certifies that the appellant's "actions while assigned to investigate matters involving [her] and the threats [she] received played no part in [her] consideration of his credentials for the position of Captain; [she] simply found another candidate, within the Rule of Three, to have superior credentials, as well as a higher quality interview process." Therefore, the appointing authority submits that the appellant's bypass was not motivated by an invidious reason.

In reply, the appellant emphasizes that he scored higher in the Police Captain examination and possess more management experience than the lower ranked eligible who was appointed. He finds disturbing that a Council member would state that there is no right or wrong answers during the interview process. Further, as evidence of political considerations in appointments, the appellant provides an example of another Police Captain who had been appointed ahead of him. The appellant claims that this Police Captain gave monetary contributions to an Assemblyman and three months later he was promoted despite work performance issues. Furthermore, the appellant contends that the Police Chief is the only person present in the interviews who has any knowledge or experience in police work to inform the Public Safety Committee if a candidate answered the questions correctly. The appellant reiterates the Police Chief's statement that there is no policy in place regarding Police interviews and candidates are not provided with scores. In support of his appeal, he presents information on the Police Captain's political donations, various emails, a memorandum from the Police Chief

² The Assistant Borough Administrator is now the Borough Administrator.

to the Mayor and Council regarding active investigations, the complaint signed by the Councilwoman and the investigation reports regarding incidents of harassment and gunshots, the investigative materials regarding the Police Officer candidate who was not recommended for hire, and pay raises of Borough employees.

The appointing authority responds that the questions posed to the eligibles during the interview “focused on getting to know each candidate’s personality as well as their managerial philosophy and decision-making skills.” The questions did not concern the Attorney General Guidelines, Title 2C of the New Jersey Statutes, or police operations. Furthermore, it emphasizes that while the Council solicits the Police Chief’s input on promotions, the Borough Council has the authority to promote employees in the Borough of Roselle. Thus, the final decision to promote, within the “Rule of Three,” rests solely with the Borough Council as the appointing authority. It contends that the appellant presents documentation and accusations that are not “backed up factually.” For instance, each department has a different budget, and therefore, the Police Department’s salary budget has nothing to do with another department’s budget. The appointing authority points out that the first ranked candidate would have been bypassed in order to appoint the appellant, and the appellant “would have [had] no problem with the Borough’s use of the Rule of Three” in that situation. The first ranked eligible did not file an appeal of her bypass.

The appellant replies, reiterating his qualifications and the performance issues of the Police Captain who was previously appointed ahead of him. He also notes that if the first ranked eligible chose not to file an appeal, then it is her decision not to do so. His appeal is based on the events occurring with him only. Moreover, he objects to the appointing authority’s characterization of the questions posed at the interview. He maintains that the Public Safety Committee should consult with the Police Chief as the questions “fall under Internal Affairs, which is an Attorney General Guideline.” The appellant recounts his interactions with the Assistant Borough Administrator and the incidents concerning the Councilwoman to support his claim of retaliation. Regarding the former, the appellant states that the Assistant Borough Administrator accused him of threatening the Assistant Borough Administrator, which he denies. The appellant also submits additional documentation regarding the investigation concerning the Council members, such as a laboratory report, to sustain his appeal.

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 the third ranked eligible over the appellant. *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 candidate was 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). Therefore, the appellant's arguments in that regard are not persuasive. Nonetheless, in response to the appellant's appeal, the appointing authority has justified the reason for the appellant's bypass, consistent with *Foglio, supra*.

Moreover, 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 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.

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).

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 the appellant for appointment on the February 3, 2017 certification. Although the appellant may have had what he believes were negative interactions or incidents with the Assistant Borough Administrator or Council members, nothing in the record demonstrates that his non-selection was due to those events or that the events tainted the Public Safety Committee’s interview of him. It is clear that the appointing authority relied on the panel interview when it selected the lower ranked eligible on the certification. The panel evaluated the credentials of the eligibles and rated their responses to pre-set interview questions. It also took the Police Chief’s recommendation of the appellant in consideration by allocating additional points to the appellant. It is emphasized that appointing authorities are permitted to interview candidates and base their hiring decision on the interview. 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”). However, interviews, whether structured or not, are not required. Thus, the fact that the appointing authority does not have a policy on Police interviews is of no moment. 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 interview was 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. All three candidates were asked the same questions. Indeed, while the Police Chief criticizes the interview process, he notes that the appointed eligible is a “fine” officer. Furthermore, as indicated above, his recommendation of the appellant was 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 a lower ranked candidate based on performance during the interview was not arbitrary and provides a legitimate reason for the appellant's bypass. Accordingly, since the appellant's assertions of retaliation are unsupported in the record, he has not established by a preponderance of the evidence a *prima facie* case as outlined above. 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," absent any unlawful motive. In reviewing this matter, the Commission has not found that the appellant's bypass was due to invidious reasons. Additionally, the appellant does not present any evidence that the third ranked eligible, who was reachable for appointment on the subject certification, was appointed as a political favor. It is emphasized 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 thorough review of the record indicates that the appointing authority's bypass of the appellant on the February 7, 2017 Police Captain (PM1322T), Borough of Roselle, eligible list was proper and the appellant has failed to meet his burden of proof.

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 18TH DAY OF JULY, 2018



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