



**STATE OF NEW JERSEY**

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

In the Matter of Justin Valente, Fire  
Fighter (M1545T), Town of Kearny

CSC Docket Nos. 2018-438 and  
2018-1627

Bypass and  
List Removal Appeals

**ISSUED: JULY 23, 2018**

**(ABR)**

Justin Valente, represented by Timothy J. Wiss, Esq., appeals the bypass of his name on the eligible list for Fire Fighter (M1545T), Town of Kearny (Kearny). He also appeals the removal of his name from the subject eligible list on the basis of his failure to complete pre-employment processing. Since these matters address similar issues, they have been consolidated herein.

By way of background, agency records indicate that the subject examination was announced with a closing date of August 31, 2015. The subject eligible list, containing 1,642 names, promulgated on March 11, 2016 and expires on March 10, 2019. The appellant, a nonveteran, was ranked 166 on the subject eligible list. A certification was issued on May 25, 2016 (OL160674) with the appellant's name listed in the 166<sup>th</sup> position. In disposing of the certification on December 15, 2016, the appointing authority, in part, bypassed the 112<sup>th</sup> listed eligible and the appellant and appointed the eligibles listed in the 167<sup>th</sup> (George King III), the 182<sup>nd</sup> (Wilfredo Lopez, Jr.), the 184<sup>th</sup> (Daniel Gurkas), the 200<sup>th</sup> (Steven Dyl), the 208<sup>th</sup> (Robert Szczesniak), the 221<sup>st</sup> (Jason Ostanski), the 232<sup>nd</sup> (Edmund McKeown) and the 269<sup>th</sup> (Thomas Witt) positions. The appellant's name was subsequently listed on a certification issued to the appointing authority on February 10, 2017 (OL170159). In disposing of that certification on October 27, 2017, the appointing authority requested the removal of the appellant's name from the subject eligible list on the basis of his failure to complete pre-employment processing.

**BYPASS**

On appeal to the Civil Service Commission (Commission), the appellant argues that he was improperly bypassed to enable the appointment of relatives of Kearny Fire Department members. Specifically, the appellant asserts that King is the son of a Deputy Fire Chief, Gurkas is the brother of a current Fire Fighter and Dyl is the son of the Fire Chief. In support he submits a July 18, 2017 newspaper article which provides background information about seven of the appointees.

In response, the appointing authority, represented by Kyle J. Trent, Esq., asserts that it bypassed the appellant because his September 9, 2016 interview responses raised concerns about his background and demeanor. It submits a certification from Bruce Kauffmann, Deputy Chief, dated February 13, 2018. Kauffmann states that the appellant had indicated that in 2014 he dropped out of a training academy for a Police Officer position with the New Jersey Transit Police Department approximately two weeks after enrolling. Kauffmann maintains that the appellant indicated that he was unable to focus at the academy because of concerns about work that needed to be performed at the home he owned at the time, including mowing his lawn. Kauffmann submits that the interview panel was particularly doubtful about the appellant's ability to perform in the stressful situations he might encounter as a Fire Fighter.

In reply, the appellant reiterates his allegation that he was improperly bypassed based upon nepotism. He contends that the relationship of several lower-ranked individuals, including the Fire Chief's son, Deputy Chief's son and brother of a current Fire Fighter evidences that the appointing authority's proffered explanation is a "clear pretextual explanation after the fact." The appellant maintains that the information furnished by the appointing authority does not fulfill its obligation to offer a statement of reasons for his bypass in accordance with *N.J.A.C. 4A:4-4.8*. He contends that such a showing of pretextual reasoning for the bypass warrants a presumption of discriminatory or retaliatory intent that the appointing authority must overcome. The appellant submits a certification wherein he contends that he told the interview panel that he quit the New Jersey Transit Police Academy in 2014 because doing so would have required him to quit his job and, in turn, would have created a substantial financial hardship on his family, as he had young children at the time. He maintains that his current financial position would not inhibit his ability to perform as a Fire Fighter. He argues that the foregoing raises material and controlling issues of disputed material fact that require a hearing.

In reply, the appointing authority argues that a hearing is not necessary in this matter, as there is no material or controlling dispute of fact. In this regard, it emphasizes that New Jersey courts have held that interview performance is a valid reason for bypass and it asserts that nepotism did not play a role in its decision not

to appoint the appellant. Moreover, it contends that the appellant has not submitted sufficient proof that his bypass was connected to nepotism. Towards that end, it notes that the appellant does not address the fact that five out of the eight lower-ranked eligibles it appointed from the May 25, 2016 certification did not have familial relationships with members of its Fire Department and that all but one were ranked lower than the three appointees who did have relatives in its Fire Department.

In a second certification dated June 4, 2018, Kauffmann states that all candidates were asked the same general questions during their interview, including:

1. Why do you want to be a Fire Fighter in Kearny and why should we hire you?
2. Do you have any emergency service experience (PD, FD, EMS)? If yes, describe your role and some experiences.
3. Can you describe a time where you have been required to perform as part of a team? What was the situation? What part did you play in the team and what was the outcome of the exercise?
4. What particular skills (strengths) and qualities would you bring to the Fire Department? What other skills would you like to develop in the future?
5. What do you consider your weaknesses?
6. Is there an achievement of which you are particularly proud? What is it? Why is it significant?
7. Where do you see yourself in 10 years if you are hired here? What would you like to accomplish?

Kauffmann also indicates that a portion of each candidate's interview included questions derived from items in their individual application. In the case of the appellant, since he stated in his application that he had been hired by the New Jersey Transit Police in 2014 but quit their training academy after two weeks, he was asked about his reasons for exiting the academy. Kauffmann reiterates that the appellant cited an inability to focus because he was worried about housework that needed to be completed, such as lawn mowing. Kauffmann submits that the appellant stated he would be better-equipped to work for the appointing authority because he had since sold his home and moved his family into a one-bedroom

apartment “so he could concentrate on a police or fire academy if he were to enter one again.” The appellant added that he would look to purchase a new home after graduating from the Fire Academy because it would be easier for him to focus on it after graduation.

Kauffmann states that the eight lower-ranked eligibles who were appointed from the May 25, 2016 certification were deemed more favorable than the appellant and their interview responses did not raise similar concerns about their demeanor, ability to perform in the subject title or ability to complete the Fire Academy. Specifically with regard to the perceived strengths of those eight appointees, King grew up in Kearny and had experience working as a first responder with the Transportation Security Administration; Lopez was certified as an Emergency Medical Technician (EMT); Gurkas grew up in Kearny and had eight years of experience as a lifeguard; Dyl grew up in Kearny and was certified in cardiopulmonary resuscitation (CPR); Szczesniak had five years of experience as a volunteer Fire Fighter in the Township of Saddle Brook; Ostanski had a degree in Fire Science and experience as a volunteer Fire Fighter; McKeown grew up in Kearny, had three years of career experience as a Fire Fighter in Bethlehem, Pennsylvania, plus service as fire instructor, on a HAZMAT team and as a volunteer Fire Fighter, and he possessed a Pennsylvania EMT certification; and Witt had lived in Kearny his entire life and expressed a lifelong desire to be a Fire Fighter. In contrast, the appellant had only moved to Kearny a few years prior to applying for a position with the appointing authority, did not possess any potentially beneficial certifications or experience and did not demonstrate a genuine passion for the job, as he was applying for both police and fire department work. The appointing authority also submits a copy of Kauffmann’s notes from the appellant’s September 9, 2016 interview.

In reply, the appellant argues that the documentation the appointing authority submits does not evidence that his demeanor was a concern during the interview. In this regard, the appellant observes that Kauffmann’s interview notes do not list any comments under the “Demeanor During Interview” section. Rather, those notes indicate that he expressed an ability to handle the aspects of the job and the only information about the appointing authority’s concerns was the notation that there “concerns about mental state, focus on academy.” The appellant argues that any concerns about his mental status would have been more properly addressed by making him submit to a psychological examination rather than relying upon Kauffmann’s assessment. The appellant also argues that the appointing authority gave improper weight to residency, as *N.J.S.A. 40A:14-9.1*, in relevant part, prohibits municipalities from passing “any ordinance, resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a paid fire department” and residency does not speak to an eligible’s merit or fitness for the subject title.

Further, he maintains that the appointing authority was inconsistent in the weight it gave to residency. In this regard, he contends that if residency was truly a factor for consideration, the appellant would have had an advantage over a number of appointees since he had resided in Kearny for several years. Finally, the appellant reiterates that the appointing authority's arguments are merely after-the-fact explanations which do not reflect the appointing authority's true rationale for bypassing him for appointment, as the appointing authority's earlier submissions focused on the appellant's demeanor during the interview and did not point to his background relative to other candidates as a reason for declining to appoint him. In support of this claim, the appellant states that Kauffmann could not have known that he applied to both police departments and fire departments, as this agency did not admit him to an examination for any police title until October 2016. In support, he submits a copy of an email from this agency, dated October 5, 2016, notifying him that test scheduling information for a number of examinations, including the Law Enforcement Series examination had been recently mailed to candidates.

### **LIST REMOVAL**

In his list removal appeal, the appellant argues that the appointing authority improperly removed his name from the subject eligible list for failing to complete pre-employment processing.

In response, the appointing authority states that the appellant's name was removed from the subject eligible list because he submitted an incomplete pre-employment application. Specifically, it maintains that he failed to submit W-2 Earning Statements (Form W-2) for the 2014 and 2015 tax years, a Federal Income Tax Return (Form 1040) for the 2014 tax year and an Internal Revenue Service Wage and Income Transcript (Transcript) for the 2014 tax year, all of which were required per the pre-employment application instructions. In this regard, it submits that the pre-employment application instructions clearly advised candidates that all documents listed therein must be enclosed and that failure to provide a copy of any single document would result in their applications being incomplete and their possible removal from the subject eligible list. Accordingly, it maintains that the appellant's removal from the subject eligible list was proper. In support, it submits a copy of the application packet it received from the appellant as part of the pre-employment process that followed the February 10, 2017 certification, which includes, in relevant part, a Form W-2 for the 2016 tax year, Form 1040s for the 2015 and 2016 tax years, and a Transcript for the 2015 and 2016 tax years. The appointing authority also submits an Application Disposition Sheet which indicates a disposition of "[d]id not complete pre-employment processing – incomplete application," because the appellant did not furnish 2014 or 2015 Form W-2s, a 2014 Form 1040 or a 2014 Transcript.

In reply, the appellant argues, in relevant part, that the appointing authority has not provided adequate evidence to support its list removal request, as it has not provided a certification that his application was incomplete. The appellant asserts that the application he sent to the appointing authority after the February 10, 2017 certification was complete when he submitted it. In this regard, he notes that he had previously applied for a Police Officer position with the appointing authority. He states that because the documents requested with the subject Fire Fighter pre-employment application were similar or exactly the same as those requested with the Police Officer application, he “essentially cop[ied] the same documents and provided them” to the appointing authority. Given that similarity, he points to the fact that the appointing authority conditionally offered him an appointment to the title of Police Officer on December 4, 2017 as evidence that the information he provided in the subject pre-employment application was sufficient. Further, he maintains that in July 2017, representatives from the appointing authority requested that he provide the missing information. He states that he submitted that information to Mayor Alberto Santos and to a Personnel Specialist, via emails sent to each on August 1, 2017. The appellant submits a certification in support of those claims, as well as copies of the aforementioned emails. In his email to the Personnel Specialist, he indicated that he was not sure if the appointing authority had misplaced his 2014 tax information, but was providing a copy of it “from [his] packet.” The appellant asserts that the status of his application packet and the question of the appointing authority’s receipt of any missing material are material and controlling disputed issues of facts requiring a hearing.

In reply, the appointing authority argues that the appellant has not raised any issue of disputed material fact warranting a hearing. It asserts that the above-noted emails do not remedy the appellant’s failure to provide all required documents at the time he submitted the pre-employment application on April 24, 2017. It acknowledges that the appellant sent 2014 tax documents via email to the Mayor and the Personnel Specialist on August 1, 2017. However, it contends that the appellant’s emails were untimely, as the email was sent after the appellant submitted his pre-employment application and after it had completed its review of the application on July 23, 2017. Moreover, it proffers that the appellant did not clearly indicate that the documentation he sent via email was intended to supplement the subject pre-employment application, as his email to the Mayor did not contain any explanation and his email to the Personnel Specialist did not specify which of his multiple employment applications<sup>1</sup> the submission was intended to cover. It submits a certification from the Personnel Specialist, who

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<sup>1</sup>The February 10, 2017 (OL170159) certification from the Fire Fighter (M1545T), Kearny eligible list, was disposed of on October 27, 2017. During the pendency of that certification, the appellant underwent pre-employment processing for the title of Police Officer, completing a separate application for that title after his name was certified from the Police Officer (S9999U), Kearny eligible list on March 30, 2017 (OL170370). The March 30, 2017 certification was disposed of on April 18, 2018.

indicates that the copy of the appellant's pre-employment application that it submitted in the instant matter is a true and accurate copy of the packet received from the appellant in April 2017. Accordingly, it maintains that the foregoing supports the removal of the appellant's name from the subject eligible list.

## CONCLUSION

Initially, the appellant requests a hearing in these matters. However, bypass and list removal appeals are generally treated as reviews of the written record. *See N.J.S.A. 11A:2-6(b)*. No material issue of disputed fact has been presented here which would require a hearing. *See Belleville v. Department of Civil Service*, 55 *N.J. Super.* 517 (App. Div. 1978).

## **BYPASS**

*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 on a promotional list, provided no veteran heads the list. As long as that decision is properly utilized, an appointing authority's discretion will not be overturned. Additionally, *N.J.A.C. 4A:2-1.4(c)* provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was 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 warranted. *See Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 436, 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 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-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 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 discriminatory motive. In a case such as this, where the adverse action is failure to appoint, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

Consistent with *N.J.A.C. 4A:4-4.8(a)3*, an appointing authority has selection discretion under the “Rule of Three” to appoint a lower ranked eligible absent any unlawful motive. *See In the Matter of Michael Cervino* (MSB, decided June 9, 2004). *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).

With regard to the subject bypass, the appellant was listed in the 166<sup>th</sup> position on the subject certification. However, it was within the appointing authority’s discretion to select any of the top three interested eligibles for each appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. Specifically, the appellant contends that he was bypassed because of the family relationships of several lower-ranked individuals. However, other than his mere allegations, the appellant has not presented any substantive evidence that would lead the Commission to conclude that his bypass was improper or an abuse of the appointing authority’s discretion under the “rule of three.” Conversely, the appointing authority has presented valid reasons for bypassing the appellant, namely, that his background did not compare as favorably as the backgrounds of the lower-ranked eligibles it appointed and his interview performance revealed concerns about his demeanor. The appointing authority has presented evidence that King, Dyl and Gurkas, the family members of current Kearny Fire Department members who were appointed from the subject certification, were selected because they possessed prior relevant certifications and/or experience. As to the other individuals the appellant was bypassed in favor of, Szczesniak, Ostanski and McKeown had firefighting experience and Witt had demonstrated a strong desire to be a Fire Fighter. In contrast, the appellant’s only first responder experience was a two-week stint as a Police Officer Recruit at the training academy for the New Jersey Transit Police Department and he did not possess any public safety-related certifications, such as an EMT certification.

Furthermore, the appointing authority has submitted evidence to support its claim that the appellant’s interview raised concerns about his demeanor. Specifically, the appointing authority asserts that it had reservations about the appellant’s ability to complete the training academy and perform the duties of the subject title because the appellant stated during his interview that he quit the training academy for the New Jersey Transit Police Department because of worries about unfinished housework that rendered him unable to focus on the program. These concerns were clearly documented in Kauffmann’s contemporaneous interview notes and attested to by Kauffmann in his February 13, 2018 and June 4, 2018 certifications. Kauffmann also certifies that the interviews of King, Lopez, Gurkas, Dyl, Szczesniak, Ostanski McKeown and Witt did not raise similar questions about their demeanor, ability to perform as Fire Fighters or their ability to complete the Fire Academy.



Finally, the appellant fails to demonstrate that the appointing authority made residency a “condition of employment” through a prohibited “ordinance, resolution, rule, regulation, order or directive” that would violate *N.J.S.A.* 40A:14-9.1. Although the appointing authority noted that several appointees were residents of Kearny, there is no indication that the appointing authority made residency an express condition for appointment. In this regard, it is noted that Lopez and Szczesniak received appointments even though they did not reside in Kearny. It is also evident that residency was not the only consideration behind the selection of any lower-ranked eligible for appointment. As noted above, the appointing authority cited other factors in bypassing the appellant in favor of the aforementioned candidates, including training, certifications, commitment to the position and first responder experience. Accordingly, a thorough review of the record indicates that the appointing authority’s bypass of the appellant’s name when disposing of the May 25, 2016 certification (OL160674) from the Fire Fighter (M1545T), Kearny eligible list was proper and the appellant has failed to meet his burden of proof in this matter.

### **LIST REMOVAL**

*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 on a promotional list, provided no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority’s decision to bypass the appellant from an eligible list was improper.

It is noted that the appointing authority has the authority and ability to require potential new hires to undergo pre-employment processing to ensure that the candidate is qualified for appointment. Such pre-employment processing may include any and all conditions necessary for an appointing authority to assess a candidate’s qualifications. Further, this information is important, as it serves the important function of informing the appointing authority as to any significant differences between the candidates which may assist it in the selection process. See *In the Matter of Laura C. Bonilla* (MSB, decided September 7, 2005); *In the Matter of Bruce C. Cooke* (MSB, decided May 8, 2001); *In the Matter of James Smith* (MSB, decided April 24, 2001).

In the instant matter, the appointing authority removed the appellant’s name from the subject eligible list on the basis of his failure to submit a complete a pre-employment application. Specifically, it maintains that the appellant did not timely submit Forms W-2 for the 2014 and 2015 tax years, a Form 1040 for the 2014 tax year and an Transcript for the 2014 tax year. However, the appellant certifies that he submitted those documents with his application in April 2017 and resubmitted

them on August 1, 2017 after the appointing authority notified him in July 2017 that it did not receive them with his application. He suggests that the appointing authority misplaced the relevant 2014 tax forms. The appointing authority has submitted a copy of the pre-employment application packet it received from the appellant in April 2017 that includes other information that the pre-employment application required but not the above-noted tax documents. Additionally, a Personnel Specialist certified that it was a true and accurate copy of that application. Comparatively, although the appellant states that the documents he emailed to the Mayor and to the Personnel Specialist in August 2017 were pulled from his copy of the pre-employment application he sent to the appointing authority in August 2017, he has not provided the Commission with such a facsimile. Furthermore, although he claims that the appointing authority requested missing documentation from him in July 2017 and that he re-sent those items to it via email on August 1, 2017, he does not make it clear that he timely or adequately responded to the appointing authority. In this regard, the appellant does not specify the date and manner in which he was notified about the issue by the appointing authority. Nor does he indicate which title the July 2017 request was in reference to. Moreover, a review of his August 1, 2017 emails to both the Mayor and the Personnel Specialist reveals that he failed to indicate whether the documents were related to his pre-employment application for the subject title or his application for the title of Police Officer. Finally, even if his August 1, 2017 submissions were intended to supplement his application for the subject title, they do not appear to include all of the missing information, as the appellant, in his August 1, 2017 email to the Personnel Specialist, stated that he was “submitting [his] 2014 taxes,” but did not indicate that he was furnishing the required 2015 Form W-2. As such, the Commission does not have a basis to conclude that the appointing authority did not give him a reasonable amount of time to cure the deficiency with his application or that the appellant furnished all of the requisite information. According, the appellant has failed to meet his burden of proof with regard to his removal from the subject eligible list.

### **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 18<sup>TH</sup> DAY OF JULY, 2018



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