



STATE OF NEW JERSEY

In the Matter of Antonio Salters, Fire
Fighter (M1838W), Township of
Hillside

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

CSC Docket No. 2021-1827

Bypass Appeal

**ISSUED: NOVEMBER 22, 2021
(ABR)**

Antonio Salters appeals the bypass of his name on the eligible list for Fire
Fighter (M1838W), Hillside Township (Hillside).

By way of background, the subject examination was announced with a closing
date of August 31, 2018. The subject eligible list, containing 1,084 names,
promulgated on March 29, 2019 and expires on March 28, 2022. The appellant, a
nonveteran, was ranked four on the subject eligible list. A certification was issued on
December 4, 2020 (OL200942), with the appellant’s name listed in the fourth position.
In disposing of the certification on March 25, 2021, the appointing authority, in part,
bypassed the appellant and the eligible listed in the 21st position; and appointed the
eligible listed in the second position and 39 others eligibles listed from the sixth
position through the 36th position.

On appeal to the Civil Service Commission (Commission), the appellant argues
that the appointing authority’s decision to bypass him constituted political retaliation
and racial discrimination. Specifically, he alleges that the political retaliation is
rooted in the rivalry between the appointing authority, the Mayor of Hillside, and his
father. In this regard, he proffers that the Mayor is a vocal detractor of his father,
who is the chairman of the Hillside Democratic County Committee, and aligned
against him politically. Further, he alleges that his status as an African-American
male was also a factor in his bypass.

In response, the appointing authority, represented by Kenneth B. Goodman,
Esq., states that she bypassed the appellant because she reasonably believed that the
appellant was untruthful during his interview and because he seemed to lack the
general enthusiasm that was exhibited by other candidates. Specifically, with regard

to untruthfulness, the appointing authority indicates that the appellant stated during his interview that he was a lifelong resident of Hillside, but that she knew this to be false because she recognized him from her tenure as a teacher in the City of Newark. The appointing authority contends that the foregoing were reasonable and legitimate reasons for the appellant's bypass and it notes that its decision is consistent with *N.J.A.C. 4A:4-6.1*, which permits a person to be denied an appointment when the have "made a false statement of material fact or *attempted any deception* or fraud in any part of the selection or appointment process" (emphasis added). Furthermore, the appointing authority, citing *In the Matter of Michael Barbato-Buckley* (CSC, decided August 16, 2017), notes that the Commission has consistently held it is permissible to bypass a candidate when the appointing authority determines that the other candidates interviewed better. Moreover, the appointing authority avers that the results of the certification undercut the appellant's claims that he was improperly bypassed. Specifically, the appointing authority advises that the appellant's brother, who appeared in the 22nd position on the subject certification, was appointed as a Fire Fighter. Accordingly, the appointing authority maintains that the appellant has not met his burden of proof in the instant matter and that his appeal should be denied. The appointing authority also submits a copy of a letter she sent to the Acting Chief of the Hillside Fire Department, dated February 4, 2021, explaining her rationale for the bypass of the appellant and one other candidate.

In reply, the appellant argues that the appointing authority's rationale for his bypass is pretextual. In this regard, he asserts that his father's political activity, coupled with his own status as a former Hillside Board of Education member who had recently run against candidates that the appointing authority had endorsed, were the true reason for his bypass. He contends that the appointing authority had no personal knowledge of his residential history and that he was truthful when he stated that he was a lifelong resident of Hillside. He advises that although he attended University High School in Newark—a fact that he disclosed in his application—he is a lifelong resident of Hillside. He maintains that the appointing authority could have inquired about this issue during his interview process and would have been reassured of his lifelong residential status, but notably did not do so. Further, he states that the appointing authority's son similarly lives in Hillside, but attends school in Newark. The appellant maintains that the statement that he lacked "general enthusiasm" is similarly false and pretextual. He avers that the appointing authority's appointment of his brother to a Fire Fighter position does not prove that his bypass was not politically motivated, as his brother is not politically active and thus the appointing authority had no reason to bypass him. The appellant also contends that the pretextual nature of the appointing authority's response requires a hearing. The appellant further argues that the appointing authority has not provided a sufficient explanation as to why each lower-ranked candidate was hired instead of him and how it is consistent with applicable law and rules.

CONCLUSION

Consistent with *N.J.A.C.* 4A:4-4.8(a)3, an appointing authority has selection discretion under the “Rule of Three” to appoint a lower ranked eligible absent any unlawful motive. *See In the Matter of Michael Cervino* (MSB, decided June 9, 2004). *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 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 436, 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 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-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 complainant sustain this burden, the complainant 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 this motive.

Initially, the appellant requests a hearing in this matter. 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 which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

In the instant matter, the appellant alleges that he was bypassed because of political retaliation and because of his status as an African-American male. However, other than mere allegations and speculation, the appellant has not presented any substantive evidence that would lead the Commission to conclude that his bypass was improper or an abuse of the appointing authority's discretion under the “Rule of Three.” The appointing authority presents legitimate, non-discriminatory reasons for the appellant's bypass, which have not been refuted. The appellant has not presented any evidence to support his claim that his bypass was politically or racially motivated and he has not rebutted the appointing authority's claim that he has not

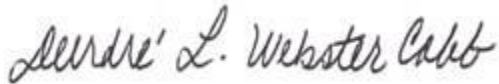
been a lifelong resident of Hillside. Further, even assuming *arguendo* that the appellant was truthful about his status as a lifelong resident of Hillside, the appointing authority's determination that he lacked the enthusiasm of other candidates in his interview is a legitimate reason for the appellant's bypass which the appellant has not refuted. It is noted that the use of an interview as the selection method was within the appointing authority's discretion. *See In the Matter of Daniel Dunn* (CSC, decided August 15, 2012). Moreover, the appointing authority's selection of the appellant's brother for appointment from the subject certification suggests that neither race nor the political activities of the appellant's family were factors in the appointing authority's selection process. Therefore, the appellant has not met his burden of proving that his bypass 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 17TH DAY OF NOVEMBER 2021



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