



STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Bruce Davis, Deputy
Fire Chief (PM1696S), East Orange

CSC Docket No. 2018-2693

Hearing Granted

ISSUED: August 2, 2019 (EG)

Bruce Davis, represented by Sanford R. Oxfeld, Esq., appeals the bypass of his name on the Deputy Fire Chief (PM1699S), East Orange eligible list.

The subject eligible list promulgated on July 26, 2015 and expired on July 22, 2018. A certification was issued on October 3, 2017 (PL171208) indicating that the appellant, a disabled veteran, was the second ranked eligible on the certification. In disposing of the certification, the appointing authority appointed the number one ranked non-veteran eligible and bypassed the appellant's name and appointed the number three and four ranked non-veteran eligible on the certification.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority improperly bypassed him for appointment from the October 3, 2017 certification for Deputy Fire Chief. The appellant asserts that once the number one eligible was appointed, he headed the certification, and as a disabled veteran he could not be bypassed for appointment. *See N.J.A.C. 4A:5-2.2(e)*. The appellant also argues that his bypass was due to invidious reasons on the part of the current and former administrations and that these actions were politically motivated, showed favoritism, were unreasonable and were discriminatory. As an example of these allegations, the appellant asserts that there have been several vacancies for Deputy Fire Chief that have not been filled by the appointing authority. In support of this contention, the appellant submits copies of emails, organizational charts, personnel rosters, tour schedules, letters from his union representative and a copy of his union contract.

In response, the appointing authority argues that it had sufficient cause to bypass the appellant due to two pending disciplinary matters. It contends that the appellant did not adhere to proper procedures nor uphold the integrity and dignity of the Department of Public Safety. It submitted information indicating that the appellant was served a Notice of Minor Disciplinary Action dated December 5, 2017, recommending a five-day suspension for an incident occurring on October 31, 2017. Also submitted was a Preliminary Notice of Disciplinary Action (PNDA) dated February 2, 2018 recommending a 10-day suspension for a December 5, 2017 incident. Further, the appointing authority supplied a PNDA which was dated March 2, 2018, recommending a 10-day suspension for a December 21, 2017 incident. Additional materials including Department of Public Safety, Fire Division memorandum were also provided.

Upon review of the materials submitted by the parties, staff at the Division of Appeals and Regulatory Affairs (DARA) found that the disposition of the minor disciplinary action was not in the record nor were there Final Notice of Disciplinary Action (FNDA) sustaining the charges indicated in the two PNDAs and imposing major discipline. As this information is necessary for the Commission to make the proper determination in this matter, it was requested that the parties provide the FNDAs for the two major disciplinary actions and the final disposition of the minor disciplinary action.

In response to the information request by DARA, the appellant contends that he has not received any FNDA's or final disposition for minor disciplinary action. Additionally, the appellant asserts that he has not served any periods of suspension for any of these disciplinary actions. Further, the appellant submits a hearing officers' report dated June 4, 2018, in which the hearing officer found him not guilty of the allegations for the incidents described in the February 2, 2018 PNDA. The appellant also provided letters, PNDA's and emails concerning the charges brought forth against him in these disciplinary matters.

The appointing authority, despite being provided the opportunity, did not submit any new evidence or arguments for the Commission to review. Rather, it resubmitted the same material it had previously provided.

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. *N.J.A.C.* 4A:5-2.2(e) provides in pertinent part, that if there is more than one vacancy, and a veteran is ranked first on the certification as a result of the first appointment from the certification, then a veteran must be appointed to the next vacancy. Further, *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)7, allows the removal

an individual from an eligible list who has a prior employment history which relates adversely to the position sought.

In a case where the motives for an employer's actions are questioned, an analysis of the justification 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 445, the Court outlined the burden of proof necessary to establish discriminatory and/or 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 would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, the appellant, a disabled veteran appeared in the second position on the October 3, 2017 (PL171208) certification. The appointing authority appointed the number one ranked non-veteran eligible and then bypassed the appellant's name to appoint the number three and four ranked non-veteran eligibles. The appellant contends that the bypass of his name was improper pursuant to *N.J.A.C.* 4A:5-2.2(e). The appointing authority argues that it properly bypassed the appellant due to his pending discipline. In reviewing this matter, it is clear that the appellant could not be bypassed for appointment as once the number one eligible was appointed, the appellant headed the list and could not be bypassed by a non-veteran eligible for appointment. Nevertheless, the Commission has previously found that eligibles can be removed from promotional lists for pending disciplinary actions that adversely relate to the position sought. However, in the instant matter the Commission is troubled since there is nothing in the record indicating that the appellant's disciplinary matters have been resolved. This lack of resolution along with the timing of the issuance of the disciplinary actions, makes it appear the appointing authority was attempting to circumvent Civil Service rules regarding veterans' preference. The appointing authority has not provided any explanation for the delay in resolving the outstanding disciplinary matters. In view of the foregoing, this matter cannot be resolved on the basis of the written record as the Commission cannot determine if the charges were filed as a pretext to avoid appointing the appellant. Accordingly, the Commission finds it necessary to

refer this matter to the Office of Administrative Law in order to develop a factual record as to whether the disciplinary matters against the appellant were filed for legitimate reasons or to serve as a basis to circumvent Civil Service laws and rules. Additionally, if the disciplinary actions were legitimate, the Administrative Law Judge should determine if the charges against the appellant could justify the appellant's removal from the subject eligible list for an unsatisfactory employment record.

ORDER

Therefore, it is ordered that the matter of the appellant's bypass for appointment on the October 3, 2017 (PL171208) certification be transmitted to the Office of Administrative Law for a hearing as a contested case. It is further ordered that the appointment of the lower-ranked eligibles be designated conditional pending the outcome of this appeal.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31ST DAY OF JULY, 2019

Deirdre L. Webster Cobb

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