



STATE OF NEW JERSEY

In the Matters of Marcello Errigo and
James Weston, Passaic County,
Sheriff's Office

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NOS. 2018-2495 and 2018-
2512
OAL DKT. NO. CSV 07998-19

ISSUED: JULY 21, 2021 (NFA)

Marcello Errigo and James Weston,¹ Sheriff's Officers, Passaic County Sheriff's Department, appeal the bypass and removal of their names from the eligible list for Sheriff's Officer Sergeant (PC1572S) due to unsatisfactory employment records. Exceptions regarding Marcello Errigo were filed on his behalf and exceptions regarding James Weston were filed on behalf of the appointing authority. A reply to exceptions was filed on behalf of James Weston.²

Having considered the ALJ's initial decision and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 21, 2021, adopted the recommendation of the Administrative Law Judge (ALJ) to uphold the bypass and removal of Marcello Errigo from the subject list and reversed in part the recommendation to reverse the bypass and removal of James Weston from the subject list.

DISCUSSION

The appellants in this matter were listed on the Sheriff's Officer Sergeant (PC1572S) eligible list. Both appellants were bypassed for appointment from certifications of the list and ultimately removed from the list. Upon their initial

¹ Official personnel records indicate that Weston retired, effective November 1, 2020.

² The Commission notes that it thoroughly reviewed the submissions of all parties in this matter and found that none warrant any specific discussion as they are either unpersuasive, based on misunderstanding or misapplication of the regulatory framework or not relevant to the Commission's ultimate determination.

appeal to the Commission regarding those actions, the Commission found issues of material fact that could not be resolved on the written record and, thus, granted hearings at the Office of Administrative Law. *See In the Matters of Marcello Errigo and James Weston* (CSC, decided September 20, 2018).

After the hearing, the ALJ made several findings. Regarding whether the appellants were bypassed or removed for improper reasons, the ALJ stated:

With regard to alleged political motivations for the skips and subsequent removal of appellants' names from the list, I **CONCLUDE** that it has not been proven, based solely on the facts in evidence, that the respective skips and list removals were politically motivated. While there is substantial evidence that the Department's actions here were based on political and personal animus against appellants, said evidence is also largely anecdotal, based on innuendo and conjecture. Barring any admission on behalf of the sheriff or member of his "roundtable" advisory staff, it would be impossible to know the exact reason that Sheriff Berdnik and his administration ultimately decided to skip over the appellants for promotion on multiple occasions, and over glowing reviews and recommendations from various supervisors.

After a thorough review of the entire matter, the Commission agrees with the above findings that the appellants have not sustained their burden of proof that their bypasses or removals were based on invidious, improper or illegal motivation, especially in light of the proposed legitimate reason professed, that the appellants had disciplinary histories which led to the selection of other lower-ranked eligible employees.

Regarding the appellants' bypasses and removals based on their respective disciplinary histories, the ALJ concluded that:

Errigo's disciplinary history includes an actual guilty plea and criminal conviction, and is, therefore, substantial enough to constitute a rational basis for Errigo's being bypassed and removed from the promotional list. I further **CONCLUDE** that Weston's disciplinary history is considerably less severe, as it does not include any criminality whatsoever, does not include any recent infractions, and, thus, does not constitute a rational basis for bypass or list removal.

While the Commission agrees with the ALJ regarding the removal of Errigo from the list as his disciplinary history clearly supports removal from the list, for the reasons set forth later in this decision, it agrees that Weston's disciplinary history was not sufficient to remove his name from the list. However, it finds that it was sufficient to bypass his name for appointment.

The ALJ further concludes that the appointing authority violated *N.J.A.C.* 4A:4-4.8(a)3, the "Rule of Three" on certification PL171320 since "Officer Errigo was the number 1 candidate on the list for promotion to sergeant, and Officer Weston was number 2. The County failed to effectuate the promotion of any of the top three candidates. Officers Errigo and Weston were passed over for candidates 5, 6, and 7 in clear violation of the rule of three, which requires that one of the top three candidates be promoted." This finding is incorrect. The Rule of Three only requires that for each appointment, an appointing authority consider the top three ranked eligible candidates for each appointment. As the appellants were removed from the certification, they were not eligible for appointment. Thus, the appointing authority's appointments of the lower-ranked candidates was not a *per se* violation of the Rule of Three. The only open question, which will be resolved later in this decision, is whether there is a Rule of Three violation on the above certification if Weston's name is restored?

The ALJ subsequently finds another Rule of Three violation regarding Weston. Specifically, the ALJ states "Weston is a veteran of the United States Coast Guard, which, as referenced in the above-cited regulation, provides an ever further level of protection regarding promotions off a Civil Service list . . . It is undisputed that Weston was skipped over multiple times, including the 2017 skip at the heart of the instant case, which seems to completely contradict *N.J.A.C.* 4A:4-4.8(a)(3)(ii) as cited above." This finding is in error. Weston was never considered a veteran for civil service examination and selection preference purposes. The Commission cannot ascertain how the ALJ came up with that conclusion as official personnel records clearly indicate Weston's non-veteran status for civil service examination purposes. As such, there is no Rule of Three violation on that basis.

Finally, in crafting a remedy for Weston, the ALJ indicates:

Regarding Officer Weston, I **CONCLUDE** that there is no rational basis for his being bypassed, and that, in light of his veteran status and the pertinent language in *N.J.A.C.* 4A:4-4.8(a)3(ii) as sited (sic) above, Weston should be promoted to Sergeant retroactive to the date of his bypass (December 27, 2017) with full back pay, back benefits, seniority, and incremental steps.

For the reasons set forth below, the Commission rejects the above remedy and instead finds that Weston's name be reflected as bypassed on the PL171320 certification.

The ALJ indicated his belief that "Weston's disciplinary history is considerably less severe [than Errigo's], as it does not include any criminality whatsoever, does not include any recent infractions, and, thus, does not constitute a rational basis for bypass or list removal." While the Commission agrees that

Weston's disciplinary history did not support his removal from the PL171320 certification, it finds his history sufficient to be bypassed for appointment. In this regard, Weston's relevant disciplinary history shows a five working day suspension in December 2014. Generally, while the Commission has determined that minor disciplinary actions do not generally constitute a sufficiently adverse employment record to justify the removal of an eligible's name from a list, it has found that an applicant with a minor disciplinary history could be bypassed by an appointing authority in its discretion under *N.J.A.C. 4A:4-4.8*. It is also noted that this discipline occurred less than three years from when Weston's name was certified on PL171320. Accordingly, the Commission finds that Weston's disciplinary history, while insufficient for removal, was clearly sufficient to bypass his name for appointment.³ What now must be reconciled is whether such a bypass creates a Rule of Three issue.

Certification PL171320 was headed by Errigo, followed by Weston and eight lower-ranked eligibles. Originally, Errigo and Weston were removed, as well as the 4TH and 9TH ranked eligible. The 3RD, 7TH, 8TH and 10TH candidates were appointed and the 5TH and 6TH ranked candidates were bypassed. This disposition was proper as for each appointment, one of the top three interested eligibles was appointed. However, as the Commission has found that Weston could not be removed from the certification, further analysis is necessary. As Weston was not a veteran, he was *not entitled to an appointment*, thus, while the appointment of the 3RD candidate would be permissible, the appointment of the 7TH, 8TH and 10TH candidates would be problematic. In this regard, to appoint those three candidates, Weston, as well as the 5TH and 6TH ranked candidates would all have to be bypassed. As such, those lower-ranked candidates could not be appointed absent a violation of the Rule of Three. In most cases, where a Rule of Three violation is present, the Commission will order the reissuance of the certification and order the appointing authority to properly redispense of the certification. However, the subsequent history of certifications from the list provides reconciliation in this matter and renders such a reissuance unnecessary.

The next certification of the list, PL181192 contained the 5TH and 6TH eligibles from above as the 1ST and 2ND eligibles. It also contained three lower-ranked eligibles. In disposing of that certification, the appointing authority appointed the 1ST, 2ND, 4TH and 5TH candidates and bypassed the 3RD ranked candidate. This disposition was proper as for each appointment, one of the top three interested eligibles was appointed. Thus, as the appointing authority had appointed the 5TH and 6TH ranked candidates on PL171320 on the subsequent certification, it is reasonable to ascribe that it preferred those candidates to

³ In most circumstances, where a list removal is changed to a bypass, and like here, the appointment of the eligible is not mandated based on veterans preference, there is no further remedy that is provided so long as the bypass does not create a Rule of Three issue.

Weston.⁴ In other words, under the Rule of Three, it is clear that the appointing authority, given the option of Weston or the 5TH and 6TH ranked eligibles on PL171320, would have appointed either of those eligibles and bypassed Weston for the legitimate reasons already provided.⁵ Further, given the above, Weston would also be entitled to be added to the PL181192 certification for consideration. However, as only one eligible was bypassed on that certification, he would not be entitled to appointment from that certification and would properly be listed as bypassed for the reasons presented previously.

ORDER

The Civil Service Commission finds that the action of the appointing authority in bypassing and removing Marcello Errigo from the Sheriff's Officer Sergeant (PC1572S) eligible list was justified and dismisses his appeal of those actions. Further, the Civil Service Commission finds that the action of the appointing authority in removing James Weston from the Sheriff's Officer Sergeant (PC1572S) eligible list was not justified and reverses that action. Further, the Commission orders that Weston's name be reflected as bypassed on certifications PL161366,⁶ PL171320 and PL181192.

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 21ST DAY OF JULY, 2021

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

⁴ Indeed, the appointing authority was seeking Weston's removal from the list, while only seeking to bypass the other eligibles. This, as well as its subsequent appointment of those candidates, indicates its clear intention to not promote Weston as compared to those candidates.

⁵ As such, the appointing authority may, in its discretion, request retroactive appointment dates from the PL171320 certification for the 5TH and 6TH ranked candidates. If requested and granted, such dates would be solely for seniority purposes. The Commission also notes that even if it ordered Weston's appointment, he would not be entitled to differential pay. That remedy is only appropriate where it has been proven that the reason for an appointing authority's non-appointment is based on improper motivation.

⁶ Weston was originally bypassed on that certification and that bypass remains valid.

Inquiries
and
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 07998-19
AGENCY DKT. NOS. 2018-2495
& 2018-2512

**IN THE MATTER OF MARCELLO ERRIGO
AND JAMES WESTON, PASSAIC COUNTY
SHERIFF'S DEPARTMENT.**

Lauren Sandy, Esq., for appellants Marcello Errigo and James Weston (Law
Offices of Lauren Sandy, attorneys)

Albert Buglione, Esq., for respondent Passaic County Sheriff's Department
(Buglione, Hutton, & DeYoe, attorneys)

Record Closed: April 13, 2021

Decided: June 16, 2021

BEFORE JUDE-ANTHONY TISCORNIA, ALJ:

STATEMENT OF THE CASE

Appellants, Marcello Errigo and James Weston (appellants or Errigo or Weston), appeal respondent Passaic County Sheriff's Department's (respondent or Department) decision to skip them both for promotion to sergeant. Appellants also appeal the Department's act of subsequently removing both their names from the promotional list for sergeant.

ISSUE

Did the Department have just cause to skip over both appellants for promotion to sergeant, notwithstanding both appellants being placed within the top three on the sergeant list, or was said act arbitrary, capricious, and/or politically motivated? Was the Department's act of removing appellants' names from the promotional list for sergeant arbitrary and capricious?

PROCEDURAL HISTORY

Considering that the case at bar involves two different officers, the undersigned asked the attorneys if either side wished to have the cases heard separately or otherwise bifurcate the hearing. The parties wished for the cases to be heard together. Hearings were conducted on November 12, 2019, December 4, 2019, December 19, 2019, and February 14, 2020. Final submissions were received by the parties on April 13, at which point the record was closed.¹

SUMMARY OF TESTIMONY

Marcello Errigo

Officer Marcello Errigo was hired by the Passaic County Sheriff's Department in 1996 as a correction officer. Errigo transferred to patrol, and became a sheriff's officer in about 2002.

Officer Errigo received several awards and commendations while working for the Department, including, but not limited to, receiving a challenge coin from Passaic County sheriff Richard Berdnik in 2012 for detaining a suspect fleeing the courthouse. Officer

¹ This decision is filed in accordance with Governor Philip Murphy's Executive Order 127 issued April 14, 2020, created by the COVID-19 emergency.

Errigo also received the "Employee of the Month" award in July 2007 for apprehending an armed robber.

Officer Errigo consistently received positive performance evaluations, including during 2017, the year in which he was bypassed for promotion to sergeant and the County filed to remove him from the list of eligible candidates. In 2018, Errigo's supervisor drafted a positive performance evaluation, noting that Errigo exercises good judgement, is extremely reliable, rarely needs supervision, and demonstrates above-average skills. (See P-3.)

Officer Errigo testified to his prior disciplinary history, which largely pertains to a disorderly person's offense that he pled to on or about June 9, 2003, and that was expunged on or about September 6, 2016. Errigo was initially suspended but was ultimately returned to active duty.

Errigo had another, somewhat more minor, disciplinary action in or about 2008, which was resolved in 2010, with Errigo serving a four-day suspension, with any remaining time to be converted to a leave of absence without pay. To his knowledge, Errigo did not forfeit future promotional opportunities in either of the settlements regarding these two disciplinary actions.

Errigo first sat for the sergeant examination sometime in 2012. When Errigo sat for the exam, the County did not file to remove him from the list of eligible candidates based on his prior disciplinary history, nor was he ever told by the County that he would not be promoted because of his disciplinary history.

During the 2013 Passaic County sheriff's race, Errigo was actively involved in supporting the political opponent of the sitting sheriff, Sheriff Berdnik. Officer Errigo attended political functions and was photographed with Frank Feenan, the Republican candidate for sheriff, who was, at the time, running against Berdnik, a Democrat.

Errigo testified that during this time, his cousin, Marco Catania, a sergeant with the Sheriff's Department, was confronted by undersheriff Mario Recinos regarding Errigo's

political alliances. Recinos asked Catania why Errigo was supporting Frank Feenan for sheriff. Recinos indicated to Catania that Errigo would never get promoted if he continued to support political opponents of the sitting sheriff. At the time, Officer Errigo was ranked number 1 on the list of candidates to be promoted to sergeant, but was not promoted off the 2012–2013 list.

Errigo sat for a subsequent sergeant exam in 2015. The County/employer did not attempt to exclude Officer Errigo from sitting for that examination, nor did the employer attempt to remove Officer Errigo from the certified list of eligible candidates for sergeant. At the time, Errigo had heard that the County sheriff advised the president of the Superior Officers Association that he had no intention of skipping anyone on that list.

Officer Errigo was ranked number 2 on the 2015 promotional list, the list that is the subject of the within appeal. Out of the five rounds of promotions made off that list, Officer Errigo was ranked number 2 for the first round of promotions, and number 1 for the subsequent four rounds of promotions.

During the first round of promotions off the 2015 list, Officer Errigo was called in for an interview, which, to Errigo's knowledge, had never been done in the past. In or about early 2016, the County promoted officers ranked number 1 and number 3 and skipped Officer Errigo, who, due to the skip, moved up to number 1.

Around this same time, various sheriff's officers in the courthouse, including Errigo's own supervisor, began calling Errigo by the nickname "skip," a derogatory reference to his being repeatedly skipped on the promotional list. Again, the County never filed to remove Errigo from the list of eligible candidates for sergeant.

On or about November 21, 2016, Administrative Chief McCrary called Officer Errigo into his office and told Errigo that he would be called to headquarters the following day to be advised that Sheriff Berdnik was promoting him to the position of sergeant. The following day, Errigo was summoned to headquarters, only to be informed that he was, yet again, being skipped. Errigo was not informed of the reason for the skip, and no indication was made that he was being skipped due to his disciplinary history.

In 2017, the County of Passaic again made promotional appointments to the position of sergeant off that same list. Errigo was number 1 on that list, but was, again, skipped, notwithstanding the extremely positive performance evaluation Errigo received from his supervisor during this time period. (See P-3.) The instant appeal on behalf of Officer Errigo ensued.

On cross-examination, Errigo testified with greater detail regarding his disciplinary history, specifically, the facts and circumstances surrounding his 2003 disorderly-persons plea and corresponding disciplinary proceedings. Appellant Errigo testified that he was arrested and charged with second-degree official misconduct for failing to report an illegal activity (gambling). Errigo was suspended on June 10, 2003, after being arrested on the criminal charges. Errigo pled guilty to a lesser fourth-degree crime of hindering apprehension, and entered an agreement permitting him to return to work. Errigo also agreed to attend Gamblers Anonymous sessions for a period of not less than twelve months at his own expense.

Errigo then testified to his second disciplinary incident. On April 21, 2008, Errigo was charged with: (i) one count of knowingly and willfully making a false entry or failing to make a required entry in any departmental report or record; (ii) one count of failing to submit a properly written report within a reasonable or prescribed period of time as per regulations; and (iii) one count of an act, action, error or omission resulting in the Department's or the County's exposure to civil litigation. The underlying facts alleged that Errigo "double-dipped," or put in two slips for the same time, one for an off-duty job and one for an official court appearance.

Errigo was found guilty, and was disciplined for conduct unbecoming a public employee, and ultimately received a four-day suspension.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

James N. Weston

Officer Weston testified that was hired by the County of Passaic as a Passaic County sheriff's investigator in 2002 and became a Passaic County sheriff's officer in 2004. During his career with the Sheriff's Department, Officer Weston worked in the Emergency Services Unit and the Detective Bureau, and held the position of union president of the Policemen's Benevolent Association Local 286 several times, dating back to 2008 and including the dates of the bypass, removal, and subsequent appeals.

Prior to working for the Passaic County Sheriff's Department, Officer Weston worked as a police officer in New York City from 1998 to 2000, and as an investigator with the Passaic County Prosecutor's Office from 1990 to 1995. Prior to his career in law enforcement, Officer Weston served in the United States Coast Guard from 1984 to 1988.

As a sheriff's officer, Officer Weston served as a firearms instructor, a PT instructor at the Passaic County Police Academy, and a member of the SWAT Team. Officer Weston testified that at the time of the hearing he was teaching tactical training and was a firearms instructor. Officer Weston testified that he took it upon himself to organize extra training for officers in the courthouse for several months a year for the past three years. He did this on his own time (Saturdays) and did not get paid for his time. The officers that Weston trained on Saturdays submitted a letter to his supervisor, Lt. Jason Barbier, to thank Weston for "organizing and spearheading the training" because those trainings were vital to the professional growth and success of young officers. (See P-9.)

Officer Weston testified that he received several awards and commendations throughout his tenure with the Department, including awards from his time with the SWAT Team, as well as from when he was the lead detective on a noteworthy case concerning two sisters who were sexual-assault victims.

Officer Weston's lieutenant, Jason Barbier, had recommended Weston for employee of the month, but Weston never received the award. Lieutenant Barbier recommended several other employees for employee of the month, and Weston was the only one who did not receive the award upon Barbier's recommendation.

Officer Weston has also attended two supervisor training courses, one with the Passaic County Police Academy and one with the Federal Bureau of Investigation. Weston's captain, Charles Tucker, submitted a letter of recommendation on his behalf. Captain Tucker noted in his letter that Officer Weston is a leader, and that many sheriff's officers seek his advice when performing difficult duties and preparing reports. Captain Tucker also noted that Weston oversaw "training all new Sheriff's Officers assigned to the Passaic County Courthouse Division." (See P-11.)

Officer Weston has always received positive performance evaluations. In his 2017 Performance Evaluation, which is applicable to the time frame relevant to the instant appeal, Officer Weston's evaluation noted that Weston exceeded performance standards. (See P-12; see also P-17.)

Officer Weston had only one disciplinary action during his long tenure with the Passaic County Sheriff's Department, a five-day suspension in 2014. While Officer Weston was assigned to a post in the Passaic Probation Office, a man visiting his probation officer arrived with his pants below his buttocks, exposing his underwear to an older woman and an infant who were sitting in the waiting room. Weston instructed the man to pull up his pants, in light of the children and elderly individual present, at which point the man became aggressive with Officer Weston. The man subsequently accused Weston of using foul language during the interaction, which was the basis for the discipline. This was Weston's sole disciplinary action since being hired in 2002.

Officer Weston first sat for the sergeant exam around 2009. The Department/employer did not file for his removal from the list and did not seek to disqualify him from taking the examination at that time. He was ranked number 2 on the list from 2010 through 2012, but was not promoted.

Officer Weston held the position of union president from January 2009 until about January 2012. As PBA president, Officer Weston often opposed actions of the sheriff. To his understanding, he did this under the purview of protected union activity. As PBA president, Weston also failed to endorse Sheriff Berdnik in an upcoming election. During

his tenure as PBA president, Weston felt that Sheriff Berdnik developed an anti-union animus for Officer Weston. Weston believes that the sheriff continues to retaliate against Weston for not endorsing him, as well as for his union activity as PBA president.

Officer Weston again sat for the sergeant examination in 2012, and again in 2015. In 2016, when the most recent list was certified, Officer Weston was ranked number 6. After the first round of promotions, Officer Weston moved up to the rank of number 4. The County did not seek to remove Officer Weston based on the aforementioned 2014 disciplinary incident, or for any other reason.

In or about late November or early December 2016, Officer Weston was ranked number 2 on the promotional list for sergeant. Weston was under the impression at the time that Sheriff Berdnik advised the president of the Superior Officers Association that he had no intention of skipping anyone on the list.

On November 21, 2016, Lieutenant Barbier called officers Weston, Errigo, and Shinn to return to the courthouse after training to meet with Administrative Chief McCrary, who "had news of promotions." Administrative Chief McCrary called Officer Weston into his office and advised Weston that he would be called to headquarters the following day to be advised that the sheriff was promoting him to the position of sergeant. Chief McCrary hugged and congratulated Officer Weston. He told Weston to act surprised the following day, but to tell his family and celebrate his accomplishment.

After receiving the news of his promotion, Officer Weston went to the cemetery to visit the grave of his deceased father to dwell on the news of his promotion. He then went to his mother's house to advise her that he was being promoted the following day. Officer Weston then went home and told his wife. The following day, Weston was called into the sheriff's office, but was informed that he was not being promoted.

In 2017, the County of Passaic again made promotional appointments to the position of sergeant off that same list. Officer Weston was number 2 on that list, but was, again, skipped, notwithstanding the extremely positive performance evaluation Weston had received from his supervisor during this time period. (See P-6; P-12.) The instant

appeal on behalf of Officer Weston ensued. Respondent Passaic County Sheriff's Department removed Weston's name from the sergeant list the day after the appeal was filed.

On cross-examination, Weston testified that he believes that he has been retaliated against by the current sheriff's administration since 2010. At that time, he received an assignment that lasted twenty-eight months, and was never once relieved for a lunch break. He cited this as another instance of retaliation. When asked why he did not formally report such alleged acts of retaliation, Weston testified that he felt such reporting would be futile, as any formal report would be passed up the same chain of command that was retaliating against him in the first place, and, thus, the atmosphere of the Department was not conducive to such reporting.

Weston stated that he did not speak to Chief McCrary for about a month and a half after the 2016 skip. When he did finally speak to McCrary, McCrary apologized to Weston.

Weston also testified as to his disciplinary history, including a 1990 incident wherein Weston, while employed as an investigator for Somerset County, was observed stealing a candy bar from a recruit at the Somerset County Police Academy. Weston further testified that he knows of other officers that have been promoted notwithstanding those officers also having a disciplinary history.

Officer Weston then testified regarding the disciplinary histories of other officers who were promoted over him, including one officer who was arrested for a domestic-violence incident, another who shot himself with someone else's gun, and a third who failed to effectuate an arrest and improperly handled evidence.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Michael Shinn

Sgt. Michael Shinn has been employed with the Passaic County Sheriff's Department since July 2003. Shinn testified that on November 21, 2016, he, James Weston, and Marcello Errigo were together at a training session when all three officers received word that they should go the Passaic County Courthouse to meet with Chief McCrary at his office. Shinn testified that it was his belief at the time that the three men were being called to meet with McCrary to be advised of their promotions. The three officers first met with (then Sergeant) Barbier and were then each called into McCrary's office one by one. When Shinn entered McCrary's office, he was congratulated by McCrary, who informed Shinn that he, along with Errigo and Weston, were to be promoted to sergeant. Shinn was then informed by McCrary that the promotions were not official yet, but they would be made official the following day, so he could tell his family.

On November 22, 2016, Shinn traveled to headquarters, along with James Weston, in order to be officially promoted by the Passaic County sheriff. When at headquarters, Errigo was the first to go in to meet with the sheriff. Shinn testified that a few minutes later, Errigo emerged from the sheriff's office, visibly upset. Errigo stated that he had been skipped, and left the building. Weston then walked into the sheriff's office. He, too, emerged a few minutes later, visibly upset, and indicated to Shinn that he had been skipped, as well. Shinn then entered the sheriff's office, himself, where he was greeted by supervisors and administrative staff, and then promoted to sergeant by the sheriff.

On cross-examination, Shinn testified that he had no prior disciplinary history, arrests, or issues with any other law-enforcement agency.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Jason Barbier

Lt. Jason Barbier has been employed with the Passaic County Sheriff's Department since 1999. Barbier testified that on November 21, 2016, he called officers Errigo, Weston, and Shinn, informing them that they should come to the courthouse, as he had news of their promotions. Upon their arrival, Barbier informed the officers that he believed they were going to be promoted, and they were being summoned to Chief McCrary's office to be informed of their promotions. The three officers then met with Chief McCrary, and upon leaving McCrary's office, the officers confirmed to Barbier that they were all informed that they were going to be promoted to sergeant. Barbier confirmed that, to the contrary, only Shinn was promoted to sergeant, while Errigo and Weston were skipped.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

William McCrary

Sgt. William McCrary was hired by the Passaic County Sheriff's Department as a sheriff's officer in 2003. He currently holds the rank of sergeant, but at the time the incidents at issue took place (2016), his title was "administrative chief." McCrary recalled having a conversation with Errigo and Weston on or around November 21, 2016, but he could not recall what he said to them.

McCrary recalls being the target of an Internal Affairs investigation in 2018, but he could not remember being formally advised as to why he was the target of that investigation. McCrary did recall being interviewed by Captain Adamo and Sergeant Aponte regarding the Internal Affairs investigation, and he remembered that they questioned him about the conversation he had regarding promotions with Errigo and Weston on or about November 21, 2016. McCrary informed Adamo and Aponte at the time of the interview that he could not recall what he said during the November 21, 2016, conversation with Errigo and Weston.

McCrary testified that he was present for a roundtable discussion regarding promotions in 2016. He remembered the discussion being attended by undersheriffs Dennis, Recinos, and Lovely, Chief Lazzara, Warden Larico, Deputy Warden Dixon, and Business Administrator Giardina. McCrary testified that no one at the meeting was there to make a decision, but they were simply there to make recommendations to the sheriff. McCrary recommended Weston and Errigo for promotions at that meeting. McCrary recalled being under the impression as he left the meeting that all those who were being summoned to headquarters the following day, including Errigo and Weston, were going to be promoted. McCrary further testified that, when Errigo and Weston were summoned to the headquarters the following day, they were informed that they were going to be skipped. McCrary was present, along with Recinos, Lovely, and Giardina, when Errigo and Weston were informed that they were being skipped.

McCrary then testified that on another occasion when he was serving as administrative chief, Lieutenant Barbier gave him a recommendation for Officer Weston's being named employee of the month. McCrary then sent this recommendation up the chain of command to Undersheriff Lovely. McCrary expressed his agreement with Weston's nomination to Lovely. McCrary subsequently received a call informing him that Weston's nomination to employee of the month had been denied. McCrary could not recall any other instance when a recommendation for employee of the month had been passed along the chain of command and not come to fruition.

On cross-examination, McCrary testified that there were actually two meetings regarding potential candidates for promotion, one on November 21, 2016, and another the following morning. Captain Rosenthal of Internal Affairs attended the second meeting, and he discussed certain candidates' personnel and/or Internal Affairs files. After said discussion, McCrary's decision to recommend Errigo and Weston for promotion did not change, but the position of other members of the panel did change.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Marco Catania

Marco Catania is the retired commander of the Narcotics Division in the Passaic County Sheriff's Office. He is also a cousin of appellant Errigo. Catania testified that he was approached by the director of narcotics, Mario Recinos, who showed him a picture of a dinner for Frank Feenan, with appellant Errigo in attendance. Frank Feenan was the Republican candidate running against Berdnik for Passaic County sheriff at the time. Catania testified that Recinos then uttered the following: "what's a [sic] matter with your cousin. He's not on the right team." Catania testified that Recinos then implied that Errigo's backing of the Feenan would hinder Errigo's ability receive a promotion.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Gary Giardina

Gary Giardina is the retired chief of the Clifton Police Department, who currently serves in the appointed position of business administrator for the Passaic County Sheriff's Office. This is considered a civilian position. Giardina testified on behalf of the Department. Giardina worked with Sheriff Berdnik as members of the Clifton Police Department, and they have known each other for thirty-seven years.

Giardina has never seen Berdnik make a decision based on political animosity towards anyone, nor has he ever witnessed a decision being made by Berdnik based upon union animosity or someone's affiliation with a union. Giardina testified that Berdnik, when making a decision, looks at all angles of a situation, and he will generally call upon other individuals for input. Based upon what he has witnessed, Giardina considers Berdnik fair and balanced when making decisions.

Giardina testified that the sheriff struggled with the decision regarding Errigo's and Weston's promotions overnight, and ultimately decided on the morning of November 22,

2016, that he could not promote appellants. Giardina testified that Berdnik told him that he could not, in good conscience, promote them, for the good of the organization.

On cross-examination, Giardina affirmed that the sheriff took no action to remove either appellant from the 2016 list of eligible candidates. Removal from the list, or ineligibility to take the sergeant examination, was not discussed at the above-referenced roundtable promotional meeting. He further affirmed that a candidate's arrest does not disqualify said candidate from promotion per se, though it does raise a red flag.

On November 22, 2016, Giardina met with Officer Weston and advised him that he was "not being considered for a promotion at this time." The following year, Weston was skipped again, but was not called to headquarters and advised that he was being skipped. No one had previously or subsequently been called to headquarters to be advised that they were being bypassed. Giardina did not know why Weston was bypassed for a promotion again in 2017 (off the same list as the 2016 skip).

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Joseph Dennis

Joseph Dennis currently serves an undersheriff for the Passaic County Sheriff's Office, a position he has held since 2011. He testified on behalf of respondent Passaic County. Dennis testified that Sheriff Berdnik did not promote Errigo and Weston because the sheriff believed there were better candidates for the job. In his experience, Dennis has not known the sheriff to be malicious. The sheriff never indicated to him that he would never promote Errigo or Weston, nor did the sheriff ever make any disparaging remark about either Errigo or Weston to him. Dennis could not remember any other instance wherein a candidate had been bypassed for promotion. Dennis further testified that promoting Weston or Errigo would not have been in the County's best interests.

On cross-examination, Dennis stated that he vaguely remembers meeting with Errigo shortly after Errigo's being skipped, but he could not remember why they met or the substance of the conversation. Likewise, Dennis stated that he also vaguely remembers meeting with Weston shortly after Weston's being skipped, but could not remember why they met or the substance of the conversation.

When questioned further on cross-examination about other sergeants who have had disciplinary history or even criminal proceedings in their past, all of whom were promoted over Weston and Errigo, Dennis indicated that each potential candidate's disciplinary and/or criminal history would certainly be considered, but he noted that any such criminal/disciplinary incidents would be viewed in light of the surrounding circumstances. When asked more pointedly whether an arrest for domestic violence would be a factor he would consider when making a recommendation for a promotion, Dennis testified that it would depend on what the outcome of the arrest was, noting that there is a difference between being arrested for something and convicted for something.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Michael Tolerico

Michael Tolerico has been employed with the Passaic County Sheriff's Office for twenty-six years. He currently serves as warden for the Passaic County Jail, a position he has held for ten years. He is a member of the personnel committee, which reviews pending promotions, including those of Errigo and Weston.

Tolerico testified that he has never seen the sheriff take a position against an individual because of their position in a union, nor has he ever been instructed by the sheriff to act in a certain way against a particular union member or union advocate. Tolerico believes he did sit on the committee that reviewed Errigo's and Weston's pending promotions, but he does not recall exact details of the meeting. He only recalls that the two appellants were called into a separate room, where they were advised that they were

not being promoted. He testified that the decision to promote lies solely with the sheriff, and added that the decision to promote or bypass is based on test scores and disciplinary history.

On cross-examination, Tolerico was questioned whether certain disciplinary infractions would preclude a candidate's promotion, to which Tolerico responded that each case would depend on surrounding circumstances. Tolerico further testified that only the sheriff has the authority to tell Errigo, Weston, or any officer about the official status of their promotion. Tolerico stated that when someone has been skipped, he just tells the individual that he or she wasn't the best candidate, but no specific reason is articulated as to why the officer was not promoted. Warden Tolerico noted that when individuals are promoted, there is a physical list of officers promoted, and any candidate being skipped or not promoted does not appear on that list. Tolerico knows of no other formal writing or document generated by the Department informing a candidate of a skip other than their name being absent from the aforementioned list.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

Jeffrey Camp

Jeffrey Camp has worked with Sheriff Berdnik at the Clifton Police Department, and as director of operations at the Passaic County Sheriff's Department from 2014 to 2018. He has never seen the sheriff be malicious towards someone who has a different political opinion. Camp noted that he has observed the sheriff hire and promote the son of a political advisory.

Camp testified that he was at a meeting in 2016 or thereabouts wherein both appellants' work and disciplinary histories were discussed. He further testified that his recommendation was not to skip the officers, but to remove them both from the list entirely.

Director Camp stated that a letter was subsequently sent to Civil Service to remove appellants, and that they ultimately were removed from the list. He testified that Civil Service requires the reason for the removal, and that the prior bad history of both officers was the reason given to Civil Service for the removal.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

George Rosenthal

Chief George Rosenthal is employed by the Passaic County Sheriff's Department. He has been employed as a member of law enforcement since 1997. He is on the personnel committee, which assists in making decisions regarding promotions. The sheriff has the ultimate appointing authority. Rosenthal has never seen Sheriff Berdnik make a decision based on political animosity or revenge, never seen the sheriff use his office for revenge against someone he didn't like, and never seen the sheriff display animosity towards a union member or representative.

Rosenthal testified that Internal Affairs would do a review of a candidate and bring to light any issues the sheriff needs to be made aware. The administration would then meet and see if there are any other issues that need to be discussed. He added that the sheriff has promoted his political rivals, and even his political rivals' sons, in the past.

Chief Rosenthal testified that Civil Service gives a list of candidates based upon a knowledge-based test, and then the department heads provide other information. Chief Rosenthal said the sheriff does not mix business and personal issues, and he has never seen the sheriff have any personal animosity towards others.

Chief Rosenthal stated that the sheriff has the final say in making the decision, and that an officer's history can be an indicator as to the type of supervisor they would be. Rosenthal did not recall seeing a specific document indicating that Errigo and Weston would be promoted in November 2016.

Chief Rosenthal recalled a meeting on November 21, 2016. He stated that there was a review of Internal Affairs records for both Weston and Errigo. At the meeting, they went through the PCSO index system, which would give a list of file numbers associated with the officers, so would pull the files and check them.

Chief Rosenthal further testified that an officer is obligated to file a use-of-force report, as mandated by the Attorney General, whenever force is used. Chief Rosenthal stated that Weston was involved with an incident while on duty wherein a use-of-force report, in his opinion, should have been filed by Weston, but was not. Chief McCrary got an internal report through the chain of command, which is how they learned of the incident. Chief McCrary then forwarded that report to Internal Affairs.

Rosenthal testified that he recalls two major disciplinary incidents in Errigo's file: one for double dipping (working off duty and putting in for overtime), and another relating to gambling. Chief Rosenthal stated that double dipping is considered a very significant infraction, noting that he knows someone who had to forfeit his job because of it. Rosenthal then recalled two disciplinary infractions concerning Weston: one involving an allegation that Weston was stealing lunches or lunch items while at the academy, and another relating to Weston allegedly stealing change from a change jar while employed at another law-enforcement agency.

Chief Rosenthal stated that there was a meeting on November 22, 2016, wherein it was discussed that Errigo and Weston should not be promoted. Rosenthal didn't speak to anyone else about the decision to skip them for the next six months. Rosenthal added that he remembers there being an issue with Weston not reporting his past disciplinary history when submitting his application to the Passaic County Sheriff's Office. Rosenthal added that candidates with better employment histories were promoted over Weston and Errigo, and that the decision not to promote appellants was based on the aforementioned work histories.

Chief Rosenthal agrees with Sheriff Berdnik's decision to request the removal of appellants' names from the sergeant list, noting that he has not seen people with

backgrounds similar to Weston and Errigo get promoted, and adding that the policy of Sheriff's Office is to get the best possible candidate.

Rosenthal testified that even though Errigo has had his criminal history expunged, any such criminal background may still be considered for purposes of law-enforcement promotion. Rosenthal stated that his decision not to promote appellants in 2017 was based on the same disciplinary/background issues contemplated when he decided against promoting them in 2016.

After hearing the testimony of the witness, reviewing the substance thereof, and considering the amount of detail and the accuracy of recall, and having viewed the witness' general demeanor at the hearing, I determine the witness to be credible.

FINDINGS OF FACT

Errigo and Weston took the promotional examination for Sheriff's Office sergeant. Both candidates achieved passing scores, with Errigo initially ranking fourth and Weston initially ranking eighth on the list, which was promulgated on September 17, 2015, and expired on September 16, 2018. Weston is a veteran of the United States Coast Guard. Certification of the aforementioned list was issued on February 5, 2016, containing the names of five eligible candidates. The first ranked eligible was appointed off that list, with the second and third being removed from the list. The fourth ranked eligible on the list, Errigo, was bypassed (skipped), and the fifth ranked eligible was then appointed. Thereafter, certification of the revised list (revised due to appointments having been made as noted above) occurred on November 17, 2016. Errigo was now ranked number 1 on the list, and Weston was now ranked number 4.

On or about December 27, 2017, the County of Passaic made promotional appointments to the position of sergeant off the above-referenced list. Officer Errigo was number 1, Officer Weston (who is a veteran) was number 2, and administrative chief William McCrary was number 3. (See P-6.) The County promoted Administrative Chief McCrary to sergeant (skipping over Errigo and Weston), at which point the list was: (1) Officer Errigo; (2) Officer Weston; (3) Officer Nicholas Morganarcher; and (4) Officer

Jose Cartagena. (See P-6.) The County subsequently made another round of promotions off the same list, skipping the top four eligible candidates (including the appellants) and promoting candidates ranked numbers 5, 6, and 7 (officers Lincoln, Aymat, and Vargas, respectively) to the position of sergeant.

Both Errigo and Weston have disciplinary infractions in their respective histories with the Department. At no time were appellants Errigo and Weston ever notified by the Department that said infractions would preclude either officer from sitting for an exam or from ultimately achieving a promotion. At no time was either officer instructed not to sit for an exam. Both appellants were ranked in the top three positions on the sergeant list at the heart of this appeal, and both officers were skipped. Neither officer received any written notice or explanation of their being skipped at any time before or after their being skipped, up until the filing of the instant appeal. The Department removed the appellants' names shortly after the instant appeals were filed by appellants.

Standard of Review

The Civil Service Commission (Commission) has broad powers to determine merit and fitness in connection with appointments and promotions. Malone v. Fender, 80 N.J. 129 (1979); State Troopers Fraternal Ass'n, Inc. v. State, 115 N.J. Super. 503 (Ch. Div. 1971), aff'd per curiam, 119 N.J. Super. 375 (App. Div. 1972), aff'd per curiam, 62 N.J. 302 (1973). It has full authority to inquire into the basis for appointments and promotions in the civil service of the State and of local jurisdictions. Malone v. Fender, 80 N.J. 129.

When applying the merit and fitness principle in reviewing an appointing authority's decision to skip over a given candidate, the Commission must ascertain whether the appointing authority exercised discretion arbitrarily or otherwise acted improperly. See Mason v. Civil Serv. Comm'n, 51 N.J. 115, 125–28 (1968); see also Walsh v. Civil Serv. Dep't, 32 N.J. Super. 39, 43–44 (App. Div. 1954), certif. granted, 17 N.J. 182 (1955) (subsequently dismissed). This broad authority includes the right to inquire into the good faith of governmental conduct directly affecting civil-service employees. See, e.g., Cunningham v. Civil Serv. Dep't, 69 N.J. 13, 18 (1975) (alleged malicious plan to demote employee); Burlington Cty. Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579, 583–84

(1970) (asserted unfair labor practices in dismissal of employee for organizational work for public employees union); Weaver v. Civil Serv. Dep't, 6 N.J. 553, 558–59 (1951) (dismissal because of the employee's political opinions and affiliations); Newark v. Civil Serv. Comm'n, 112 N.J.L. 571, 574–75 (Sup. Ct. 1934), aff'd per curiam, 114 N.J.L. 185 (E. & A. 1935) (a breach of good faith to circumvent statutory procedure when removing an employee); see also McGarrity v. Civil Serv. Dep't, 140 N.J. Super. 536, 540–41 (App. Div. 1975), certif. denied, 70 N.J. 152, 153 (1976) (alleged discriminatory grading of civil-service examination); Essex Cty. Prosecutor's Detectives & Investigators Ass'n v. Hudson Bd. of Freeholders, 130 N.J. Super. 30, 46–47 (1974) (alleged political discrimination, personal favoritism, and arbitrary infringement of rights are proper foci for Civil Service Commission examination). The concepts of bad faith or arbitrariness include improper motives on the part of a government employer reflecting bias against public-employee organizations. See Burlington Cty. Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579.

In the case at bar, appellants Errigo and Weston assert that they were skipped due to animus held against them by the Department, specifically by Sheriff Bedrink, and said skips were, thus, retaliatory. The Department, however, maintains that appellants were skipped due to their respective disciplinary histories. In cases of this nature, where dual motives are asserted for an employer's actions, an analysis of the competing justifications must be made to ascertain the actual reason underlying the Department's actions. See Jamison v. Rockaway Twp. Board of Educ., 242 N.J. Super. 436 (App. Div. 1990) (the initial burden rests on the complainant to establish a prima facie case of retaliation, at which point the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the decision).

Appellants appeal two specific actions of the employer/Department: 1) being bypassed, or skipped, for promotion; and 2) being subsequently removed from the 2016–2017 sergeant list altogether. With regard to the skip, Errigo and Weston do not only assert political retaliation, but also assert that the Department abused its discretion when it skipped over each of them for promotion to sergeant, especially when considering each candidate's high placement (within the top three) on the 2016–2017 list of candidates for sergeant. This abuse of discretion, they argue, coupled with the retaliatory motive behind the skips, renders the Department's actions here arbitrary, capricious, and in bad faith.

With regard to alleged political motivations for the skips and subsequent removal of appellants' names from the list, I **CONCLUDE** that it has not been proven, based solely on the facts in evidence, that the respective skips and list removals were politically motivated. While there is substantial evidence that the Department's actions here were based on political and personal animus against appellants, said evidence is also largely anecdotal, based on innuendo and conjecture. Barring any admission on behalf of the sheriff or member of his "roundtable" advisory staff, it would be impossible to know the exact reason that Sheriff Berdnik and his administration ultimately decided to skip over the appellants for promotion on multiple occasions, and over glowing reviews and recommendations from various supervisors.

Further, regarding their respective disciplinary histories, I **CONCLUDE** that Errigo's disciplinary history includes an actual guilty plea and criminal conviction, and is, therefore, substantial enough to constitute a rational basis for Errigo's being bypassed and removed from the promotional list. I further **CONCLUDE** that Weston's disciplinary history is considerably less severe, as it does not include any criminality whatsoever, does not include any recent infractions, and, thus, does not constitute a rational basis for bypass or list removal.

Bypass

The Department insists that both candidates were denied promotion due to their respective disciplinary histories. The Department points to the broad discretion of the appointing authority when bypassing a candidate, relying, in its brief, on the seminal case of In re Crowley, 193 N.J. Super. 197, 214 (App. Div. 1984) (the appointing authority can bypass a candidate for any legitimate reason based on merit). In Crowley, however, the candidate up for promotion (a correction officer), who had been skipped multiple times for promotion, received written notice from the appointing authority, officially notifying the candidate of the bypass (skip):

Appellant was notified on June 12, 1978 by the Chief of the Bureau of Personnel, Department of Corrections, that he had

not been appointed to the position because “[i]ndividuals ranking higher on the certification and provisional incumbents of the position have been appointed and there are no additional vacancies remaining in the location(s) [in] which you have indicated an interest.”

The second certification to Clifton was issued on August 9, 1979. . . . Appellant received written notification on August 20, 1979 from the Acting Chief of the Bureau of Parole that he had not been appointed to the position.

[In re Crowley, 193 N.J. Super. at 201.]

Neither Errigo nor Weston received any notice explaining why they were skipped at any time prior to the filing of the instant appeal: “In reviewing an agency decision to determine whether it is supported by substantial credible evidence and is not arbitrary, unreasonable or capricious, we must have a clear statement from the administrative agency as to the basis for its decision.” Id. at 214 (citing St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 29–30 (App. Div. 1977)). In the case at bar, a clear, articulable reason for the 2017 skip of both Weston and Errigo was only first provided by the Department upon receipt of the instant appeal, well after both appellants were skipped. I **CONCLUDE** that, while said lack of notice tends to show that the Department’s decision to skip over Errigo and Weston was arbitrary and capricious, said lack of notice does not definitively prove same, and thus, the underlying bypass shall not be deemed arbitrary and capricious based solely on the lack of notice.

The Rule of Three

N.J.S.A. 11A:4-8, commonly referred to as the “rule of three,” permits an appointing authority to select from the top three interested eligible candidates to fill a vacancy:

The commission shall certify the three eligibles who have received the highest ranking on an open competitive or promotional list against the first provisional or vacancy. For each additional provisional or vacancy against whom a certification is issued at that time, the commission shall certify

the next ranked eligible. If more than one eligible has the same score, the tie shall not be broken and they shall have the same rank. If three or more eligibles can be certified as the result of the ranking without resorting to all three highest scores, only those eligibles shall be so certified.

A certification that contains the names of at least three interested eligibles shall be complete and a regular appointment shall be made from among those eligibles. An eligible on an incomplete list shall be entitled to a provisional appointment if a permanent appointment is not made.

Eligibles on any type of reemployment list shall be certified and appointed in the order of their ranking and the certification shall not be considered incomplete.

Moreover, civil-service promotions from an open competitive examination must be effectuated in conjunction with the rule of three. See N.J.A.C. 4A:4-4.8, which states in pertinent part:

(a) Upon receipt of a certification, an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

.....

3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:

i. Disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list;

ii. If the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed;

On or about December 27, 2017, the County of Passaic made promotional appointments to the position of sergeant off a certified list. Officer Errigo was number 1, Officer Weston (who is a military veteran) was number 2, and Administrative Chief McCrary was number 3. (See P-6.) The County promoted Administrative Chief McCrary to sergeant (skipping over Errigo and Weston), at which point the list was: (1) Officer

Errigo; (2) Officer Weston; (3) Officer Nicholas Morganarcher; and (4) Officer Jose Cartagena. (See P-6.) The County subsequently made another round of promotions off the same list, skipping the top four eligible candidates (including the appellants) and promoting candidates ranked numbers 5, 6, and 7 (officers Lincoln, Aymat, and Vargas, respectively) to the position of sergeant. In the within appeal, Officer Errigo was the number 1 candidate on the list for promotion to sergeant, and Officer Weston was number 2. The County failed to effectuate the promotion of any of the top three candidates. Officers Errigo and Weston were passed over for candidates 5, 6, and 7 in clear violation of the rule of three, which requires that one of the top three candidates be promoted. Based on the foregoing, I **CONCLUDE** that the Department violated the above Administrative Code provision, colloquially referred to as the "rule of three," when it failed to select one of the top three candidates, including Errigo and Weston, for promotion to Sargent.

Weston's Veteran Status

Weston is a veteran of the United States Coast Guard, which, as referenced in the above-cited regulation, provides an ever further level of protection regarding promotions off a Civil Service list. The Department insists that its decision to skip Weston was based on his disciplinary history, and is therefore based on merit, and, thus, not arbitrary or capricious. It is undisputed that Weston was skipped over multiple times, including the 2017 skip at the heart of the instant case, which seems to completely contradict N.J.A.C. 4A:4-4.8(a)(3)(ii) as cited above. Notwithstanding the Department's argument, which focuses on Weston's disciplinary history generally, the Department fails to articulate how it is able to overcome the above-referenced regulatory provisions regarding preference for military veterans. I, therefore, **CONCLUDE** that, with regard to the bypass of Officer Weston, the Department has doubly violated both the letter and spirit of N.J.A.C. 4A:4-4.8(a)(3)(ii).

CONCLUSIONS

Based on the foregoing, I **CONCLUDE** that the "rule of three" does not require that the candidate at the top of the list, in this case Errigo, be promoted, only that one of the

top three candidates be promoted. Thus, if a rational basis exists to skip over one of the top three candidates, said skip may be properly effectuated by the appointing authority. I further **CONCLUDE** that Errigo's disciplinary history, which includes a guilty plea and corresponding criminal conviction, is substantial enough to constitute a rational basis for Errigo's being bypassed, and thus, said skip/bypass should be upheld.

Regarding Officer Weston, I **CONCLUDE** that there is no rational basis for his being bypassed, and that, in light of his veteran status and the pertinent language in N.J.A.C. 4A:4-4.89(a)3(ii) as cited above, Weston should be promoted to Sergeant retroactive to the date of his bypass (December 27, 2017) with full back pay, back benefits, seniority, and incremental steps.

Further, based on the forgoing, I **CONCLUDE** that Errigo's removal from the promotional list should be upheld, while that of Weston should be rescinded as there appears to be no rational basis for same.

ORDER

Based upon the foregoing, it is **ORDERED** that the forgoing appeal is **DENIED** in part and **GRANTED** in part, and that Officer Errigo's bypass and list removal be, and hereby is, upheld, and that Officer Weston's bypass and list removal be, and hereby is, overturned. It is further **ORDERED** that Weston be promoted to Sergeant, retroactive to the date of his bypass, (December 27, 2017) with full back pay, back benefits, seniority, and incremental steps.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 16, 2021

DATE



JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

6/16/21

Date Mailed to Parties:

6/16/21

ld

APPENDIX

LIST OF WITNESSES

For Appellants:

Marcello Errigo
James N. Weston
Michael Shinn
Jason Barbier
William McCrary
Marco Catania

For Respondent:

Gary Giardina
Joseph Dennis
Michael Tolerico
Jeffrey Camp
George Rosenthal

LIST OF EXHIBITS IN EVIDENCE

For Appellants:

- P-1 Errigo Challenge Coin
- P-2 Errigo Employee of the Month Award July 2007
- P-3 Errigo Performance Evaluation 2018
- P-4 Errigo Expungement Order June 15, 2016
- P-5 Affidavit of Rosemarie Errigo
- P-6 Certification of Eligibles for Appointment
- P-7 Errigo Bypass Appeal - Stamped Received
- P-8 (CD) Internal Affairs Interview of Errigo
- P-9 Letter to Lieutenant Jason Barbier re: Weston Volunteering Saturday Range Trainings

- P-10 Weston Certificate of Completion of 6 Day Course in Supervision of Police Personnel
- P-11 Letter of Recommendation of Weston for position of Sergeant from Captain Charles Tucker
- P-12 Weston Performance Evaluation
- P-13 Affidavit of Debra Weston
- P-14 Weston Bypass Appeal - Stamped Received
- P-15 (CD) Internal Affairs Interview of Weston
- P-16 Affidavit of Sergeant Michael Shinn
- P-17 Affidavit of Lieutenant Jason Barbier
- P-18 (CD) Internal Affairs Interview of Sergeant William McCrary

For Respondent:

- R-1 Exhibits marked as (D-1) Disciplinary Proceedings for Errigo
- R-2 Exhibits marked as (D-2) Disciplinary Proceedings for Weston