



STATE OF NEW JERSEY

In the Matter of Qiana Brown,
Police Captain (PM1803W),
Hillside

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

CSC Docket No. 2021-374

Bypass Appeal

**ISSUED: FEBRUARY 23, 2021
(JET)**

Qiana Brown appeals the bypass of her name on the Police Captain (PM1803W), Hillside, eligible list.

The appellant took the promotional examination for Police Captain (PL200510), Hillside, achieved a passing score, and was ranked on the subsequent eligible list. In disposing of the certification, the appointing authority bypassed the appellant, who was the first ranked eligible on the certification, and recorded her as “retained, interested others appointed.” The appointing authority appointed Benjamin Niewinski who was the second ranked eligible on the certification, effective September 9, 2020. It is noted that the list was certified one time and one appointment was made.

On appeal, the appellant asserts that she is an African American female, and she previously filed two separate EEOC complaints against the appointing authority for separate unrelated matters which were sustained.¹ The appellant asserts that she was previously bypassed for promotions, and she continues to be retaliated against by the appointing authority as a result of the instant bypass. The appellant contends that she filed hostile work environment and discrimination complaints against the appointing authority which are still pending. In addition, the appellant states that she was appointed as a provisional Police Captain effective March 31, 2020, and she has been serving in law enforcement positions for 18 years.² The

¹ The appellant states that the EEOC sustained the matters on June 11, 2012 and on April 20, 2016.

² The appellant notes that she has completed executive level training, serves as an accreditation manager, OEM liaison, and Internal Affairs supervisor.

appellant states that the Mayor interviewed her for the subject position on August 5, 2020. The appellant maintains that, although the Chief of Police recommended her for promotion to Police Captain, she was notified on September 22, 2020 that another candidate was selected for appointment to the subject position. The appellant adds that no reason was provided pertaining to why she was not selected. Moreover, the appellant asserts that the lower ranked candidate is a Caucasian male, and as such, she requests a hearing in this matter. In support, the appellant provides copies of the EEOC determination, and notices and e-mails from the appointing authority in support of her claims.

In response, the appointing authority, represented by Charles Simmons, Esq., asserts that the Mayor interviewed the candidates and reviewed their resumes, personnel files, education and training. The appointing authority explains that, although the appellant's qualifications were considered strong, the Mayor determined that Niewinski demonstrated that he was the better candidate, as his qualifications included leadership abilities, mentoring capabilities, and the ability to assist with transitions and policy changes. The appointing authority adds that Niewinski possesses more seniority than the appellant, as he has been serving with the appointing authority since June 1998. The appointing authority contends that, in contrast, the appellant was appointed to a law enforcement position in January 2003. As such, the appointing authority asserts that the Mayor properly used her discretion under the Rule of Three to appoint Niewinski. Moreover, the appointing authority asserts that the appellant's arguments pertaining to race are without merit, as the Mayor is an African American female, and there is no proof in this matter that the appellant was subjected to retaliation.³ In support, the appointing authority provides a certification from the Mayor with respect to the candidates' qualifications.

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, provided that disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned.

N.J.A.C. 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, 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 on 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

³ The appointing authority notes that the Mayor is not the subject of the appellant's pending litigation or prior EEOC complaints.

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 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 employee sustain this burden, he or she has established a presumption of retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the retaliatory motive.

Initially, the appellant requests a hearing in this matter. List 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 Civil Service 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). For the reasons set forth below, 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 this matter, the appellant has provided no substantive evidence to show that the bypass was improper. Initially, the appellant has not provided any information to show that he is more qualified than Niewinski. Accordingly, she has not established in any way that she is more qualified than Niewinski to be appointed as Police Captain. The appellant's credentials are insufficient to show that the appointing authority's selection discretion was abused without showing a direct nexus between the credentials and the position in question. It is within an appointing authority's discretion to choose its selection method, and the record indicates that the candidates were ranked and the appointing authority then selected the candidate it determined was best suited for the position. Additionally, the appointing authority provided a legitimate basis for not selecting the appellant, including that Niewinski demonstrated superior leadership skills and has the ability to assist with transitions and policy changes. Although the appellant ranked higher on the PM1803W eligible list based on her examination score, that fact, by itself, is insufficient to establish that her bypass was improper given the discretion afforded an appointing authority under the Rule of Three.

With respect to the appellant's argument that she was discriminated and/or retaliated against based on her race or as a result of her prior EEOC complaints, the appellant has not provided any substantive evidence in support of that claim.

Initially, such arguments pertaining to the appellant's pending litigation and prior EEOC complaints are outside the scope of this matter and cannot be addressed. Moreover, there is no substantive evidence to show that the Mayor discriminated and/or retaliated against the appellant. Additionally, the fact that the appellant served as a provisional Police Captain is not a *prima facie* showing of retaliation. Additionally, the appellant's removal from the provisional appointment, in and of itself, does not establish that she was subjected to retaliation. A provisional appointment does not automatically entitle an employee to a permanent appointment and it was at the appointing authority's discretion to remove the appellant from her provisional appointment. Moreover, it is counter-intuitive that the appointing authority provisionally appointed the appellant if its inclination was to later subject her to discrimination and/or retaliation by not appointing her. More likely, and the records supports that, rather, the appointing authority's non-appointment of the appellant was based on its proffered legitimate business reasons.

Accordingly, other than the appellant's unsupported allegations, as there is no evidence that her bypass was for anything other than legitimate business reasons, she has not sustained her 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 17TH DAY OF FEBRUARY, 2021

Deirdre' L. Webster Cobb

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