



STATE OF NEW JERSEY

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

In the Matter of David Niland, Police
Chief (PM0169A), Clifton

CSC Docket No. 2020-2726

Bypass Appeal

ISSUED: JANUARY 22, 2021 (HS)

David Niland, represented by Robert K. Chewning, Esq., appeals the bypass of his name on the Police Chief (PM0169A), Clifton eligible list.

The appellant appeared as the first ranked non-veteran eligible on the subject eligible list, which promulgated on July 4, 2019 and expires on July 3, 2022. A certification, consisting of the names of two non-veteran eligibles only, was issued on February 28, 2020 (PL200302) with the appellant listed in the first position. In disposing of the certification, Clifton bypassed the appellant and appointed T.R., effective May 1, 2020.

On appeal to the Civil Service Commission (Commission), the appellant maintains that he should have been promoted to Police Chief. He claims that the City Manager stated that the promotion would be based on the candidates' scores on the Civil Service examination to avoid the use of an improper basis for the selection. The appellant argues that he was the superior candidate as he ranked higher on the eligible list; had 25 years of experience as a police officer; had more years of service as a police officer; and had superior work assignments and more extensive training. But, according to the appellant, Clifton ignored his qualifications and instead promoted T.R. based on T.R.'s political connections and relationships. The appellant also requests that this matter be referred to the Office of Administrative Law (OAL) for a hearing.

In response, Clifton, represented by Andrés Acebo, Esq., counters that its selection was based on legitimate criteria in accordance with Civil Service law and

rules. It states that after each candidate was individually interviewed with the same questions, Clifton weighed the merit of each and selected T.R. This determination, per Clifton, was based in part on T.R.'s experience serving in every division within the Police Department over his 25-year tenure, which contrasted with the appellant's more limited experience in only two divisions of the Police Department over a similar term. Clifton adds that based on T.R.'s comprehensive and overall experience and positive qualities and skills, T.R. was determined to be the best fit and most meritorious for appointment to Police Chief and thus was made "Acting" Police Chief, pending formal appointment. Clifton states that T.R. was immediately put to the test amid the COVID-19 pandemic, which caused significant scheduling changes in the Police Department; performed his duties successfully; and consequently was named permanent Police Chief. Clifton also contends that the appellant offers only generalized accusations regarding alleged motives that are devoid of any factual support and fall far short of a showing that its action was illegitimate, arbitrary or discriminatory. Clifton maintains that those alleged motives had no bearing on the selection of T.R. In support, Clifton submits the City Manager's certified statement.

In reply, the appellant states that the three Police Captains eligible to take the Police Chief (PM0169A) examination, which included the appellant and T.R., met with the City Manager and the Personnel and Equal Employment Opportunity Officer on February 7, 2019 to discuss the promotional process. According to the appellant, the City Manager informed the candidates that whoever scored the highest on the examination would be selected, and neither the City Manager nor the Personnel and Equal Employment Opportunity Officer mentioned that there would be an interview. The appellant maintains that he demonstrated a respectable service record and achieved several commendations during his years as a police officer, yet he was bypassed based on favoritism, nepotism and political connections and relationships. To the appellant's knowledge, this was the first time that Clifton has ever used an interview process for police promotions. According to the appellant, the only information known about the interview process is that: (1) the candidates were allegedly asked the same questions; (2) the City Manager, the Personnel and Equal Employment Opportunity Officer, and an attorney for Clifton, M.P., were present for the interview; and (3) the interview lasted approximately one hour. What was unknown to the appellant at the time of the interview and remains unknown is (1) whether the candidates' answers to the interview questions were scored; (2) if so, who scored the candidates' answers and how did they score the answers; and (3) how the interview performance would be weighed against the eligible list rankings. Therefore, the appellant argues, no weight should have been placed on the performance of the candidates in the interview process because Clifton has failed to demonstrate that the interview process was structured, objective and uniform for all candidates. He alleges that Clifton utilized the candidates' alleged interview performance to support its decision on who it wanted to promote, T.R., based on favoritism. The appellant also states that T.R. has served in every "bureau," not every "division." Specifically, the appellant states that T.R. has served in the

Administrative Services, Field Operations and Investigation bureaus, while the appellant has served in the Administrative Services and Field Operations bureaus. The appellant requests that Clifton's decision to bypass him be overturned or, in the alternative, that this appeal be transmitted to the OAL for a hearing. In support, the appellant submits his certified statement and various training certificates.

CONCLUSION

Initially, bypass appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service*, 155 N.J. Super. 517 (App. Div. 1978).

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)*.

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 445, the court outlined the burden of proof necessary to establish discriminatory 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.

Since only non-veterans were listed on the certification, it was within Clifton's discretion to select any of the two interested eligibles on the certification. Nevertheless, the appellant alleges that he was bypassed for the improper reasons of

favoritism, nepotism and political connections and relationships. However, the appellant has not provided any substantive evidence beyond mere allegations that his bypass was motivated by such improper reasons. Moreover, Clifton has presented legitimate reasons for bypassing the appellant and selecting T.R. In this regard, T.R., unlike the appellant, served in every division of the Police Department. It is of no moment that Clifton may have used the term “division” when it should have used the term “bureau.” Even assuming that “bureau” is the correct term, the appellant still acknowledges that T.R. has served in every bureau, while the appellant has served in two of the Police Department’s three bureaus. Additionally, Clifton points to T.R.’s successful performance of his duties while serving as “Acting” Police Chief. *See In the Matter of Donald Fillinger* (CSC, decided December 16, 2009) (Absent a showing that another individual was selected for an “acting” position based on an improper reason, Commission determined it was appropriate for appointing authority to rely on experience gained in the “acting” position when exercising its discretion under the “Rule of Three”). T.R.’s experience in the foregoing respects is not in dispute.

Neither has the appellant shown that Clifton’s proffered reasons were pretextual. For example, the appellant claims that no mention was made at the February 7, 2019 meeting that an interview would take place; that that this was the first time that Clifton used an interview process in a police promotion; and that the interview was unstructured. It should be emphasized though that appointing authorities are permitted to interview candidates and base their hiring decision on the interview. This is within the appointing authority’s discretion and may apply to all positions, including Police Chief. However, interviews, whether structured or not, are not required. *See In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012). It is within the appointing authority’s discretion to choose its selection method, *i.e.*, 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 Potocki* (MSB, decided January 28, 2004). Thus, since conducting interviews is discretionary, any purported lack of structure in the interview is not cause to find that the appellant’s bypass was improper. So long as the hiring decision is in compliance with *N.J.A.C.* 4A:4-4.8(a)3, the Commission cannot find that the interview was conducted inappropriately. In this case, the record is clear that Clifton interviewed both candidates and considered their qualifications. In this regard, it is evident that Clifton interviewed the appellant, and his experience was evaluated in comparison with T.R.’s, as noted earlier. The appellant does not substantively dispute Clifton’s representation that both candidates were asked the same questions. In short, even assuming that this was the first time that Clifton used an interview process for a police promotion, the Commission lacks any substantive basis to conclude that Clifton instituted such process for any improper reason or that the format of the process establishes that the appellant was improperly bypassed. Further, even assuming that the City Manager represented on February 7, 2019 that the candidate who scored the highest on the examination would be

selected, the appellant has not established that such statement had any binding effect or that the City Manager changed his mind for any improper reason.

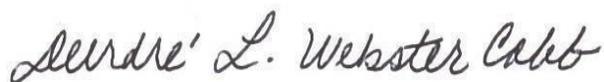
Additionally, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, Clifton still has selection discretion under the “Rule of Three” to appoint a lower-ranked eligible absent any unlawful motive. See *N.J.A.C. 4A:4-4.8(a)3*; *In the Matter of Nicholas R. Foglio, Fire 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 Clifton’s discretion under the “Rule of Three.” Moreover, Clifton presented legitimate reasons for the appellant’s bypass that have not been persuasively refuted. Accordingly, a review of the record indicates that Clifton’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 20^H DAY OF JANUARY 2021



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