



**STATE OF NEW JERSEY**

In the Matter of Jason Ryan, Deputy  
Fire Chief (PM3240V), Hamilton  
Township Fire District Number 2

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

CSC Docket No. 2020-738

List Bypass Appeal

**ISSUED:** May 1, 2020 (SLK)

Jason Ryan, a Fire Captain with the Hamilton Township Fire District Number 2, represented by Patrick P. Toscano, Esq., appeals the bypass of his name on the Deputy Fire Chief (PM3240V), Hamilton Township Fire District Number 2 eligible list.

By way of background, the appellant, a nonveteran, appeared on the PM3240V eligible list. The appellant’s name was certified on PL191204. He was the first-positioned eligible on PL191204, which was disposed of on September 11, 2019, with the second-positioned eligible, B.S., being appointed.

On appeal, the appellant presents that he was the highest ranked eligible with a score of 91 on the test. The appellant indicates that he had an initial 20-minute interview in front of the five-member executive board (Board) and the Fire Chief. Thereafter, during the next Board meeting, each candidate had to give a five minute “sales pitch” as to why the applicant was the best candidate. He claims that it was obvious at that meeting, based on the body language of the Board, that the members were uninterested in what he was saying and had already made up their minds. For example, one of the Board members interrupted him to say that there was one-minute left to present, which disrupted his presentation. The appellant believes that he was bypassed because he is a union shop steward. He claims that at a prior Board meeting, the Fire Chief brought up the fact that the appellant had been asking about being promoted while at the same time he was actively pursuing that the Board members lose their jobs during the Hamilton Township Fire District consolidation process. He states that another Captain, J.P., was a witness to this discussion.

The appellant describes an incident that took place in the hallway outside of a Board meeting, where he voiced his concern and gave reasons to Board members why he felt that the Board made an error when it promoted R.P. to Training Captain. Later that month, the Fire Chief told the appellant that the Board was upset by his comments and that it was going to bring disciplinary charges against him. He indicates that he replied that his comments were made as a shop steward and reflected the union members' thoughts. The appellant claims that the Fire Chief responded, "is that the excuse you're going with ... Good luck with that. I will relay it to the Board." Further, he provides that he did receive disciplinary charges for this incident which were later dropped after the union's counsel indicated that it would be filing an unfair labor practice complaint.

The appellant presents that in 2013, he was pursuing a promotion for Deputy Fire Chief when he received disciplinary charges concerning the use of a new fire engine. He states that B.S. was the driver on his shift, but he did not receive charges. The charges resulted in an agreement that the parties would no longer discuss the incident. The appellant asserts that he has not been disciplined in several years, but he seems to get disciplined when he is up for a promotion. He highlights that he is a Level 2 Fire Instructor while B.S. is not, he has the most certifications among all staff, he has 12 years of service as a Fire Captain while B.S. has only four, and he was the only candidate who had been Acting Fire Chief. Further, the appellant presents that he filed a grievance regarding the improper filing of overtime. He claims that the Fire Chief responded by telling him that if B.S. needs to be removed from his position as Deputy Fire Chief, the Board would choose someone other than the appellant, which the appellant believes is another example demonstrating that he was not chosen due to his union activity.

In response, the appointing authority, represented by Benjamin E. Widener, Esq., states that although it recognizes that the appellant had the highest exam score, it was within its discretion to choose B.S., who was the second ranked candidate and whose score was only four points lower than the appellant's. It believes that B.S. was the best fit and would be a better complement to the Fire Chief. The appointing authority presents that B.S. has been employed by the Fire District since 2001 and had been a Fire Captain for five and one-half years prior to appointment. It asserts that B.S. is a team player who brings out the best in people, is well-liked and respected by his peers, is intelligent and a problem-solver, is a very good and capable fireman, has no disciplinary issues, and is a skilled mechanic. Further, he educates himself about new equipment purchased by the department, is interested and gets excited about the progression of the fire service, such as learning how to use new technologies to fight fires, and firefighters want to work with and for him. It cites specific examples where B.S. exhibited leadership and problem-solving abilities. The appointing authority asserts that these are the reasons that B.S. received the promotion and it had nothing to do with any of the appellant's allegations. Further, the appointing authority felt that B.S. exhibited more passion and vision for the position than the appellant during the interviews as the appellant simply rehashed

his resume. It states that the only time that the appellant showed passion for the position was when he stated that it would mean a lot to his father, who previously had been a Fire Chief for the District, if he were appointed as Deputy Fire Chief. Concerning the appellant's statement that he was interrupted during his "sales pitch," it indicates that all candidates received a one-minute warning. The appointing authority highlights other employees who had served as union representatives who recently had been promoted to demonstrate that it is not biased against union members.

Regarding the incident after the Board announced its decision to promote R.P. to Fire Captain, who was the first ranked candidate on that eligible list, the appellant, just outside the boardroom and in front of other firefighters, openly criticized the Board by expressing that they made the "wrong choice," that "everybody in town wants him," referring to a candidate that the appellant preferred, said "no one likes him," referring to R.P. and "there will be repercussions" suggesting that there would be some sort of backlash for the Board's decision. The appointing authority notes that the appellant did not indicate at that time that he was making these comments that he was acting as a union representative. Further, the appellant did not ask to privately speak to the Board about his opinion. These comments were demeaning to R.P. and the Board felt that these comments could result in a lack of support for their new Fire Captain. Although the appointing authority believed that the appellant's actions were inappropriate, it decided to resolve the matter informally and use the matter as a teaching moment indicating that if he disagreed with the Board as a union representative, there were more appropriate ways to express his opinion. Concerning the 2013 Deputy Fire Chief position, the appellant is incorrect to suggest that he was not promoted due to disciplinary action as he did not pass the test and, therefore, was ineligible. It highlights that the appellant is violating the terms of the confidential settlement regarding the 2013 incident by bringing it up in this appeal.

The appointing authority argues that there is no presumptive right of appointment because the appellant finished first on the Civil Service test, that the Deputy Fire Chief does not serve as the department training officer so his Level 2 Fire Instructor certification does not automatically make him more qualified, that even though he may have more certifications and training than B.S., he has not used this background to the benefit of the District and its members, that although he has more time as a Fire Captain than B.S., they both started in the District on the same date, and the fact that he has been Acting Fire Chief and has had other opportunities only shows that the District has never retaliated against him for any of the reasons expressed in this appeal. Moreover, it highlights that in 2008, when he was appointed to Fire Captain, he was appointed despite being ranked below bypassed another candidate. The District also presents that the appellant's grievance regarding the improper filing of overtime was filed after B.S.'s appointment and, therefore, it was not relevant to his bypass. Additionally, the grievance had no merit as even the union did not support it and the District argues that he manufactured it so it could be part of this appeal.

In response, the appellant highlights his managerial experience as the Fire Commissioner and a Board representative for Emergency Management Services in Florence Township. He presents that he has been a Fire Captain for nearly seven years longer than B.S. and he had been told by the Fire Chief on several occasions that he would be promoted. The appellant argues that personality, attitude and better fit to align with the Fire Chief are subjective criteria which should not be considered. Instead, he believes that only objective criteria such as qualifications, certifications, and experience should be considered in making the promotional appointment. He presents his certifications, his awards and provides examples where he was forward thinking and a problem solver. The appellant states that his current disciplinary record is clear and that past discipline that no longer exists should not be considered. He acknowledges that B.S. has responsibility for repair of equipment, but states that the Captains each have their areas of responsibility and they do not involve themselves in the areas where others are responsible. He presents various recommendations that he has made to improve the Fire Department, which sometimes were approved and sometimes were not. The appellant states that staff members want to work with him and request to transfer to his shift while no one has requested to transfer to B.S.'s shift.

The appellant states that he put more time, effort and money in preparing for the Civil Service test and his higher test score should not be downplayed. He indicates that even during his interview, the Fire Chief indicated that he had the most experience, which includes his ability to train staff, purchase equipment and budget. He explains that during the interviews, he did discuss his resume as his experience and certifications demonstrate why he was the best candidate. He is insulted that the only thing the Board picked up on during his second interview was his statements about his father as he demonstrated through both interviews why he was the superior candidate. Concerning R.P.'s promotion, it was his duty as shop steward to voice the entire staff's concerns and, in response, he was initially levied disciplinary charges. He indicates that it was only after the union's attorney threatened to bring an unfair labor practice complaint that the charges were dropped. The appellant denies that he ever said that there would be repercussions for the Board's decision to promote R.P. or anything demeaning about him. Instead, he simply expressed the union membership's belief that there was a preferred candidate based on that candidate's qualifications. Regarding the 2013 Deputy Fire Chief examination, he states that another candidate was chosen without an interview or selection process; however, the other candidate did not take the position as the examination was cancelled due to the list being incomplete. Further, disciplinary charges were brought against him at that time regarding an incident for taking out fire equipment. He believes that these past disciplines show a pattern that the appointing authority disciplines him whenever he is up for promotion. The appellant highlights that he has been Acting Fire Chief on eight separate occasions. Concerning his prior promotion for Fire Captain where he was selected in lieu of a higher-ranked candidate, he states that he had similar qualifications as that candidate and when volunteer staff was asked for their opinion, the volunteers

indicated that he was the preferred candidate. With respect to the overtime filing grievance, the union did support his grievance and it allowed him to handle it based on his experience as a union representative.

## 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)3i 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.

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 action 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 motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment. Therefore, the appellant, the first ranked candidate on the subject certification, and B.S., the second ranked candidate, were reachable for potential appointment. Nevertheless, the appellant alleges that based on his test score, experience, certifications, education and other factors, he should have been appointed to the subject title as he believes that he was the more qualified candidate. He argues that he was not appointed due to his union affiliation. However, even assuming, *arguendo*, that the appellant was more qualified than B.S., as long as the bypass was not based on an unlawful or invidious motivation, it was within the appointing authority discretion to bypass him under the "Rule of Three." See *In the Matter of Michael Cervino* (MSB, decided June

9, 2004). Further, the appointing authority presented legitimate business reasons for his bypass. Specifically, it cites examples where B.S. demonstrated leadership and problem-solving abilities. Additionally, it indicates that B.S. educates himself about new equipment purchased by the departments and is interested and gets excited about the progression of the fire service, such a learning how to use new technologies to fight fire. It also presents tangible criteria, such as the appellant's mechanical abilities. Further, contrary to the appellant's belief, subjective criteria may also be considered, such as passion, vision, attitude and personality fit with the Fire Chief. Otherwise, the "Rule of Three" would not exist and interviews would not be an acceptable part of the selection process. In this regard, the appellant cannot have things both ways as the appellant explained that in 2008, the first ranked candidate was bypassed for a Fire Captain promotion in favor of the appellant based on the opinion of volunteer staff. In other words, the appellant received a prior appointment based, in some part, on subjective criteria.

Moreover, the appointing authority presents the appellant's comments concerning R.P.'s appointment as Fire Captain. While there may be a difference in the characterization of the incident, the record is clear that the appellant, in a public place in front of both Board members and other firefighters, made comments indicating that he disagreed with the Board's selection of R.P. as Fire Captain and preferred another candidate. While expressing that the majority of the union membership preferred another candidate may be considered protected union activity, the Board had a legitimate business concern that the appellant's public airing of such concern, even if no disrespect was intended towards the Board or R.P., undermined it. Therefore, the appointing authority presented a legitimate example as to why the appellant may not have been the best fit and a good complement to the Fire Chief. Finally, the appellant has not presented any witness statements, documents or other evidence that shows that the reason that the appellant was bypassed was not for legitimate business reasons, but for unlawful or invidious motivation due to his union affiliation.

### **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 29<sup>TH</sup> DAY OF APRIL , 2020



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