



**STATE OF NEW JERSEY**

In the Matter of Jeffrey Terry,  
Supervising Public Safety  
Telecommunicator (PC1728U), Morris  
County

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

CSC Docket No. 2022-706

List Bypass Appeal

**ISSUED: DECEMBER 20, 2021 (SLK)**

Jeffrey Terry appeals the bypass of his name on the Supervising Public Safety Telecommunicator (PC1728U), Morris County eligible list.

By way of background, the appellant, a nonveteran, appeared on the PC1728U eligible list, which promulgated on December 15, 2016 and expired on December 14, 2019. The appellant’s name was first certified on December 15, 2016 (PL161505) for a position in the subject title. The appellant, the second positioned candidate, was bypassed in favor of lower-ranked candidates who were appointed.<sup>1</sup> Thereafter, the appellant was certified on January 12, 2018 (PL180061), March 26, 2019 (PL190389), and November 8, 2019 (PL191637) in the first position, and bypassed in favor of lower-ranked candidates who were appointed.

On appeal, the appellant presents that on September 17, 2021, he contacted this agency regarding certification PL191637 and was advised that the subject eligible list had been certified four times, where the first time he was ranked second and the other three times he was ranked first. He indicates that he never received notice of the disposition of these certifications. The appellant states that he has been passed over for promotion eight times in favor of lower ranked candidates, including two who were provisionally promoted. Additionally, he provides that two more employees have been promoted to “acting” Supervising Public Safety

<sup>1</sup> The first ranked candidate was also appointed.

Telecommunicator, which now means that 10 people have been promoted ahead of him. He states that this agency advised him that he should have received four letters of dispositions for certifications. The appellant asserts that he spent a great deal of time preparing for the subject promotional examination and he feels that by bypassing him this many times, even with the Rule of Three, the appointing authority is discriminating against him.

In response, the appointing authority, represented by Mark A. Tabakin, Esq., presents that the appellant has been employed by the County for approximately 11 years and currently serves as a Senior Public Safety Telecommunicator. The Director of Emergency Communications (Director) made the determinations as to who to appoint as Supervising Public Telecommunicator. It presents that the appellant appeals his bypass on certification PL191637 and its disposition was due by February 10, 2020. The appointing authority presents that under *N.J.A.C.* 4A:2-1.1(b), the appellant had 20 days to appeal from when he knew or should have known that his name was bypassed. It notes that it was not required to provide notice that he was not appointed or that the certification was disposed. The appointing authority states that it was this agency who was to advise the appellant that the subject certification had been issued and disposed. Therefore, it believes that this agency has the evidence regarding his notification of the disposition of the certification. The appointing authority asserts that the appellant knew or should have known that the subject certification had been disposed by February 10, 2020, the disposition date identified on the list. Therefore, it argues that the appellant needed to appeal by March 2, 2020, and his appeal on September 23, 2021, was approximately 570 days too late.

Regarding the merits, the appointing authority presents that it had discretion to appoint one of the top three eligibles on the certifications under the Rule of Three. Further, while the appellant believes he is entitled to appointment because he “spent a great deal of time and effort preparing for the promotional exam,” he does not have a vested right to appointment and he can be bypassed for a merit-based reason. It states that he was bypassed for valid, non-discriminatory, performance based reasons. Specifically, the Director indicated that the appellant had been reprimanded on four occasions, counseled on his excessive use of sick time on five occasions and received unsatisfactory performance reviews. Additionally, while the appellant was counseled on the ways he could improve upon his performance deficiencies, he neither attended training sessions nor did he seek out his supervisors for feedback, which was suggested by the Director. It states that while the appellant expected to be promoted for no other reason than his years of service and his exam preparation, he ignores that there were better qualified candidates who had stronger performance records and who did not abuse sick time.

## 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 an open

competitive or 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.

*N.J.A.C.* 4A:2-1.1(b) provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed.

Initially, it is noted that *N.J.A.C.* 4A:4-4.8 does **not require** a Disposition Notice to be sent for a bypass. Rather, it indicates that such a notice, *inter alia*, can be used to notify an eligible he or she has been bypassed. In this regard, such notices are sent by this agency and not an appointing authority, which is not required to send any notice of a bypass. Further, such notices are **only** sent by this agency when a bypass is due to a temporary condition that may be resolved in the future such as where an eligible does not currently possess something required for the position (*e.g.*, a suspended license, *etc.*). Such "bypasses" are permitted and less punitive than removing an eligible from the list since, if the condition causing the current bypass resolves in the future, the eligible will still be able to be considered on subsequent certifications. Where bypasses are solely due to the appointment of a lower-ranked eligible based on an appointing authority's assessment that the lower-ranked eligible is more suitable based on factors such as qualifications, training, interviews, *etc.*, no Disposition Notice is provided. *See In the Matter of Craig G. Howlett and Lori A. Soares* (CSC, decided December 19, 2018). In this case, the disposition of certification PL191637 was recorded on January 27, 2020, indicating two permanent appointments. As such, the appellant knew or should have known around that date that he was not appointed, and his September 23, 2021, appeal was well after 20 days from that date and, therefore, untimely.

Regarding the merits, 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 the instant matter, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment. Nevertheless, the appellant alleges that the appointing authority "discriminated" against him based on the number of times he has been passed over for promotions and his time and effort in preparing for the promotion. Initially, it is noted, that there is no Civil Service law or rule which limits the number of times that an eligible for a promotional examination may be bypassed. Further, under Civil Service law and rules, discrimination can only be adverse action taken based on an individual's membership in a protected class. *See N.J.A.C. 4A:7-3.1*. However, as the appellant has not made such an allegation or provided any evidence to support such an allegation, he cannot establish that he was subjected to discrimination by being bypassed on multiple occasions.<sup>2</sup> Instead, while the appellant believes that he deserves to be appointed, consistent with *N.J.A.C. 4A:4-4.8(a)3*, the appointing authority had 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) In this case, the appointing authority presents lawful reasons for the appellant's bypass. Specifically, it presents that the appellant was bypassed due to poor work performance, excessive use of sick time, and his failure to take steps to improve his performance. Moreover, the appellant has not provided any evidence that the appointing authority's bypass was not based on legitimate business concerns. Accordingly, the appellant failed to meet his burden of proof.

### 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.

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<sup>2</sup> Even if the appellant presented that he was in a protected class, he has provided no evidence of discrimination. Moreover, the appointing authority has presented legitimate, non-discriminatory reasons for his bypass.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 15<sup>TH</sup> DAY OF DECEMBER, 2021

*Deirdre L. Webster Cobb*

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