



STATE OF NEW JERSEY

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

In the Matter of Edward Lugo, Police
Sergeant (PM5095M), Hamilton
Township

Administrative Appeal

CSC Docket No. 2018-3529

ISSUED: August 1, 2019 (SLD)

Edward Lugo, represented by Stuart J. Alterman, Esq., appeals his non-appointment from the Police Sergeant (PM5095M), Hamilton Township eligible list.

The examination for Police Sergeant (PM5095M) was announced with a closing date of September 21, 2010. The resultant eligible list of 58 names, including the appellant as the 20th ranked non-veteran eligible, promulgated on August 7, 2014 and expired on May 23, 2018.¹ On May 8, 2018, a certification (PL180611) was issued, containing the names of three non-veteran eligibles, including the appellant as the second listed eligible. However, this certification was cancelled on May 9, 2018 at the request of the appointing authority. On May 11, 2018 a certification (PL180625) was issued, containing the names of three eligibles, including the appellant as the second listed eligible. This certification was also cancelled. Agency records indicate that the certification was cancelled as it was issued in error as the appointing authority had requested cancellation on May 8, 2018.

On appeal to the Civil Service Commission (Commission), the appellant asserts that the appointing authority falsely alleged that there was an error in the certification process. Specifically, the appellant asserts that the appointing

¹ Agency records indicate that the PM5095M eligible list had been extended from its original expiration date of August 6, 2017, until the new eligible list for Police Sergeant (PM0804V) promulgated on May 24, 2018. The PM0804V list expires on May 23, 2021. It is noted that the appellant appears as the 11th ranked eligible on this list.

authority was attempting to circumvent the PM5095M eligible list in order to choose a candidate of their liking. He asserts that the appointing authority has “taken every step” to ensure the cancellation of his certification and “pressured [the] employees responsible for the certifications to not request a legitimate certification” from the PM5095M eligible list, despite having a known vacancy for Police Sergeant. The appellant maintains that the cancellation of the certification was a “deliberate attempt” to punish him for his “active involvement” as a vice-president in the police union. In this regard, he argues that the union has recently raised the issue of the Township cutting police vehicles from the recent budget. The appellant explains that the union voiced its concerns at Town Council meetings and he attended fundraising events for the opposing political party.

The appointing authority, represented by Bruce R. Darvas, Esq., asserts that its actions in this matter were taken in good faith and although it acknowledges mistakes were made, they were not made with ill-intent. Specifically, the appointing authority maintains that the decision to make an appointment from the new Police Sergeant (PM0804V) eligible list was rooted in the decision to do what was best for the department in the eyes of the new Police Chief and Hamilton Police Benevolent Association Local 66 (PBA) President. Moreover, it disputes the appellant’s assertion that the decision had anything to do with the appellant at all. Rather, it maintains that several mistakes in the processes turned the situation into a confused one, which ultimately resulted in the certification being requested early. Therefore, it argues that as its actions were undertaken in good faith, and there was no intent to circumvent any Civil Service law or rule, the appellant’s appeal should be dismissed. In this regard, and by way of background, the appointing authority notes that in the spring of 2018, the PBA requested that a new Police Sergeant position be added in anticipation of vacancies due to expected retirements, and argued that the appellant deserved the appointment. However, on or about March 19, 2018 the appellant was advised that no appointment would be made until vacancies actually occurred. It noted that the appellant acknowledged this decision in an email dated March 19, 2018. The appointing authority notes that although the PM5095M eligible list was due to expire, it was extended pending the promulgation of the new eligible list for Police Sergeant (PM0804V).

In early May 2018, the then-Police Chief circulated three job actions for the titles of Police Captain, Police Lieutenant and Police Sergeant. The appointing authority notes that the new eligible list for Police Captain and Police Lieutenant had already promulgated. However, it claims that there was some confusion for the position of Police Sergeant, as the PM5095M eligible list was still active and the new eligible list was pending. Therefore, it requested clarification from this agency. The appointing authority maintains that it was told that if a certification was issued, it would be issued from the PM5095M eligible list as the new eligible list

had not yet promulgated. Thereafter, on May 2, 2018 the Personnel Officer² submitted requests to this agency to issue certifications from the eligible lists for Police Captain (PM0636V), Police Lieutenant (PM0709V) and Police Sergeant (PM5095M). On May 8, 2018, the Personnel Officer contacted this agency for a status update, and was advised to resubmit the requests. Mayor Kelly Yaede, who is the appointing authority, asserts that she subsequently advised the Personnel Officer that she had no knowledge of nor did she approve of the job actions circulated by the Police Chief. Therefore, she directed the Personnel Officer to stop the processing of the certification for Police Sergeant. As a result, the Personnel Officer contacted this agency and requested that the certification request for Police Sergeant be cancelled and he was advised that the certification for Police Sergeant had been cancelled. However, on May 11, 2018 the PL180625 certification for Police Sergeant was issued.

The appointing authority maintains that it was only on May 16, 2018 when the appellant submitted a letter of interest for the PL180625 certification that it realized that another certification had been issued. It asserts that the appellant was told that the certification was cancelled. The appointing authority asserts that it was later told that although it had requested cancellation of the certification for Police Sergeant, only the May 8, 2018 request was cancelled, but the May 2, 2018 request was processed which resulted in the issuance of the PL180625 certification. Subsequently, the appointing authority asserts that it again contacted this agency and was advised, via a May 21, 2018 email, to return the signed certification with a "C5" cancellation certification code, as the subject certification was issued due to an error in processing.

In response, the appellant argues that the appointing authority improperly cancelled a valid certification in order to circumvent his appointment to the title of Police Sergeant. Specifically, he maintains that either due to his "advocacy for replacement cars as part of his [union] involvement, or some other reason, an apparent animus existed" for him by the appointing authority. The appellant argues that without such animus, he was next in line for appointment and would have been selected for the position of Police Sergeant. In this regard, he notes that although he was the second listed eligible on the PL180625 certification, the first listed eligible had already retired and thus, he was next in line for promotion.

The appellant further argues that *N.J.A.C.* 4A:4-4.1(a) provides that when a vacancy is to be filled in the competitive division of the career service from an eligible list, the appointing authority shall request a certification of names for regular appointment. Moreover, as long as there is a valid list of eligibles, appointment may only be made from that list. *See N.J.A.C.* 4A:4-3.3. The appellant contends that as there was a known vacancy, as acknowledged by the

² The Personnel Officer is listed as an authorized signatory for the appointing authority who is listed as Mayor Kelly Yaede.

appointing authority, it was required to make an appointment from the only valid list at that time, which was the PM5095M eligible list. The appellant contends that if the appointing authority had followed the established regulatory and statutory directives, the appellant would have been appointed to the position. Therefore, the appellant maintains that the appointing authority's decision to cancel the certification is clear evidence of circumvention. Accordingly, the appellant argues that the appointment of the individual appointed to the title of Police Sergeant instead of him should be rescinded and his appointment ordered.

CONCLUSION

In the instant matter, the appellant argues that he is entitled to an appointment to the title of Police Sergeant as there was a vacancy. He maintains that since there was a vacancy, the appointing authority's cancellation of the subject certification is evidence of its attempt to circumvent Civil Service law and rules which require his appointment. However, there is no requirement that every vacancy must be filled or that an appointing authority cannot leave a position vacant. In this regard, the determination as to whether a vacancy exists and/or will be filled is generally left to the discretion of the appointing authority. *See In the Matter of Institutional Fire Chief* (MSB, decided January 12, 2005) (County that did not intend to fill the recently vacated position of Institutional Fire Chief not compelled by law to fill position and this agency recognizes discretion granted to local Civil Service jurisdictions to abolish positions for reasons of economy and efficiency); and *In the Matter of Todd Sparks* (MSB, decided April 6, 2005) (Even if a vacancy existed, there is no provision in Civil Service law or regulation that requires an appointing authority to fill a vacancy immediately upon its creation). *See also, In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). Moreover, the appointing authority argues that it did not approve the request for a certification for Police Sergeant and therefore, its decision to cancel the certification was appropriate. This un rebutted evidence is clearly most persuasive. As the record indicates that the Mayor, who is the appointing authority, did not approve of the request for a certification, any such certification issued would be considered unauthorized and, as such, invalid.³ Moreover, the record reveals that due to an administrative error, although two certification requests for the title were received by this agency, only one was cancelled prior to its issuance, even though the request to cancel was received prior to either certification being issued.

Additionally, although the appellant argues that he was entitled to the appointment and therefore, the only explanation for the cancellation of the certification was animus against him, the record evidences that he was not entitled

³ The only circumstances where is a certification is automatically issued is where a provisional appointee encumbers the title in question. In such a case, it is clear that the appointing authority has implicitly authorized the certification of a list by virtue of having an individual provisionally serving.

to the appointment. In this regard, *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, the “Rule of Three,” 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 the evidence that an appointing authority’s decision to bypass the appellant on an eligible list was improper. The Rule of Three allows an appointing authority to use discretion in making appointments and, 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).

In cases 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*, 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. However, as noted above there were other eligibles whose names were also on the PM5095M eligible list and who were reachable for appointment. Moreover, as a non-veteran eligible the appellant was not entitled to an appointment. In this regard, 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). Therefore, a review of the record indicates that the appellant has failed to meet his burden of proof as he has not shown by a preponderance of the evidence that the decision to cancel the certification was improper.

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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