



**STATE OF NEW JERSEY**

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

In the Matter of Dean Testa, Police  
Sergeant (PM0861V), Rockaway  
Township

Bypass Appeal

CSC Docket No. 2021-830

**ISSUED: SEPTEMBER 7, 2021 (ABR)**

Dean Testa, represented by Robert K. Chewning, Esq. appeals the bypass of his name on the Police Sergeant (PM0861V), Rockaway Township (Rockaway) eligible list.

By way of background, the subject examination was announced with a closing date of July 21, 2017. The subject eligible list, containing 16 names, including the appellant as the fourth ranked eligible, promulgated on May 24, 2018 and expires on May 23, 2022.<sup>1</sup> Certification PL200810 was issued on September 11, 2020 containing the names of ten eligibles, including the appellant, a non-veteran, in the first listed position. In disposing of the certification, the appointing authority bypassed the appellant’s name and appointed Michael Baeder, the eligible in the second position.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority’s decision to bypass him was arbitrary, capricious, and done with an invidious purpose. In this regard, he avers that this represents the third time the appointing authority bypassed his name on a certification from the subject eligible list<sup>2</sup> and that this current bypass was part of a

<sup>1</sup> The eligible list was originally set to expire on May 23, 2021, but was extended for one year.

<sup>2</sup> The appellant’s name was previously certified to the appointing authority from the subject eligible list on August 9, 2018 (PL181142) and December 4, 2018 (PL181541). With the disposition of the December 4, 2018 certification, the appellant appealed his bypass to the Commission, asserting that his bypass was retaliatory, as evidenced, in part, by the fact that the appointing authority had never previously utilized the “Rule of Three.” The Commission denied his appeal, finding that the

pattern and practice of bad faith and retaliation that the appointing authority had subjected him to throughout his employment. He contends that based upon his merits, including his 17 years of service and experiences like serving as an AR-15 instructor, he should have been appointed to the title of Police Sergeant instead of Baeder.

In response, the appointing authority, represented by Thomas N. Ryan, Esq., avers that the appellant's bypass was consistent with the "Rule of Three." The appointing authority submits a certification from Michael Puzio, Mayor of Rockaway, who advises that Baeder was selected because he had more experience and education than the appellant. Specifically, Mayor Puzio states that the totality of Baeder's experience, additional specialized training and education, provided him with valuable insights into situations and investigations and made him the best possible candidate to fill the subject vacancy in the title of Police Sergeant. In particular, Mayor Puzio cites Baeder's experience in Rockaway's Traffic Bureau, experience as a dispatcher, Associate's Degree in Criminal Justice, service with the Honor Guard, and participation in the Police Unity Tour as factors in his selection for appointment. Finally, the appointing authority contends that the appellant has not provided any evidence to show that his bypass was arbitrary, capricious or done with an invidious purpose.

In reply, the appellant contends that a significant number of merit-based considerations demonstrate that he should have received the subject appointment rather than Baeder and that the appointing authority's explanation for its selection of Baeder fail to establish legitimate reasons for bypassing him. In this regard, the appellant submits that when the subject eligible list was issued, he was ranked fourth and Baeder was ranked seventh. He also states that while he was never assigned to the Traffic Bureau or the Honor Guard, he assisted detectives with several investigations, including an initiative to catch criminals responsible for automated teller machine thefts. The appellant further contends that his exemplary service in the Patrol Division, and numerous commendations, certifications and awards also supported his advancement to the title of Police Sergeant. He also maintains that he has an exemplary service record and has never received an "unacceptable" ranking for any criteria on which he has been graded as a Police Officer. He also claims that Rockaway's Chief of Police recommended that this promotion be based solely on who ranked the highest on the eligible list, *i.e.*, the appellant. The appellant argues that while Baeder's service in the Honor Guard and Police Unity Tour were noble, neither establishes that Baeder was the better candidate. He further contends that the true reason for Baeder's selection is that Baeder's father-in-law serves as a councilman in Rockaway. In support of this

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appellant failed to establish a prima facie case of retaliation and observing that even if the appellant's claim that the appointing authority had never previously utilized the "Rule of Three" was true, such discretion was not a "use it or lose it" right. *See In the Matter of Dean Testa* (CSC, decided October 23, 2019); *aff'd In the Matter of Dean Testa*, Docket No. A-1454-19 (App. Div. May 3, 2021).

claim, the appellant alleges that the budget plan that the appointing authority prepared in 2020 evidences that it intended to promote Baeder many months prior to the December 2020 appointment date.<sup>3</sup> The appellant also maintains that Baeder was the first person that the appointing authority did not subject to a psychological evaluation prior to promotion, which evidences its clear intent to promote Baeder. Moreover, the appellant maintains that prior to his bypasses, the appointing authority had never previously utilized the “Rule of Three.”<sup>4</sup> Accordingly, he contends that the bypass at issue was inconsistent with the merit-based considerations, and contrary to New Jersey law and the intent of the Legislature. Therefore, he argues that he should be promoted to the title of Police Sergeant and be awarded back pay, seniority, attorney’s fees and all other equitable relief. The appellant asserts that if the Commission does not grant his requested relief, the appointing authority’s bad faith will continue with future certifications. The appellant also submits a certification in support of the foregoing claims.

The appellant argues that, in the alternative, this matter should be referred to the Office of Administrative Law as a contested case based on the disputed material facts concerning the appointing authority’s promotional process and its decision to bypass the appellant. In this regard, he maintains that the appointing authority’s true reasons for bypassing him are material and controlling facts in dispute. Specifically, whether the appointing authority unlawfully, arbitrarily, and/or capriciously exercised the “Rule of Three” to bypass him on the subject list due to Baeder’s familial relationship with a councilman. The appellant asserts that the truth of the matter can only be ascertained by assessing the credibility of the appellant, Mayor Puzio, Chief McParland, and other appointing authority representatives involved in the promotional process at a fact-finding hearing before an administrative law judge.

## 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).

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<sup>3</sup> It is noted that the appellant provides no further detail regarding this claim.

<sup>4</sup> As noted above, because the Appellate Division has already upheld the Commission’s prior determination that even if the appointing authority had not previously utilized the “Rule of Three,” it did not foreclose the appointing authority from bypassing the appellant, and therefore the Commission will not address this argument further in the instant matter.

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 employer 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 this motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

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 even though he was more qualified, the appointing authority bypassed him because a lower-ranked eligible was related to an elected official in Rockaway. 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. Specifically, it proffers that Baeder's education, greater specialized training and experience in different divisions were significant factors in its decision to bypass the appellant. The appellant fails to explain how it was unreasonable for the appointing authority to accord greater weight to more permanent assignments, like Baeder's experience with the Traffic Bureau or as a dispatcher, than it did to the appellant's intermittent work assisting detectives with a few investigations. Further, the

appellant has not addressed other relevant factors cited by the appointing authority, particularly education.

As to the appellant's contention that Rockaway's Chief of Police recommended him for the position, the appellant fails to submit any proof to corroborate this claim. Additionally, even assuming *arguendo* that the Chief of Police did recommend the appellant for the position, that fact is not determinative, as Rockaway's Chief of Police is not the appointing authority.<sup>5</sup> See *In the Matter of Craig G. Howlett and Lori A. Soares* (CSC, decided December 19, 2018) (Although the Police Chief recommended that the appellants be promoted, the Commission found that the bypasses of the appellants did not violate the "Rule of Three" as there was no evidence that the appointing authority's public safety committee had an unlawful motive when it did not select the appellants after conducting an interview process where all candidates were given the same questions and the Police Chief's recommendations were factored in its scoring. The Commission noted that the Police Chief is not the appointing authority, which may exercise selection discretion). While the appellant alleges that the appointing authority's 2020 budget plan demonstrates its intent to promote Baeder many months prior to his appointment, the appellant has not provided any real detail as to how that budget plan evidences its intent to do so. Moreover, as to the appellant's contention that the appointing authority did not subject Baeder to a psychological evaluation prior to selecting him for appointment evidences the appointing authority's bad faith, the Commission observes that Civil Service law and rules do not mandate psychological screenings prior to promotional appointments for law enforcement titles. As such, even if the appellant's claim that Baeder was not subjected to a psychological screening prior to his promotional appointment is correct, and that this differed from the appointing authority's normal procedures, it cannot be said that it establishes any impropriety on the part of the appointing authority. Finally, even assuming, *arguendo*, that the appellant was more qualified than the appointed candidate, as he has not presented any evidence that the true reason for his bypass was nepotism or any other unlawful motive, the appointing authority's actions were within its discretion under the "Rule of Three." See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). Accordingly, the appellant has not sustained his burden of proof in this matter.

## ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>5</sup> Rockaway's appointing authority is its Business Administrator

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 1<sup>ST</sup> DAY OF SEPTEMBER, 2021

*Deirdre' L. Webster Cobb*

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