

the matter to the Office of Administrative Law pursuant to the Appellate Division's decision).

In his initial decision, the ALJ found that Brown's bypass was improper as Brown provided a *prima facie* case that the bypass was based on retaliatory motives and the appointing authority did not refute that showing by providing otherwise legitimate business reasons for the promotion. Of note in this regard, the ALJ found the Police Chief's testimony not credible as to the reasoning behind Brown's bypass. After its independent review of the record, the Commission agrees with the ALJ and finds that Brown has sustained his burden of proof in establishing that his bypass was improper.

In its exceptions, the appointing authority argues that the ALJ improperly found the Police Chief's testimony not credible, as he proffered legitimate business reasons for Brown's bypass. If further argues that Brown did not establish a nexus between his bypass and any purported retaliatory motive.

In response, Brown argues that the appointing authority failed to show that the officers promoted were more qualified than him and that he had established disparate and retaliatory treatment,

The Commission is unpersuaded by the appointing authority's exceptions. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this matter, there is no evidence in the record to demonstrate that the ALJ's finding the Police Chief's testimony regarding the reasons for Brown's bypass not credible, in light of the other credible evidence in the record, was arbitrary, capricious and unreasonable. As such, the Commission affirms the ALJ's determination that the bypass was improper.

Regarding the remedy, *N.J.A.C. 4A:2-1.5(b)* provides:

Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C.*

4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Civil Service Commission or where the Commission sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

The instant matter is not a disciplinary appeal, nor is it one where the appointing authority has failed or delayed to carry out a Commission order. Thus, back pay and counsel fees may only be awarded if the Commission finds sufficient cause. In past bypass appeals, the Commission has granted the successful appellant the next available appointment to the title in question with a retroactive appointment date, "front" and back differential pay, and counsel fees. *See e.g., In the Matter of Michael Kudrick v. City of Perth Amboy*, Docket No. A-4007-97T2 (App. Div. April 15, 1999). In this case, the Commission finds no reason to deviate from that remedy. In this regard, the Commission has the authority to order the displacement of the lowest-ranked eligible appointed below the appellant. However, and consistent with *Kudrick, supra.*, it finds that would be an inequitable application of its authority. A review of the record indicates that two lower-ranked employees were appointed on December 5, 2016, and continue to serve as Police Sergeant.¹ It would not be useful or equitable to displace the lowest-ranked appointee given his long and continued tenure as a Police Sergeant. Rather, the proper remedy for Brown would be to be awarded the *next available* Police Sergeant position with a retroactive appointment date of December 5, 2016,² and, based on the appointing authority's bad faith, differential back pay from that date, along with "front" pay from the date of this determination, until his actual Police Sergeant appointment.

The Commission also awards reasonable counsel fees to the attorney for the appellant. With regard to counsel fees, as the appointing authority improperly bypassed appellant on the subject certification, it improperly deprived him of a promotion to Police Sergeant. The appointing authority's bad faith constitutes sufficient cause to assess it for the cost of the appellant's representation in this matter. *See Kudrick, supra.* However, the appellant is not entitled to counsel fees for any proceedings related to this matter before the Appellate Division or any other

¹ It is noted that the appointing authority has also appointed two additional Police Sergeants from a subsequent list. However, for the same reasons expressed, the Commission declines to order the displacement of either of those employees. The remedy provided by the Commission in this matter will serve to make the appellant "whole."

² This will only constitute his permanent appointment date as a Police Sergeant after the appellant successfully completes his working test period. If he does not successfully complete it, he will not receive a permanent appointment as a Police Sergeant. Rather, his record would then reflect that his appointment as a Police Sergeant, effective December 5, 2016, would be considered a provisional appointment and would be discontinued the date of his return to his Police Officer title after the working test period. In either circumstance, Brown is entitled to the back and front pay awarded in this decision.

forum as any time expended litigating related matters in other forums is not reimbursable by the Commission. See *N.J.S.A.* 11A:2-22; *N.J.A.C.* 4A:2-2.12(f). See also, *In the Matter of Rachel Ann Burris*, 338 *N.J. Super.* 493 (App. Div. 2001); *Tooker v. Hartford Accident and Indemnity Co.*, 136 *N.J. Super.* 572, 578 (App. Div. 1975), *cert. denied*, 70 *N.J.* 137 (1976).

This decision resolves the merits of the dispute between the parties. However, in light of the Superior Court of New Jersey, Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in bypassing Robert Brown from the PL160952 certification of the PM0622N Police Officer, Salem City eligible list was not justified and grants Brown's appeal in that regard.

The Commission further orders that Brown receive the next available Police Sergeant position with a retroactive appointment date of December 5, 2016, and differential back pay from that date, along with "front" pay from the date of this determination, until his actual Police Sergeant appointment.

Counsel fees are awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-1.5(b) and subject to *N.J.A.C.* 4A:2-2.12(f). An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount or back pay and counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF APRIL, 2022

Deirdre' L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04702-19

AGENCY DKT. NO. 2019-2355

IN THE MATTER OF ROBERT BROWN,

Petitioner,

v.

SALEM COUNTY (sic) CITY, POLICE DEPARTMENT

Lauren Sandy, Esq., for Robert Brown, appellant (The Law Office of Lauren Sandy, attorney)

Andrea Rhea, Esq., for Salem City, Police Department, named in the transmittal incorrectly as Salem County, respondent (Chance & McCann, LLC, attorneys)

Record Closed: February 14, 2022

Decided: February 25, 2022

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE

Appellant, Robert Brown (Officer Brown), disputes the respondent's, Salem City Police Department's (Salem), 2016, passing over him for elevation to the position of Police Sergeant. Officer Brown maintains he did not receive the promotion because of inappropriate and discriminatory criteria used. Specifically, the petitioner initially maintains, his seniority customarily would result in his appointment. Officer Brown also

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maintains, his prior action against Salem resulted in retaliatory action on the part of Salem. Finally, Officer Brown maintains that he was discriminated against due to his race. The respondent maintains the determination not to appoint appellant is due to legitimate business purposes and not discriminatory nor retaliatory action.

PROCEDURAL HISTORY

The appellant appealed the action by the Civil Service Commission in supporting the elevated officers, and denied appellant's challenge to the promotions. Appellant appealed, and the Appellate Division remanded the matter back to the Civil Service Commission to conduct an evidentiary hearing rather than rely solely on the materials submitted by the parties. This matter was transmitted to and filed with the Office of Administrative Law (OAL) on April 4, 2019, by the Civil Service Commission for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearing dates were held on February 23, 2021, and March 8, 2021, by Zoom[®]. At the conclusion of the hearing, the parties requested time to submit written closing statements and legal memorandums. The Administrative Law Judge who heard the matter became elevated to the New Jersey Superior Court. This matter was assigned to the undersigned. I listened to the audio transcript, and reviewed the written transcripts. The record closed on February 14, 2022, upon the receipt of the post-hearing submissions.

DISCUSSION

Salem City is a community of approximately 4,500 persons, approximately sixty percent of which identify themselves as African American¹.

TESTIMONY

Leon Daniels (Daniels)

¹ This information obtained from <https://worldpopulationreview.com/us-cities/salem-nj-population>.

Sergeant Daniels retired from the Salem P.D. on or about July 2013, prior to that time for approximately three years, he had worked as a supervisory sergeant of petitioner. He acknowledge a similar litigation to petitioner's against Salem, maintaining he was passed over for promotion. Daniels confirmed exhibit E-7 and E-8, as Officer Brown's 2011 and 2012 performance evaluations which he signed. Daniels recommended Officer Brown for Top Gun School, a drug enforcement training, and "supervisory school". He also characterized Officer Brown as an "outstanding officer," and, "he gets the work done". He expressed concern over opportunities to officers of less seniority than Officer Brown. He claims to have observed him in leadership positions, but acknowledged that he would not have been present while Officer Brown was acting sergeant. He explained the designation of acting sergeant, as the senior officer, when the sergeant is not available for duty.

Robert Brown (Officer Brown)

Robert Brown began employment with the City of Salem in March 2001, as a police officer. He over his twenty year career, received accommodations for meritorious service. He received semi-annual performance reviews. He identified Exhibit E-4, as the August-September 2016 performance evaluation. Lieutenant P filled out the evaluation. Lieutenants fill out the performance evaluation for supervisory personnel. He described the evaluation. Timely completion of tasks is noted. Overall appearance and demeanor reflect well on the Salem P.D. Identified a June 2015 performance evaluation completed by Sergeant H. as E-5.

Officer Brown testified he had never been suspended as a result of a disciplinary investigation. He identified E-9 as a Performance Notice from February 4, 2010. He received a formal written reprimand for personal internet usage. He identified E-2 as a November 16, 2006, disciplinary notice, a ten day suspension was requested, after mediation, the discipline became probation and held the ten days in abeyance. It converted to a written reprimand.

Officer Brown took a sergeant's exam for the first time in 2005. He recalls taking the exam five times. Eventually lists were created². In 2016, he appeared as number four on the first list. Officer H. appeared as number 1 and received the promotion, Officer H had the most seniority. The next time a sergeant positions opened, Officer Brown appeared as number two on the list. Officers M, S, and B, appeared in the first, third and fourth positions.

Officer Brown identified P-1 as his prior certification. He described the custom of the Salem PD to elevate the officer with seniority to the position of sergeant. He described his asking for training and being denied the ability to attend training. He claimed this reasoning was used to deny him promotion. He identified P-2 as an e-mail from Salem P.D.'s counsel to Officer Brown's prior counsel. He identified Supervisory Training as the course other officers were afforded but not him, despite his request for same. He was sent to a Field Training Course which is not as helpful for the promotion.

The Mayor of Salem City, B.C., came to Officer Brown's home in 2016, to discuss the community's disappointment with Officer Brown's failure to be promoted. The Mayor stated that he was not going to consider Patrolman M., because of his public communication issues, unless he went to a communications class. The promotions were delayed until Patrolman M. completed communication course to satisfy the Mayor's request.

Officer Brown addressed the incident critical of his performance reflected in Paragraph 8 of E-1. He did not recall the date but related the incident of a pugilistic bout in a lot, with an anticipated crowd of fifty to one hundred public. Officer Brown worked the night shift with two other officers, there was a sign up sheet for additional officers to assist the anticipated crowd. Officer Brown had normal duties but went with the detail to the lot, after noise complaints came in. At the end of the bout, the crowd did not disburse. At the lot, the exchange with the public acted to aggravate the crowd. The officers backed down, returned to the station, obtained more reinforcements, including the state police, all returned to the location, and disbursed the crowd. Officer Brown maintains he allowed the officer in charge of the detail to run it, and approved his

² It appears prior to 2016, lists had not been created, and as a result of litigation, lists were created for elevation to Sergeant.

actions, eventually disbursing crowd. The Salem PD took no disciplinary action against Officer Brown.

Officer Brown also discussed the incident with a junior officer regarding handcuffing suspects with hands in the front rather than back. He did not recall much of the incident. Officer Brown denied he was a handcuff instructor, claiming that was trained at the Police Training Academy.

Officer Brown eventually went to Supervisor School but after the 2016 promotions. Officer Brown testified to being a supervisory officer to cover for absent officers, sometimes a week or a month in duration. Presently he is serving as an acting sergeant. Officer Brown discussed the promoted officers supervisory opportunities but had little personal knowledge of the officers time at supervisory rolls.

Officer Brown could not testify to any specific statements made to him that would indicate the Salem P.D.'s actions were based on retaliatory action.

William Robinson (Robinson)

Robinson is a retired Salem City Police Sergeant, who previously served as an operations specialist second class for the United States Navy. Robinson identified the community as low income, crime ridden. He claimed familiarity with the promotional process of Salem City, but then could not say there was any promotional policy. He supervised Officer Brown approximately three years over the course of his ten year career with the Salem P.D. He said he never had problems with Officer Brown. He recalled a four or five month stretch when Officer Brown acted as supervisor. He also recalled a longer period where Officer Brown served as supervisor when another Sergeant retired. He stated, "I had zero issues with Officer Brown." He did not recall any disciplinary issues with Officer Brown. Robinson testified he never had any complaints about Officer Brown after Officer Brown served in a supervisory capacity. He found Officer Brown to be a pleasure to work with, and considered him a good officer candidate for Sergeant.

Robinson did supervise Officer M, and found him to be unorganized. He found Officer M. to lose equipment and ticket books. Robinson had to constantly supervise Officer M. to avoid having it reflect poorly on him. Robinson had given disciplinary actions against Officer M.

He believed Officer Brown had more quality experience than those promoted over him, and maintains Officer Brown should have been promoted to Sergeant.

Christopher Pew (Lt. Pew)

Lt. Pew is a twenty-nine year employee of the City of Salem, Police Department. In 2016, he became a lieutenant. The size of the Salem City Police Department is approximately sixteen officers. There is a sergeant for each shift, sometimes two. Officer Brown as a senior officer would serve as a supervising officer if a sergeant was not assigned to the shift.

Lt. Pew discussed officer's request to attend training policy. The officers request training and those requests are considered by the Chief and Lt. Pew. They look at vacation schedules, personnel needs, and the costs of the training.

Lt. Pew would not evaluate officers only sergeants after he attained his position as lieutenant. He discussed that in 2016, the evaluations were prepared based upon a two week period. The officer would be advised he was being reviewed, during that period. Since 2016, that procedure changed and the evaluation is conducted twice a year, every six-month period. He discussed the evaluation forms, and the custom to grade all officers in the middle range as a low or high rating required further explanation. He would discuss informally the candidates for sergeant with Chief Pelura. Lt. Pew offered no memory of discussion with Chief Pelura regarding the 2016 promotions.

Regarding Officer Brown, Lt. Pew identified E-4 as an evaluation he prepared for Officer Brown. Lt. Pew discussed the evidence referenced improvement. Lt. Pew related that a junior officer complained of Officer Brown's absence while booking a suspect. Lt. Pew related his position that Officer Brown should have been at the station during that booking process to look over the actions of the junior officer. Lt. Pew could not say whether the junior officer had called

Officer Brown to come in to the station. Lt. Pew also discussed that a Detective Sergeant would likely be at the station. Lt. Pew could not confirm that the within incident occurred during the two week review period identified in the E-4 evaluation. Lt. Pew acknowledge that Officer Brown had training as a field training officer. Lt. Pew described that as training new recruits, out of the Police Training Academy.

Lt. Pew's opinion was sought as to officer M, who was on his shift regularly, and performed well. Lt. Pew had a favorable opinion on his promotion. He also had no issues with the others promoted over Officer Brown.

As to Officer Brown he found him likeable and considered him a friend, but he questioned some of his choices. He offered little personal knowledge. He vaguely references work history without specifics, and current internal affairs issues without specifics. He discussed a recent incident where Officer Brown reportedly offered a women suspect/victim a urine sample cup, asking for a sample, rather than having the emergency room obtain said sample.

John A. Pelura (Chief Pelura)

Chief Pelura has twenty-five years of service to the Salem City Police Department. He became Chief in 2008. In 2016, a list of four persons were eligible for elevation to Sergeant. He reviewed Exhibit E-10. The City Ordinance provides for the elevation of a Sergeant by the Mayor and Council. The Chief recommends the eligible candidates.

Chief Pelura in evaluating the candidates looks at internal affairs substantiated complaints, his personal knowledge of how the officers performs on duty. He strongly weighs confidential internal affairs investigations that are substantiated.

He acknowledged that his certification claimed, "A review of the Internal Affairs investigations would show no substantiated complaints against the other officer." Chief Pelura admitted his certification, Exhibit E-1 to be incorrect. Another officer did have a substantiated internal affairs investigation. He testified Officer Brown had four substantiated investigations occurred against Officer Brown. The exact nature of the substantiated items were a rule violation, excessive force, an improper arrest, and a demeanor issue. Heavy weight was placed on these

four violations, generally, brought forward by the public. None of the specifics were identified to the tribunal.

Ability to take charge is a factor Chief Pelura considered.

Chief Pelura described the demeanor of Officer M, the other candidate who was elevated, as rough around the edges. He describes him as a pro-active officer. He is through and tactical. A critical factor in the Chief's analysis.

In regard to Officer Brown, he raised the issue of the projected pugilistic bout. Chief Pelura maintains the shift supervisor should be responsible for the coordination of the detail. It is the Chief's understanding Officer Brown was otherwise occupied and allowed a junior officer to conduct the operations. He never discussed this directly with Officer Brown.

On another occasion Chief Pelura and Officer Brown were involved with a vehicle stop. Chief Pelura questioned Officer Brown's report as being inconsistent with Chief Pelura's video cam. Officer Brown corrected his report to comport with Chief Pelura's video cam.

He recalled a subordinate officer made an arrest, cuffing the suspect in the front. In training the correct procedure is to handcuff with hands behind the back. There are certain circumstances where that is not done. During the transport of the suspect to the station the video cam in the vehicle was not operated. This is against procedure. After the transport, the officer is suppose to inspect the back of the vehicle to insure no contraband was discarded. I noted there was contraband in the car. These events should not have occurred. Officer Brown was not disciplined. The matter was discussed and Officer Brown took responsibility. He is good in accepting correction.

He does not specifically recall going over evaluations with Officer Brown. He did not weigh the evaluations as heavily as the substantiated internal affairs investigations. He continues to have concerns over the performance of Officer Brown for elevation to Sergeant, specifically, related to a more recent Internal Affairs Investigation, again not disclosed.

Chief Pelura had no issues with Officer B, nor Officer S in regard to handling their shift supervision appropriately. Chief Pelura discussed the issue of seniority in connection with promotions and said there was no policy regarding giving those with seniority the elevation to Sergeant. In comparing Officer Brown to the other officers, the combinations of the Internal Affairs substantiated investigations, and shortcomings in his shift supervision affected Chief Pelura's decision not to recommend him for elevation.

Chief Pelura discussed opportunities for training, Officers are made aware of the opportunity to attend training classes. Officers then express an interest in attending classes. Chief Pelura and Lt. Pew look at whether the department has a need to improve skills in the area of the class, whether the class will help the officer grow, whether attending the class can be accommodated with personnel needs, and whether the budget can afford the expenditure.

Generally previously, he did not send officers to supervisor training until after they obtained the supervisory position. Now he has been sending them before promotions. He discussed Top-Gun school as a drug school. An officer with a high degree of drug arrests, would be an ideal candidate, but the ultimate determination is usually made by the prosecutor's office. It would not be regularly recommended for someone in line for a Sergeant position to attend.

Officer Brown was sent to supervisor school after the promotion was made as to the other officers.

Chief Pelura maintains Officer Brown's prior actions against the City of Salem had no bearing on the determination to consider him for elevation to Sergeant. Chief Brown then went on to describe the racial make up of the City Council as being fairly representative of the community.

Chief Pelura discussed the de minimus use of disciplinary actions against officers.

DISCUSSION

Both Chief Pelura and Officer Brown offered undated certifications as to this matter. There were misstatements in both the certifications. Chief Pelura testified to

substantiated internal affairs investigations against Officer Brown but such investigations were not offered to the tribunal for in camera review. Officer Brown certified he did not have any prior disciplinary infractions over his sixteen year career. He did have one, however the date was approximately ten years before the consideration for promotion. The proposed ten day suspension was suspended and did not result in any loss of pay. Chief Pelura testified to the nature of the substantiated internal affairs investigations. The nature of those incidents might be sufficient justification for by passing Officer Brown for promotion to Sergeant, however, the absence of the documentation of those substantiated internal affairs investigations is fatal to this tribunal accepting same. Chief Pelura further provided no contemporaneous written determination of his selection process. This factor is also fatal to this tribunal's consideration of the motivation for the failure to advance Officer Brown. Finally, the failure of Chief Pelura to recall Officer Brown's previous litigation is disengenous at best. For the above reasons, this tribunal cannot accept Chief Pelura's testimony as credible.

The evaluation reports as to Officer Brown are consistent with average to above average evaluations, with recommendations for improvement. Lt. Pew and Chief Pelura both testified there are always recommendations for improvement on all officers evaluations. None of the evaluations of the other officers were provided. It appears, it is the policy of this police department to not encumber officers records with disciplinary actions. It appears that confidential internal affairs investigations are conducted to keep private any questionable actions of the officers. This may be a successful prosecution strategy, however it leaves the municipality with the inability to present a position as to the discipline of their officers. The evidence did not present any basis for the promotion of the other officers over Officer Brown.

Lt. Pew reflected no issues with the promotion of the other three officers but acknowledged demeanor issues for one of the candidates.

FINDINGS OF FACT

As a result of the testimony and documentary evidence, I **FIND** the following **FACTS**:

1. Officer Brown confirmed he amicably resolved litigation commenced in 2013, against the City of Salem, for the City's failure to permanently appoint Officers to the rank of Sergeant. See Exhibit P-1, Paragraph 5.
2. The settlement occurred by some time in June 2014. See Exhibit P-2.
3. When the 2016 Sergeant's list issued, Officer Brown scored second in a group of four. All the other Officer's were promoted to Sergeant. Officer Brown was passed over.
4. Captain Pelura was in the best position to set forth a contemporaneous written presentation as to his decision making process on the elevation of officers, that was not done here.
5. This tribunal finds the City of Salem's determination to not promote Officer Brown has not been documented appropriately and contemporaneously with the promotions.
6. This failure supports this tribunals determination the promotion determination occurred because of an improper purpose.
7. The City of Salem's has failed to show the promoted officers had better qualifications than Officer Brown.
8. The City of Salem's justifications for the failure to promote Officer Brown is pretextual.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965).

The New Jersey Constitution requires that "[a]ppointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made [*9] according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive." N.J. Const. art. VII, § 1, ¶ 2. These principles eventually led to the adoption of the "Rule of Three." In re Foglio, 207 N.J. 38, 45, (2011); N.J.S.A. 11A:4-8. For over a century, the rule has governed both the certification of candidates to the appointing body and the appointing body's hiring discretion. Foglio, 207 N.J. at 45 (citing L. 1908, c. 156, § 21).

Under the Rule of Three, after the Commission certifies a list of at least three candidates, the appointing authority has the discretion to select any of the top three candidates; there is no presumption in favor of the highest-ranked candidate. N.J.S.A. 11A:4-8; *see also* N.J.A.C. 4A:4-4.8(a)(3). The purpose of the rule is "to limit, but not to eliminate, discretion in hiring." Foglio, 207 N.J. at 46. "While ensuring that competitive examinations winnow the field of candidates, the Rule of Three does not stand as 'an immutable or total bar to the application of other important criteria' by a government employer." *Ibid.* (quoting Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 150, (1981)).

If the appointing authority selects a lower-ranked candidate, it is required to provide a "statement of the reasons 'why the appointee was selected instead of a higher ranked eligible [candidate].'" *Ibid.* (citing N.J.A.C. 4A:4-4.8(b)(4)). This requirement is intended to "ensure[] that only merit and fitness are factors in appointments, and that no impermissible reason is used for bypassing an eligible on a list." *Ibid.* (citing Loc. 518, N.J. State Motor Vehicle Emps. Union, S.E.I.U., AFL-CIO v. Div. of Motor Vehicles, 262 N.J. Super. 598, (App. Div. 1993)).

However, an appointing authority retains discretion to bypass a higher-ranked candidate "for any legitimate reason based upon the candidate's merit." In re Hruska, 375 N.J. Super. 202, 210, (App. Div. 2005); *see also* In re Crowley, 193 N.J. Super. 197, 214, (App. Div. 1984) (an appointing authority can bypass a higher-ranked candidate for any "legitimate reason"). Indeed, an appointing authority has "broad discretion" to consider a

wide range of subjective factors. Terry, 86 N.J. at 150. It is only prohibited from using discriminatory reasons to make its decision—for example "anti-union animus or discrimination based on . . . race, ancestry or gender." Foglio, 207 N.J. at 57 n.5.

A higher-ranked candidate challenging a bypass bears the burden of establishing by a preponderance of the evidence that the appointing authority's bypass decision was motivated by discrimination, retaliation, or other improper motive. See N.J.A.C. 4A:2-1.4(c). Once the candidate makes a prima facie showing, the burden of production—but not the burden of persuasion—shifts to the authority to present a legitimate, non-discriminatory reason for the decision. Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445, (App. Div. 1990). Should the authority meet its burden, the candidate can still prevail if the candidate shows that the articulated reasons are pretextual or that an improper motive was more likely responsible. *Ibid.* If the candidate meets that burden, the candidate has established a presumption of discriminatory or retaliatory intent and the burden shifts to the authority. *Id.* at 446. The authority must then prove that the action would have taken place regardless of the discriminatory or retaliatory motive, usually by showing that the other candidates had better qualifications. *Ibid.*

Salem City failed to produce legitimate business reasons for bypassing petitioner. This demonstrated unlawful or improper motive in the failure to promote Officer Brown.

I **CONCLUDE** that appellant, Robert Brown, did show a prima facie presentation that retaliation was more likely than not the motivation for the City of Salem's failure to promote him to the position of Sergeant.

I **CONCLUDE** that respondent, City of Salem, has not shown the other candidates had superior qualification to Officer Brown, and further failed to properly document evidentiary proof of their justification for the promotional decisions.

I **CONCLUDE** that respondent, City of Salem, by the failure to contemporaneously document the determination process, results in the conclusion the determination occurred due to impermissible rationale.

I **CONCLUDE** that appellant, Robert Brown, did show a prima facie presentation that retaliation was more likely than not the motivation for the City of Salem's failure to promote him to the position of Sergeant.

ORDER

For the reasons stated above, I hereby **ORDER** that petitioner, Robert Brown, should be promoted to the position of Sergeant effective as of the same date as the promotion of the other Sergeants from the class of 2016.

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. 52:14B-10.

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, PO 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.

February 24, 2022

DATE


JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

February 24, 2022

Date Mailed to Parties:

February 24, 2022

mm

APPENDIX
LIST OF WITNESSES

For Appellant:

Leon Daniels, retired Salem County Police Department
Robert Brown, appellant
William Robinson,

For Respondent:

Christopher Pew,
John Pelura,

LIST OF EXHIBITS

Joint Exhibits:

- J-1 Remand Decision 4/2/19
- J-2 App. Div. Decision 3/1/19
- J-3 CSC Final Administrative Action 7/17/17
- J-4 App. Div. Notice of Appeal (sic) 8/16/17
- J-5 App. Div. Amended Notice of Appeal (sic) 8/2/17
- J-6 App. Div. Case Information Statement 8/2/17

For Appellant:

- P-1 Certification Robert Brown (undated)
- P-2 E-mail from Puma (June 17, 2014)

For Respondent:

- E-1 Certification of John A. Pelura, III (undated)
- E-2 PNDA 12/18/06, referencing 11/16/06 notice ten (10) day suspension reduced to written reprimand and up to one year suspension of ten (10) day suspension.
- E-3 Certification of John A. Pelura, III (undated)

- E-4 Semi-Annual Performance Evaluation 9/12/16
- E-5 Semi-Annual Performance Evaluation 7/3/15
- E-6 Semi-Annual Performance Evaluation 6/10/14
- E-7 Semi-Annual Performance Evaluation 1/3/13
- E-8 Semi-Annual Performance Evaluation 1/25/12
- E-9 Performance Notice Written Reprimand 2/4/10
- E-10 Police Department Composition Ord. 50-3 Composition
- E-11 Excerpt F Collective Bargaining Agreement providing for increased pay for personnel working as shift supervisor