



STATE OF NEW JERSEY

In the Matter of Marcello Errigo and
James Weston, Sheriff's Officer
Sergeant (PC1572S), Passaic County

**DECISION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket Nos. 2018-2495 and
2018-2512

Bypass/List Removal Appeals

ISSUED: SEPTEMBER 24, 2018 (SLK)

Marcello Errigo and James Weston, represented by Lauren Sandy, Esq., appeal their bypass/removal from the eligible list for Sheriff's Officer Sergeant (PC1572S), Passaic County, on the basis that they possessed an unsatisfactory employment record. These matters have been consolidated due to common issues presented.

By way of background, the appellants took the promotional examination for Sheriff's Officer Sergeant (PC1572S), achieved a passing score, and Errigo was ranked fourth and Weston was ranked eighth on the list. The list promulgated on September 17, 2015 and expired on September 16, 2018. Certification PL160163 was issued on February 5, 2016 containing the names of five eligibles, including Errigo. The first ranked eligible was appointed, the second and third ranked eligibles were removed, Errigo, the fourth ranked eligible was bypassed, and the fifth ranked eligible was appointed. Thereafter, certification PL161366 was issued on November 17, 2016 containing the names of 12 eligibles. Errigo, the first positioned eligible was bypassed, the second and third positioned eligibles were appointed, Weston, the fourth positioned eligible was bypassed, the fifth and sixth positioned eligibles were appointed, the seventh and eighth positioned eligibles were removed, and the ninth, 10th, 11th and 12th positioned eligibles were appointed. Subsequently, certification PL171320 was issued on November 1, 2017 containing the names of 10 eligibles. Errigo was the first positioned eligible and Weston was the second positioned eligible. Although PL171320 had not yet been returned, on January 16, 2018, Errigo and

Weston filed appeals with the Civil Service Commission (Commission) claiming that they were bypassed. Thereafter, on February 5, 2018, the appointing authority returned PL171320 to this agency requesting the removal of the appellants' names from the list on the basis of an unsatisfactory employment history.¹ Additionally, the third eligible was appointed, the fourth eligible was removed, the fifth and sixth eligibles were bypassed, the seventh and eighth eligibles were appointed, the ninth eligible was removed and the 10th eligible was appointed. On February 8, 2018, this agency approved the appointing authority's disposition of PL171320 and Errigo and Weston filed timely appeals of their removals.

On appeal, Errigo asserts he does not have an unsatisfactory employment record. Specifically, he presents that he has received many commendations throughout his employment with the appointing authority, including one for apprehending a suspect committing an armed robbery. He indicates that he received a challenge coin from the Sheriff in 2013 and the Employee of the Month Award in July of 2007. Additionally, Errigo represents that he trains new employees on many occasions. Further, he states that he has never received a negative evaluation. Moreover, Errigo indicates that he has not been disciplined in the past eight years and his prior discipline was already included in the calculation of his score and rank on the list.

Errigo presents that, in 2013, he supported the political opponent of the current Sheriff. He claims that his cousin, who is a Sergeant in the Department, was confronted by the Undersheriff who advised him that that Errigo would never be promoted. Further, he states that in 2015, internal affairs advised him that he would never receive a promotion regardless of his score on a Civil Service examination and started calling him the nickname "skip" because he would always be skipped on the promotional list. Thereafter, he was bypassed as the second ranked eligible on certification PL160163 which was issued in February 2016. Then, while as the first ranked eligible on a certification PL161366 which was issued in November 2016, the Sheriff advised the union that he had no intention of bypassing anyone. Further, in November 2016, Errigo claims that an Administrative Chief advised him he was going to be promoted to Sergeant the next day. However, the appointing authority

¹ With respect to Weston's employment history, the appointing authority presented to the Division of Agency Services (Agency Services) its background report highlighting that he received a five day suspension for theft while employed in the county prosecutor's office in 1990, he resigned from the county prosecutor's office due to administrative charges related theft in 1995, he falsified his application for the Sheriff's Office by not accurately describing the circumstances of his resignation from the prosecutor's office and other falsifications and his disciplinary notices and the hearing officer's decision concerning a physical altercation which led to Weston receiving a five day suspension in 2014. With respect to Errigo's employment history, the appointing authority presented to Agency Services various documents related to his suspension and settlement concerning a gambling incident in 2003, a minor discipline he received in April 2008 for conduct unbecoming and a Final Notice of Disciplinary Action that terminated him in 2008 for conduct unbecoming and a settlement in that matter in 2010 that enabled him to return to work.

rescinded his promotion and promoted eight others to Sergeant. Thereafter, on certification PL171320, Errigo certifies that the appointing authority initially attempted to bypass him in late December in favor of the fifth, sixth and seventh ranked eligibles in violation of the “Rule of Three.” He argues that this “bypass” was in bad faith and in retaliation for his political activity. Further, when he filed a bypass appeal in January 2018, the appointing authority requested to remove his name from the list in retaliation for his bypass appeal. Errigo argues that the appointing authority has not provided a sufficient basis to remove his name from the list.

Weston presents that he was President of his local union from January 2009 to 2012. As President, he often opposed actions of the Sheriff under the purview of protected union activity. Weston contends that the Sheriff developed an anti-union animus towards him. Further, he did not endorse the Sheriff for re-election. Additionally, Weston indicates that around January 2014, he initiated litigation against the appointing authority on the basis that he was being retaliated against in violation of his First Amendment speech rights as well as substantive and procedural due process rights. He also claimed there was a hostile work environment, civil conspiracy and negligent infliction of emotional distress. Weston claims that the retaliation against him started at least seven years prior to his 2014 complaint. For example, he presents that in 2012, he was transferred from the Detective Bureau to Probation for his failure to endorse the Sheriff, which resulted in a loss of pay. In 2016, the Sheriff advised the union that he had no intention of bypassing anyone on the Sergeant’s list and, in November 2016, the Administrative Chief advised him that he was being promoted. However, on the next day, Weston was told his promotion was rescinded and eight other Sheriff’s Officers were promoted to Sergeant. Thereafter, in December 2017, he states that he was second on the list. However, Weston presents that he was “bypassed” on certification PL171320 in favor of the fifth, sixth and seventh eligibles in violation of the “Rule of Three and asserts that this was done in bad faith in retaliation for his union and political activity. Additionally, he states he was again reassigned to Probation.

Furthermore, Weston asserts that his name should not have been removed as he does not have an unsatisfactory employment record. He highlights that he has received many commendations through his employment, has been assigned to be a firearms instructor on many occasions and never received a negative evaluation. Weston indicates that in his employment with the appointing authority, he only received one minor discipline, which took place four years ago, while others with greater discipline histories and other infractions, such as domestic violence, have been promoted. He certifies that, on his own time on Saturday mornings, he has been providing extra training and advanced tactics to officers for several months and was instrumental in creating a mock courtroom to help with training. Further, his 2017 performance evaluation indicated that he received the highest possible scores in all categories, but one. He highlights that only after he filed his bypass appeal, did the

appointing authority remove his name based on a five day suspension that happened in 1990, 28 years ago, by another employer, and his resignation from a previous position in 1995, 23 years ago. Weston submits a letter from a retired Captain from the Department in support of his appeal.

In response, the appointing authority, represented by Heather Goldstein, Esq., presents that both Errigo and Weston engaged in prior serious misconduct, which resulted in their suspensions. With respect to Errigo, the appointing authority presents that he was suspended in June 2003 after being arrested on criminal charges involving moral turpitude and he pled guilty to a lesser 4th degree crime of hindering apprehension and entered into an agreement permitting him to return to work. Further, in 2004, he was indicted for an incident involving gambling and pled guilty to hindering prosecution, a disorderly persons offense. Thereafter, in 2008, after an internal affairs investigation involving him submitting a time slip for being on the road and a time slip for him being at court at the same time, he was charged with knowingly and willingly making a false entry or failing to make a required entry in any departmental report or record, failing to submit a properly written report within a reasonable or prescribed period of time as per regulations and a count of an act, action, error or omission resulting in the Department's or the County's exposure to civil litigation. Additionally, the investigation revealed that he committed similar violations on five occasions. He was found guilty of conduct unbecoming a public employee, insubordination, lying, and driving to or from beat or post without authorization. Errigo received a four-day suspension for conduct unbecoming a public employee in April 2008. Further, in July 2008, Errigo was initially terminated and, after an appeal and a settlement, he was reinstated in October 2010.

In reference to Weston, it presents in a prior civil suit brought by him against the Sheriff's Office, the discovery² revealed that as an investigator in 1990 for the county prosecutor's office, Weston was observed stealing a candy bar from the lunch of a recruit at a police academy. He admitted to the theft, was given a five-day suspension by the prosecutor's office and thrown out of the police academy. Thereafter, while still at the prosecutor's office, between January 1991 to March 1995, he was investigated for suspected stealing multiple items from the workstations of co-workers and was later caught on surveillance of stealing at least three or four times and a total of \$55.75 was missing. This led to his termination from the county prosecutor's office in 1995. The appointing authority also highlights that a review of his employment application for a position in the Sheriff's Department in 2002 indicates that he falsified his application as he indicated that he left the county prosecutor's office due to a conflict with a supervisor and not that he was terminated for stealing. He also did not disclose the earlier stealing incident in 1990. It highlights that Weston did disclose this information on his application to the Wayne Police Department in 1998, but not to the appointing authority, which tends

² The record is unclear as to when the Sheriff's Office received the discovery that was part of its basis for removing him from the list.

to indicate a trend of being dishonest. Further, in 2014, Weston was involved in a physical altercation at the probation office and he failed to file proper reports and failed to properly advise his supervisors of the incident, thereby exposing the agency to civil litigation. This incident led to Weston receiving a five-day suspension. Therefore, based on his stealing, a physical altercation with another officer and lying, the appointing authority properly chose to appoint others to the position of Sergeant.

CONCLUSION

N.J.A.C. 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)7, allows for the removal of an individual from an eligible list who has a prior employment history which related adversely to the position sought.

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).

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 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-retaliatory reason for the decision.

N.J.A.C. 4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error.

In this matter, Errigo was bypassed on the first certification, PL160163, that was issued. Thereafter, both Errigo and Weston claim they were advised by an Administrative Chief that they were going to be promoted to Sergeant on the second certification, PL161366, and then the next day they were told that their appointments were rescinded. The appointing authority has not responded to this claim. On the second certification, Errigo was bypassed for a second time and Weston was bypassed

for the first time.³ Subsequently, while the record is unclear, it appears that the appellants were initially advised that they were both being “bypassed” on the third certification. Thereafter, Errigo and Weston appealed their names being “bypassed.” However, after their “bypass” appeals, the appointing authority returned the third certification, PL171320, to this agency indicating that instead of bypassing the appellants, it was removing their names for an unsatisfactory employment history.

On appeal, Errigo claims he was not appointed due to his support of another candidate for Sheriff. Weston claims that he was not appointed due to his support of another candidate for Sheriff and his union activity. The appointing authority claims that Errigo had a 2003 hindering apprehension incident, a 2004 gambling incident and a 2008 falsifying records or documents incident. Further, the appointing authority claims that Weston had a 1990 stealing incident while working for the county prosecutor’s office while attending a police academy, subsequent stealing incidents in the county prosecutor’s office through 1995, lying about these incidents on his application prior to his 2002 appointment for a position in the Sheriff’s Department, and a 2014 physical altercation while working in the Sheriff’s Department which led to a minor discipline. The Commission notes that both appellants assert that they were only removed from the third certification, which was disposed on February 8, 2018, after they filed their bypass appeals on January 16, 2018. However, there is nothing in the record to evidence that the appellants copied or otherwise put the appointing authority on notice that they filed the bypass appeals. Absent any documentation or assertion that the appellants put the appointing authority on notice when they filed their bypass appeals on January 16, 2018, there is no evidence to conclusively establish that the appointing authority’s request to remove their names was linked to the filing of their bypass appeals.

Conversely, although it requested the removal of their names at the time it disposed of the certification, in its response to the instant appeal, the appointing authority argues that it bypassed the appellants’ due to their unsatisfactory employment records. However, the appointing authority has not rebutted the appellants’ allegations regarding their bypasses on the earlier certifications and how those relate to its request to remove them from the list on the third certification. Additionally, the appointing authority has not explained why it chose to bypass Errigo and Weston on the earlier certifications and remove them on the third certification. Additionally, with the exception of Weston’s 2014 minor discipline, all of the behavior that the appointing authority presents to justify its actions is too far removed to indicate that the appellants’ histories are currently adverse to the position sought. Further, minor discipline is generally not grounds for removal. See *In the Matter of Laura Verdi* (CSC, decided July 30, 2008) and *In the Matter of Walter Langdon* (MSB, decided October 14, 1998). Thus, in these cases, a dispute of fact exists regarding the reasons for the initial bypass of the appellants’ names on the

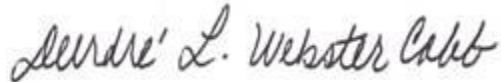
³ The record does not indicate that Errigo appealed his bypass on certification PL160163 or that Errigo and Weston appealed their bypasses on certification PL161366.

prior certifications and the change to a removal on the subject certification. Accordingly, under these circumstances, where it is not possible to determine on the written record whether the reasons for appointing authority's actions were proper, these matters should be referred to the Office of the Administrative Law for a hearing. *See In the Matter of Piyush Patel and Isabelino Pellot* (MSB, decided February 13, 2008)

ORDER

Therefore, it is ordered that these matters be referred to the Office of Administrative Law for a hearing. The Civil Service Commission also recommends that the instant matters be consolidated at the Office of Administrative Law.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20th DAY OF SEPTEMBER, 2018



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