

perform his supervisory duties. He received a three-day suspension for an incident occurring on November 15, 2016 involving his failure to appropriately perform his supervisory duties. The appellant also received, by settlement, a 30-day suspension for incidents occurring in August, October and November 2016 involving untruthfulness, lack of judgment and poor conduct. The appointing authority maintains that J.S. and P.R. have demonstrated superior leadership and supervisory performance and do not have the disciplinary history the appellant has. In support, the appointing authority submits, among other documents, the appellant's disciplinary history report and the certified statement of the Warden of the Atlantic County Justice Facility (Warden), who was charged with selection for promotion.

In reply, the appellant proffers that there was a level of discomfort with the idea of promoting C.G., and this motivated the appointing authority to bypass the appellant. He contends that otherwise, the appointing authority would have had no choice but to appoint C.G., a disabled veteran.¹ The appellant also maintains that unless the appointing authority provides the disciplinary histories of the appointees, there is no basis to accept its stated reason for his bypass. He further notes that C.G. claims that the Warden told him that the Warden felt more comfortable promoting "his people." In addition, the appellant complains that no interviews were conducted. In support, the appellant submits his and C.G.'s respective certified statements.

In reply, the appointing authority emphasizes that C.G. did not appeal his bypass. It also maintains that strict discipline is particularly important in military-like settings such as correctional facilities and that its policies require the reporting of all incidents. Thus, the appointing authority contends that it could justifiably consider the appellant's occasions of failing to perform his supervisory duties and holding staff accountable.

With respect to J.S., the appointing authority states that he has over 29 years of experience in county corrections with 15 years as a supervisor, and his disciplinary record since 2016 shows only one minor discipline for performance. It states that J.S. has the most experience of all the eligibles, having worked in various areas of the jail including being a line supervisor and administrative supervisor providing him with a more comprehensive knowledge base of the entire department. J.S., according to the appointing authority, has mastered the ability to delegate efficiently and has demonstrated good judgment with his decision-making and set a proper example in dignity, courtesy and other qualities. With respect to P.R., the appointing authority states that he has 17 years of experience in county corrections with eight years as a supervisor, and his disciplinary record since 2016

¹ However, Civil Service regulations do allow for the removal of a veteran's name from a promotional list. See *N.J.A.C. 4A:5-2.2(c)*. It is noted that the County and Municipal Personnel System reflects that C.G. received, among other disciplinary actions, a 15-day suspension in 2016.

shows no discipline. It states that P.R. has more experience and training than does the appellant, having worked in various areas of the jail including being a line supervisor, classifications supervisor and investigations unit supervisor providing him with a more comprehensive knowledge base of the entire department. P.R., according to the appointing authority, has demonstrated a high level of integrity, honesty and leadership abilities during his eight years as a supervisor. By contrast, the appellant, according to the appointing authority, has 13 years of experience in county corrections with four years as a supervisor. It maintains that the appellant has the least amount of experience and training of all eligibles in that his correctional supervisory experience has been limited to only that of a line supervisor in the jail.

In support, the appointing authority submits the Warden's second certified statement. In this statement, the Warden maintains that he told C.G. that he was promoting the people he was most comfortable promoting because he felt they were best suited for the position.

In reply, the appellant questions why the appointing authority only considered the eligibles' disciplinary records since 2016 and asserts that since the appointees were serving in administrative positions since that time, they were safe from potential disciplinary write-ups typically seen in the jail setting. He wonders what the appointees' records would reveal if one looked prior to 2016. In support, he submits a second certified statement.

It is noted that the County and Municipal Personnel System (CAMPS) reflects the following disciplinary history for J.S. prior to 2016: a one-day suspension in 2013; a one-day suspension in 2012; a three-day suspension in 2011; a one-day suspension in 2010; two one-day suspensions in 2009; a 15-day suspension in 2000; a two-day suspension in 1998; two one-day suspensions in 1997; and a one-day suspension in 1996.

CAMPS reflects no disciplinary history for P.R.

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, it must be noted that C.G. did not appeal his bypass, and the appellant has no standing to appeal C.G.'s bypass. As such, the Commission declines to entertain the appellant's claim that his bypass was motivated by the appointing authority's *aversion to promoting C.G.* However, the Commission may

properly review the appointing authority's decision to bypass the appellant based on *the appellant's own background* and instead appoint J.S. and P.R., and it is to that issue that the Commission proceeds.

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 appointing authority justifies its decision to bypass the appellant on the basis of his disciplinary record since 2016. 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*.

While the appellant does not dispute his disciplinary history, he does question why the appointing authority chose to consider disciplinary infractions since 2016. CAMPS reflects no disciplinary history for P.R. As to J.S., CAMPS reflects that he does have a disciplinary history prior to 2016, consisting primarily of minor discipline actions. *See N.J.A.C. 4A:2-3.1(a)*. J.S. also has a 15-day suspension on his record, and such suspension is considered major discipline. *See N.J.A.C. 4A:2-2.2(a)3*. However, the 15-day suspension occurred in 2000, approximately *18 years* before J.S. was considered for the position at issue. As such, there is no substantive basis to suggest that the appointing authority chose 2016 as the cutoff for the purpose of making J.S.'s recent disciplinary history appear better than it otherwise might have been had another year been chosen for the cutoff. The appointing authority's determination that the appellant had the worse disciplinary record at the time the eligibles were being considered for the appointments at issue was not unreasonable. In addition, the appellant offers no support for the proposition that service in an administrative role was somehow a shield against discipline.

The appellant claims, via C.G.'s statement, that the Warden stated that he felt more comfortable promoting "his people." The Warden maintains that he stated that he was promoting the people he was most comfortable promoting because he felt they were best suited for the position. The Commission does not find this dispute material, given the lack of any additional support for C.G.'s statement that personal favoritism was at play and the eligibles' documented disciplinary histories. As to the appellant's complaint that no interviews were conducted, it was within the appointing authority's discretion whether or not to interview candidates. *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 Fotocki* (MSB, decided January 28, 2004). Therefore, the appellant's disciplinary record 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 legitimate reasons for the appellant's bypass that have 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 31ST DAY OF JULY, 2019



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