



STATE OF NEW JERSEY

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

In the Matter of James Arpino,
Battalion Fire Chief (PM2170W),
Voorhees Township

CSC Docket No. 2022-2306

Bypass Appeal

ISSUED: AUGUST 3, 2022 (RE)

James Arpino appeals his bypass on the certification (PL210681) resulting from the examination for Battalion Fire Chief (PM2170W), Voorhees Township.

By way of background, the appellant received a make-up examination, which was administered on February 17, 2021. On July 6, 2021, the certification (PL210681) was issued with only the name of another candidate. As the appellant’s score was issued after the certification, he was not included on it. He requested to be added to the certification and the Civil Service Commission (Commission) granted this request. *See In the Matter of James Arpino, Battalion Fire Chief (PM2170W), Voorhees Township* (CSC, decided November 17, 2021). In its determination, the Commission indicated that the appellant was initially informed that he would be considered for prospective appointment only. The Commission noted that the administration of the make-up was delayed due to the interruption of services due to the pandemic, and noted that the appointing authority was not required to appoint from the list as there were not three eligible candidates. Since there was only one candidate on the list and the appointing authority had not made an appointment, the Commission added the appellant’s name to the certification for the appointing authority’s consideration. The appellant’s name was added in November 2021, and he ranked above the individual who was on the list. In January 2022, the appellant responded that the appointing authority was proceeding with an appointment without consideration of his placement on the list. The appellant was advised that the appointing authority was notified that he was placed on the list, and that he could appeal with any concerns after the certification

was returned and disposed, but at that point an appeal was premature. Thereafter, on February 8, 2022, the certification was disposed and the other candidate was appointed to Battalion Fire Chief from the certification with an effective date of August 10, 2021.

On appeal, the appellant contends that the appointing authority appointed the other candidate via Resolution No. 192-21, which passed the Voorhees Township Committee on August 9, 2021. The appellant states that a representative of the appointing authority told him that the bypass occurred in December 2021, and it had made the decision that it would not be demoting the other candidate. He states that he did not receive a Notification of Certification in December 2021 regarding his placement on the certification, and therefore did not have the opportunity to respond to the appointing authority. The appellant contends that he was not considered based on merit and fitness, and that he was bypassed simply because his name was not on the certification and he was not a veteran. The appellant argues that, while the appointing authority has the discretion to bypass a higher-ranked candidate on a list of eligibles for any legitimate reason based on the candidate's merit, his bypass was not based on merit, but based on the other candidate's work performance in the preceding months. The appellant maintains that he was transparent with the appointing authority and provided them with all relevant documentation as he received it, including that he was getting a makeup, and his test score. Nonetheless, he argues that he was not appointed due to the circumstances which caused a delay in the addition of his name to the certification. He argues that the appointing authority was aware of his rank on the list prior to its appointment of the other candidate, and it did not contact him to tell him he had been bypassed. He requests an immediate retroactive appointment to August 10, 2021.

In response, the appointing authority states that it was informed by the Division of Agency Services (Agency Services) in July 2021 that make-up candidates are added to the list for prospective appointment only. It then appointed the other candidate in August 2021, and was unaware that this was not official until receipt of the Commission's decision in November 2021. The appointing authority then followed up with Agency Services to complete the disposition of the certification.

CONCLUSION

N.J.A.C. 4A:4-2.9(g) states, the name of any candidate passing a make-up examination will be added to the eligible list. Except for error by the Civil Service Commission or appointing authority, prior appointments from the eligible list will not be affected by the addition of a name to the list.

N.J.A.C. 4A:4-4.8(a) provides in relevant part that upon receipt of a certification, an appointing authority shall appoint one of the top three interested

eligibles (Rule of Three) from a promotional list. *See also*, N.J.S.A. 11A:4-8 and N.J.S.A. 11A:5-7. Moreover, it is noted that the appellant has the burden of proof in this matter. *See N.J.A.C. 4A:2-1.4(c)*.

Initially, in *Thomas v. McGrath*, 75 N.J. 372 (1978), the court addressed the issue of specifying the time when a Civil Service appointment achieves finality. It decided that appointing authorities are required to comply with all ministerial steps required by any rule, regulation and statute pertaining to appointments as a condition to making an appointment final. Thus, the steps necessary to perfect a regular appointment, which include Commission review and approval of a certification disposition proposed by an appointing authority, are required and necessary.

Since the appellant was the first listed interested eligible on the certification, it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification for each vacancy filled. It must be emphasized that, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under the Rule of Three, absent any unlawful motive. *See N.J.A.C. 4A:4-4.8(a)3i; Terry v. Mercer County Board of Chosen Freeholders*, 86 N.J. 141, 149 (1981) (The Rule of Three affords an appointing authority some latitude in making its hiring decision, by not requiring the appointment of the highest-ranking candidate.) There is nothing in the record to indicate that the appellant's non-selection was arbitrary or based on an unlawful motive. Further, even with the addition of the appellant's name to the certification, the list was still incomplete, and the appointing authority did not have to make an appointment of either candidate. The Commission added the appellant's name to the list in part because the list was incomplete, and this allowed the appointing authority the flexibility to select another candidate if it so chose.

Moreover, it is noted that the appellant does not possess a vested property interest in the position. Individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984), *Schroder v. Kiss*, 74 N.J. Super. 229 (App. Div. 1962). The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). The appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the Rule of Three. The Rule of Three was designed to afford an appointing authority with some degree of discretion in making appointments. Further, eligible lists are not promulgated for the benefit of any particular individual, but an eligible's interest in being on a list is in being considered for a vacancy. An appointing authority is permitted to bypass an eligible

for lower-ranked individuals for a legitimate reason. It may even appoint individuals with lesser qualifications than the bypassed eligible, so long as the decision was not based on an unlawful motive, such as discrimination or political influence.

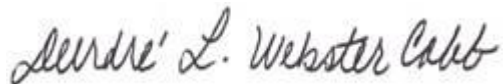
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name on the Battalion Fire Chief (PM2170W), Voorhees Township eligible list was proper and the appellant has failed to meet his burden of proof in this matter.

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.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF AUGUST 2022



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