



STATE OF NEW JERSEY

In the Matter of L.M., Human
Services Specialist 3 (PC2626W),
Monmouth County

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

CSC Docket No. 2022-2029

Bypass Appeal

ISSUED: AUGUST 3, 2022 (HS)

L.M. appeals the bypass of her name on the Human Services Specialist 3 (PC2626W), Monmouth County eligible list.

The appellant appeared as the 10th ranked non-veteran eligible on the subject eligible list, which promulgated on April 11, 2019 and expired on April 10, 2022. A certification, consisting of the names of 34 eligibles, all non-veterans, was issued on October 29, 2021 (PL211304) with the appellant listed in the third position. In disposing of the certification, the appointing authority bypassed the appellant and appointed M.B., J.M., A.V., M.W., and D.C., the fifth, 11th, 12th, 13th, and 15th listed eligibles respectively, effective February 16, 2022.

In her appeal to the Civil Service Commission (Commission), postmarked January 10, 2022, the appellant asserts that her bypass, for positions in Medicaid units within the Division of Social Services, was improperly based on race, disability, and gender discrimination. She notes that she is an African-American female with a disability of which the appointing authority was aware. The appellant maintains that in light of her academic qualifications and work experience, her bypass was discriminatory.¹

¹ The appellant also complains of adverse employment actions that took place in August 2019, November 2019, May 2020, November 2020, May 2021, and June 2021. These claims are untimely and will not be addressed. See *N.J.A.C. 4A:2-1.1(b)*.

In response, the appointing authority, represented by Steven W. Kleinman, Special County Counsel, states that there were five available positions, in Units AW, CH, CE, BC, and 415, and the appellant applied for three, those in Units CH, CE and 415. The appointing authority states that consistent with standard procedure, a three-person interview panel was convened to recommend the best potential applicants for the position to management. This panel, a diverse one in the appointing authority's view that included two women, one of whom is a minority, conducted a comprehensive series of interviews for all applicants seeking any of the five available positions. They then reviewed the answers and ranked the candidates based upon the answers received. While the appellant was deemed qualified for the position, her interview score of 1.94 ranked her 11th of 13 candidates² for the five available positions. The lowest ranked candidate who received a promotion scored significantly higher, with a score of 2.25. Specific to each promotion that the appellant applied for, with respect to Unit CH, she ranked last of the four candidates listed. With respect to Unit CE, she ranked last of the five candidates listed. With respect to Unit 415, she ranked seventh of the eight candidates listed. Three of the five promoted candidates, M.B., J.M., and M.W., were female. The appointing authority maintains that the bypass decision was made reasonably and in good faith. It notes that the subject title is a lead worker title and argues that, therefore, the appellant's ability to interact with her co-workers was an important consideration. As such, in the appointing authority's view, interviews with experienced personnel would assist in making that judgment. The appointing authority contends that the appellant has not presented any evidentiary support for her allegations of discrimination. The appointing authority insists that it has discretion under Civil Service regulations to make the best judgments it can for each promotional position with the information it has available and that this is the entire purpose of the "Rule of Three."

In support, the appointing authority submits various exhibits, including the interviewers' evaluation forms for the appellant dated November 23, 2021. Scores were assigned to answers using the following rubric:

- **1** for POOR answer ("Significant Gap" and "fail[s] to enforce the policy/procedure/guideline")
- **2** for FAIR answer ("Below Requirements")
- **3** for AVERAGE answer ("Meets Requirements")
- **4** for GOOD answer ("Exceeds Requirements")
- **5** for EXCELLENT answer ("Far Exceeds Requirements" "[t]o speak with employees individually to ensure that they understand the policies, procedures, and guidelines")

² Thirty-four eligibles were certified. However, numerous eligibles were either removed; indicated that they were interested in future certifications only; or were not reachable for appointment.

The interviewers were P.M., A.S., and B.K. At the time of the appellant's interview, P.M. and A.S. were serving permanently in the title of Human Services Specialist 4. B.K. was serving provisionally in the title of Assistant Administrative Supervisor of Income Maintenance but held permanent status in the title of Human Services Specialist 4.

In reply, the appellant opines that the scores recorded by the two non-minority interviewers reflect institutional or systemic racism, which affects individuals or groups by having their opportunities viewed with prejudicial, stereotypical, and biased thoughts or viewpoints rather than the simple facts. The appellant argues that systemic racism is often overlooked due to its passive nature and when looked at individually. However, she believes that when looked at as a whole, as in her situation, to include what is being done regarding her disability and sex, it becomes clear. More specifically, the appellant points to the interview question, "Tell me how you meet the qualifications of [a Human Services Specialist 3] position." The appellant recounts that she stated her qualifications, which included a Master of Business Administration degree in Healthcare Management; State certification to sell health insurance; knowledge of programs including Excel and SOLQ; over eight years of experience with the Division of Social Services; and 16 years of experience overall as a public employee. The appellant claims that the two non-minority interviewers, whom she identifies as A.S. and B.K., viewed her qualifications poorly. Using the scoring rubric outlined earlier, A.S. rated her 2.5, and B.K. rated her two. The minority interviewer, whom the appellant identifies as P.M., rated her four. The appellant also points to the interview question, "Tell me about a time you had to deal with a customer and/or co-worker who was nasty, rude and aggressive. How did you handle the situation?" For this question, A.S. and B.K. rated her three, while P.M. rated her four. The appellant states that as part of her answer, she indicated that she assisted the client, explaining and guiding the client within the rules and regulations. The appellant claims that she was undermarked for this question because a score of five is granted to those that explain the rules and regulations to clients. In the appellant's view, her interview was sabotaged to reach a less qualified Caucasian female and due to systemic racism.³

The appellant also contends that her bypass was due to disability discrimination because of the manner in which her updated Americans with Disabilities Act (ADA) accommodations request made on May 11, 2021 has been handled. In that request, the appellant recounts, she asked for an updated desk and chair. According to the appellant, she did not receive a new chair until March 10, 2022, and the chair was not the chair recommended by the appointing authority's own evaluation specialist. The appellant complains that to date, she still has not received the correct chair. "To add insult to injury," she was served with a final notice of counseling on April 14, 2022 for underperformance,

³ The appellant also asserts that there has been gender discrimination because she was allegedly not appointed in 2019 in favor of two Caucasian males with whom she had a tying score. Although this claim is clearly untimely, *see N.J.A.C. 4A:2-1.1(b)*, the Commission nevertheless notes that the claim is factually incorrect. In this regard, agency records indicate that the appellant's name was certified from the subject eligible list on October 4, 2019, but no appointments were made from that certification. The appellant's name was again certified on October 24, 2019. The appellant's name was retained on that certification because she was not interested in the organizational unit of the position, and three *females* were appointed.

notwithstanding that she had countered that the underperformance was due to the prolonged lack of accommodations. The appellant adds that she has also not received her desk accommodation. The appellant complains that the prolonged delay has caused her to request intermittent leave under the Family and Medical Leave Act and exhaust all her paid time off because she is suffering everyday at work without the proper accommodations.⁴ The appellant believes that this suffering—discriminatory behavior against her disability—has been inflicted on her due to systemically racist beliefs. In support, the appellant submits various documents.

In reply, the appointing authority counters that the appellant has engaged in cherry-picking from various interview answers where she feels that she was graded poorly and disagrees with the assessments of the interviewers. The appointing authority points out that the appellant has misidentified A.S. as a non-minority. It argues that as A.S. is in fact a minority, this portion of the appellant's claim is not justified by the facts. But more importantly, in the appointing authority's view, the notes included on the interview evaluation forms do not necessarily fully express the interviewers' observations of the appellant's demeanor, presence, and communications skills—all of which are pertinent to the Human Services Specialist 3 position, which requires interaction with clients in need of assistance. Rather, the appointing authority contends, the scores listed reflect the best evidence of how the panel viewed the appellant's answers and indicate that her performance was demonstrably poor, particularly compared to her peers. The appointing authority adds that the positions the appellant applied for in Units CH and CE handle applications for benefits under NJFamilyCare, which is the State's publicly funded health insurance program for those in financial need. This includes people who qualify for the Children's Health Insurance Program and Medicaid. With respect to Unit 415, which provides medical coverage through the NJFamilyCare Aged, Blind and Disabled program, the appointing authority indicates that its records reflect that the appellant had no experience whatsoever in that area. According to the appointing authority, the appellant had no recent or significant experience in any other NJFamilyCare program. Rather, her assignments throughout her career (including at the time of her promotional application) have generally been in units that handle applicants for benefits under the Supplemental Nutrition Assistance Program (SNAP), which provides food assistance to families with low incomes. The appointing authority maintains that there are substantial differences between the program regulations pertaining to NJFamilyCare and those pertaining to SNAP. According to the appointing authority, the individuals promoted in Units CH, CE, and 415—M.B., J.M., and M.W. respectively—have all been trained in NJFamilyCare and worked in NJ FamilyCare (Medicaid) units during most or all of their careers. It argues that the appellant is apparently suggesting that she was most qualified even though her experience in the program being administered in the pertinent units did not measure up to the experience of those who were

⁴ The appellant may wish to pursue the issue of her accommodation request and the alleged disability discrimination in an appropriate alternate forum, such as a forum established by the appointing authority; the New Jersey Department of Law and Public Safety's Division on Civil Rights; or the U.S. Equal Employment Opportunity Commission.

promoted. This claim, the appointing authority contends, is not supported by any documentary evidence on the appellant's part and is clearly meritless.⁵

The appointing authority states its understanding that its interview-based evaluation system might be subjective to some extent. However, it asserts that carelessly throwing out allegations of blatant sabotage and systemic racism is not justified by any of the extremely limited evidence the appellant has submitted because the "Rule of Three" recognizes that an appointing authority must enjoy some level of discretion when it comes to promotions, and thus subjectivity is necessarily involved in that process. The appointing authority maintains that an argument of systemic bias in the absence of actual facts cannot be used "willy-nilly" to overturn an employment decision or it would be used every time some protected class member was bypassed for promotion, and such argument does not meet the appellant's required burden of proof. The appointing authority proffers that statistics belie the claim of systemic racism in its promotional procedures.

With respect to the appellant's claim of gender discrimination, the appointing authority argues that the claim is rendered meritless on its face because the appellant acknowledges that she was bypassed by another female.

Concerning the claim of disability discrimination, the appointing authority contends that this allegation has nothing to do with the matter before the Commission, which is solely related to the promotional opportunity she was allegedly denied. While the appointing authority does not accept the appellant's description of what has been going on with her accommodation request at all, it argues that whether she received an ergonomic chair within a particular timeframe has absolutely nothing to do with whether she interviewed well for a promotion in November 2021 compared to her peers. Similarly, the appointing authority argues, the counseling notice the appellant received in April 2022, long after the promotions at issue here were decided, cannot possibly be of the slightest relevance in this bypass appeal. While the appointing authority states that it is more than prepared to defend its actions regarding the accommodation request in some appropriate forum if the appellant chooses to pursue that option, it is declining the effort to "go into the weeds" with the appellant here on an issue not remotely within the Commission's jurisdiction. What is relevant, in the appointing authority's view, is that the appellant has not even attempted to tie any alleged disability to any promotional decisions made in November 2021, much less met her substantial burden of proof on that point. In support, the appointing authority submits various exhibits.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. 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).

⁵ The interview evaluation forms indicate that the interviewers scored candidates for "related work experience."

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*, at 445, the court outlined the burden of proof necessary to establish discriminatory or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or 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-discriminatory or non-retaliatory reason for the decision. If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of 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 the discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

Since only non-veterans were listed 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. Nevertheless, the appellant alleges that she was bypassed based on race, gender, and disability discrimination. However, the appellant initially did not present any substantive evidence beyond mere allegations that the bypass decision was motivated by such improper reasons. But even assuming the appellant made the requisite *prima facie* showing, the appointing authority articulated a legitimate non-discriminatory reason for bypassing the appellant for appointment to the positions in Units CH, CE, and 415—the three positions in which the appellant was interested—and selecting M.B., J.M., and M.W. respectively. In this regard, they had better interview performances. It should be emphasized that it is within the appointing authority's discretion to choose its selection method, *i.e.*, whether or not to interview candidates. *See e.g., In the Matter of Angel Jimenez* (CSC, decided April 29, 2009); *In the Matter of Abbas J. Bashiti* (CSC, decided September 24, 2008); *In the Matter of Paul H. Conover* (MSB, decided February 25, 2004); *In the Matter of Janet Potocki* (MSB, decided January 28, 2004). So long as the hiring decision is in compliance with N.J.A.C. 4A:4-4.8(a)3, the Commission cannot find that the interview was conducted inappropriately.

The appellant has not shown that the proffered reason was pretextual or that the asserted improper reasons more likely motivated the appointing authority. The appellant claims that the scores assigned by the interviewers she identifies as non-minorities, A.S. and B.K., evince racial discrimination. This claim is undermined by the appointing authority's un rebutted indication that the appellant has misidentified A.S. as a non-minority. A.S. apparently is a minority. Evidently then, a *minority*

interviewer was among the interviewers who assigned scores with which the appellant was not satisfied. The appellant also claims that she was undermarked for the question concerning how to deal with rude customers or co-workers because a score of five is granted to those that explain the rules and regulations to clients. The appellant seems to be suggesting that a score of five is *guaranteed* to candidates who answer that they explained the rules and regulations to the client. This is a mischaracterization of the scoring rubric, which states only that a score of five may be assigned if the interviewer finds that the answer “far exceeds requirements.” The appellant indicates that she answered that she explained the rules and regulations to the client, but what about the appellant’s answer *far* exceeded requirements is hardly clear. Assigning a score of three if the answer “meets requirements” or a score of four if the answer “exceeds requirements” were possibilities as well. In short, there is no evidence that the scores assigned were a pretext for racial discrimination or that the scores assigned represented anything other than the interviewers’ good faith assessments. Rather, it appears that the appellant simply disagrees with some of the scores she received. However, her mere disagreement or dissatisfaction with assigned scores is not sufficient to demonstrate pretext or that racial discrimination more likely motivated the appointing authority. The appellant’s suggestion that the interview process was a pretext to discriminate on the basis of gender is undermined by the fact that the candidates appointed to the three positions in which the appellant was interested were all females. And further undermining any suggestion of pretext is the appointing authority’s un rebutted indication that M.B., J.M., and M.W. have all been trained in Medicaid and worked in Medicaid units during most or all of their careers, while the appellant’s experience has generally been in SNAP. The positions in which the appellant was interested were in Medicaid units, and it is reasonable for the appointing authority to prefer candidates possessing more experience germane to the positions to be filled.

The appellant’s discussion of her accommodation request cannot be taken as evidence that disability discrimination, rather than any other reasons advanced, more likely motivated the appointing authority’s bypass decision. A review of the appellant’s recounting of events demonstrates no link to the decision to bypass her for the promotional appointments at issue here. Without such link, the appellant’s claim of disability discrimination is essentially a free-standing claim of discrimination in local service, over which the Commission has no jurisdiction. *See N.J.A.C. 4A:7-1.1(g)* (local service appointing authority may establish policies and procedures for processing discrimination complaints).

Additionally, 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” to appoint a lower-ranked eligible absent any unlawful motive. *See N.J.A.C. 4A:4-4.8(a)3; In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City, 207 N.J. 38, 49 (2011). 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).* Moreover, the appellant does not possess a vested property interest in the position. In this regard, the only interest that results from placement on an eligible list is that the candidate will be considered for an applicable

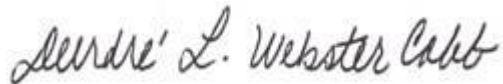
position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). The appellant has not presented any substantive evidence regarding her bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "Rule of Three." Moreover, the appointing authority presented legitimate reasons for the appellant's bypass that have not been persuasively refuted. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name was proper, and the appellant has not met her burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

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

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



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: L.M.
Suzanne Ogborne
Steven W. Kleinman, Special County Counsel
Division of Agency Services
Records Center