



**STATE OF NEW JERSEY**

In the Matter of Litasha Worthen-Barnes, Police Sergeant (PM0849V), Orange

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

CSC Docket No. 2022-2892

List Bypass Appeal

**ISSUED: November 2, 2022 (SLK)**

Litasha Worthen-Barnes, represented by Annette Verdesco, Esq., appeals the bypass of her name on the Police Sergeant (PM0849V), Orange eligible list.

By way of background, the appellant, a nonveteran, appeared on the PM0849V eligible list, which promulgated on May 24, 2018 and expired on May 23, 2022. The appellant's name was certified on January 12, 2022 (PL220043) for a position in the subject title. A total of nine names were certified, and the appellant was the second ranked candidate. The first ranked candidate and the appellant were bypassed while the other seven candidates were appointed.

On appeal, the appellant presents that she has been a Police Officer for over 20 years. She indicates that the day before the appointments were effectuated, she was informed that her name was being bypassed due to an alleged adverse employment history regarding sick time usage and two minor disciplinary matters. The appellant states that she is aware of at least two lower ranked candidates with comparable or worse sick time usage who were promoted to the subject title. She presents that this disparate treatment is the basis for this appeal. The appellant provides that she only received two minor disciplines, both for insubordination, throughout her career. She indicates that the Civil Service Act is to ensure equal employment opportunity at all levels of public service and to protect career public employees from political coercion, and Civil Service positions are to be beyond political control, partisanship, and personal favoritism. The appellant asserts that

almost all of her sick time was appropriately documented. She certifies that she used approximately 1,700 sick hours throughout her 20-year career, which included being unable to work for a period in 2008 due to pregnancy complications and intermittent periods between 2011 and 2013 due to diverticulitis and related complications/surgeries, which were documented by her physicians. The appellant indicates that one of the appointed eligibles, R.B-S., had a 2,151 negative sick hours balance and another, R.L.W., accumulated a 682.25 negative sick hour balance. She questions how her sick time can be used to bypass her as she had already been disciplined for this and she only received a reprimand, indicating that her supervisors did not think that her actions were severe. The appellant states that she never received major discipline and she only received a one-day suspension for insubordination in 2001, in her first year, and she received a four-day suspension for insubordination in 2016. She argues that these disciplines that took place 20 and six years ago, are too remote to be considered adverse for the promotion. Therefore, the appellant requests that she be appointed, or in the alternative, the matter be transmitted to the Office of Administrative Law for a hearing as a contested case.

In response, the appointing authority, represented by John J.D. Burke, Esq., confirms that the appellant was bypassed for her massive negative sick leave balance and disciplinary history, which indicates a longstanding pattern of sick leave abuse. It presents that while minor discipline is not a basis for removal from a list, it can be a basis for bypass. The appointing authority states that the appellant is just guessing when she asserts that she was bypassed due to favoritism or partisanship as there is nothing in the record to support these assertions that the decision to bypass her was not based on a legitimate business decision. It highlights that the appellant acknowledges that her negative sick leave balance exceeds 1,700, which translates into approximately 212 eight-hour shifts. The appointing authority emphasizes that the 1,700 hours of sick leave is beyond her yearly and contractually prescribed amounts and not for Family Medical Leave Act (FMLA) or approved long-term leaves of absences. In other words, it provides that the appellant has not only exhausted her contractual sick leave, she has taken over 200 extra shifts beyond what she is contractually allowed, which led to this negative sick leave balance. The appointing authority indicates this alone justifies its decision to bypass her.

Regarding the appointed candidates that the appellant presents, the appointing authority certifies that R.B-S., had a negative sick leave balance of 2,151 hours and R.L.W. had a negative sick leave balance of 682.50 hours, which it highlights is less than half of the appellant's negative sick leave. Additionally, it states that the appellant's disciplinary history also factored into its decision. The appointing authority presents that the appellant has a prolonged and consistent pattern of discipline, which included sick leave abuse, that is largely omitted from her appeal. Specifically, it indicates that the appellant received a July 8, 2004, written reprimand, a July 5, 2006, 10-day fine for a vehicle accident, an August 5, 2009, suspension for five days for abuse of sick time, a September 3, 2009, notice for abuse of sick time, an April 6, 2011, suspension for five days for abuse of sick time, a

December 21, 2012, performance of duty notice, a December 18, 2013, verbal counseling regarding hours and leave, a March 14, 2014, performance notice for abuse of sick time, an April 18, 2014, written reprimand for insubordination, an August 21, 2014, written reprimand for abuse of sick time, a March 16, 2016<sup>1</sup>, four-day suspension for insubordination, a June 7, 2016, sustained major discipline for administrative charges, a January 3, 2017, verbal counseling, and a September 18, 2019, sustained administrative charge for abuse of sick time. Therefore, the appointing authority states that contrary to the appellant's assertion that she never received major discipline, she actually received at least four major disciplines over 20 years. It emphasizes that the Civil Service Commission (Commission) has consistently held that a disciplinary record, even a minor one, is a legitimate business reason to bypass an eligible.

In reply, the appellant states that under the Rule of Three, the appointing authority cannot use an improper or unlawful motive for a bypass. She presents that the appointing authority failed to submit documentation to support the appointment of a lower ranked eligible, such as their performance evaluations and disciplinary history, which would indicate that the lower ranked eligibles were more suitable for appointment as a Police Sergeant than her. She submits cases to indicate that the Commission and the Appellate Division have upheld an appointing authority's decision to bypass where the appointing authority presented detailed explanations and documentation to support the choosing of the lower ranked candidate. The appellant certifies that the disciplinary history that the appointing authority indicates against her is inaccurate and it has failed to submit documentation, such as Final Notice of Disciplinary Actions and written reprimands and other documentation. She asserts that she has met her burden of proof to establish by a preponderance of the evidence that her bypass was discriminatory or retaliatory by submitting the names of lower ranked candidates who had equal or worse histories than her, but who were appointed due to personal favoritism and relationships with the Chief and other high-ranking officers in the Department. She also states that one of the candidates is dating a Police Lieutenant in the Department. The appellant reiterates her claims that the appointing authority is inflating her disciplinary history to justify her bypass. She indicates that the appointing authority failed to mention that she is contractually able to use one year of sick time for the same illness, without facing disciplinary charges.

The appellant certifies that it is her understanding that performance notices were supposed to be removed from her file within six months and not to be part of her permanent record and, therefore, should not be considered. She indicates that she does not recall the July 8, 2004, written reprimand, the July 5, 2006, fine for a vehicle

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<sup>1</sup> The appointing authority's response indicates that the four-day suspension was in 2017. However, it lists this suspension prior to a 2016 suspension in its response and the appellant acknowledges that she received a four-day suspension in 2016. Therefore, it is presumed that this suspension was in 2016 and not 2017.

accident, a December 18, 2013, verbal counseling, a June 7, 2016, major discipline, and a January 3, 2017, verbal counseling. The appellant confirms that she now recalls a major discipline that she received in 2008 to 2009. She questions the accuracy of several vehicle accidents, a firearm discharge, and criminal investigation as she has no knowledge of these events. The appellant notes that this is the second time she was bypassed for a position as a Police Sergeant. She states that the Chief and Captain have told her that she is a “good cop,” yet she was still bypassed.

The appellant indicates that although the appointing authority states that she was bypassed because she has 1,700 hours in negative sick leave balance, which translates to approximately 212 eight-hour shifts, her union contract allows members to take up to one year in sick time for the same illness without being charged with discipline. Therefore, she argues that while the appointing authority is attempting to portray her in a negative light, she was contractually permitted to take up to a year in time. She disputes that she received four major disciplines as she does not recall having a hearing for them or executing settlement agreements.

### 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)3i allow an appointing authority to select any of the top three interested eligibles on an open competitive or promotional list provided no veteran heads the list.

*N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority’s decision to bypass the appellant from an eligible list was improper.

*N.J.A.C.* 4A:2-1.1(d) provides that except where a hearing is required by law, this chapter or *N.J.A.C.* 4A:8, or where the Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record. For the reasons set forth below, the Commission finds no basis for a hearing in this 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 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.

In this matter, the Commission finds that the appellant has not established a *prima facie* case that her bypass was based on favoritism or any other illegal or invidious motivation. The appellant acknowledges that she has a 1,700 negative sick leave hour balance although she asserts that she was contractually able to use one year of sick time for the same illness.<sup>2</sup> The record is unclear if the appellant is claiming that her entire negative sick leave balance was covered under the contract or only partially. She highlights that one of the appointed eligibles, R.B-S., had a 2,151 negative sick leave hour balance and R.L.W., had a 682.25 negative sick leave hour balance. Therefore, she asserts that she had a comparable sick leave history and contends that the decision to bypass her in favor of these candidates was due to personal favoritism and relationships with the Chief and other high-ranking officers in the Department. She also alleges that one of the candidates is dating a Police Lieutenant in the Department.<sup>3</sup> However, the appointing authority indicates that the decision to bypass her was based on her negative sick leave hour balance *combined* with her disciplinary history.

The record indicates that there is some dispute as to the appellant's disciplinary history as the appellant does not recall all the discipline presented by the appointing authority and claims that the "disciplines" the appointing authority indicated that were "notices" were supposed to be removed from her disciplinary file. However, the record indicates that the appellant acknowledged, or at least did not specifically dispute, that she received a 2001 one-day suspension for insubordination<sup>4</sup>, an August 6, 2009, suspension for five days for abuse of sick time, an April 6, 2011, suspension for five days for abuse of sick time, an April 18, 2014, written reprimand for insubordination, an August 21, 2014, written reprimand for abuse of sick time, a four-day suspension in 2016, and a September 18, 2019, sustained administrative charge for abuse of sick time. Further, the appellant has not argued with any specificity that R.B-S. or R.L.W. have more significant

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<sup>2</sup> The Commission notes that even if true, the appointing authority can use an employee's record of attendance in its consideration to appoint or bypass an eligible.

<sup>3</sup> The record is unclear if the appellant is alleging that R B-S. or R.L.W was dating a Police Lieutenant or one of the other appointed candidates. Also, the record is unclear if the appellant is alleging that this Police Lieutenant was involved in making the subject appointments.

<sup>4</sup> Personnel records indicate that the appellant was appointed as a Police Officer on December 26, 2001 and she received discipline, effective December 13, 2002. The appointing authority did not indicate this disciplinary action in response to the appeal. Personnel records do not indicate the reason for the discipline or the disciplinary action that was issued.

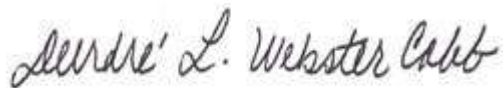
disciplinary histories than the appellant.<sup>5</sup> Therefore, it is clear that the appellant's disciplinary history provided an additional legitimate business reason for the bypass. Further, other than mere allegations, the appellant has not provided any evidence, such as a witness, a document or other evidence, that the appointing authority made its decision to bypass her based on favoritism and not the combination of her sick leave and disciplinary history. Moreover, as the appellant acknowledges at least some of her disciplinary history, there are no material facts in dispute which require a hearing. Additionally, while the appellant questions how her sick time can be used to bypass her as she had already been disciplined, as indicted previously, disciplinary actions can be considered by an appointing authority when it chooses to bypass a candidate.<sup>6</sup> See *In the Matter of Paul DeMarco* (MSB, decided April 6, 2005). Further, there is no requirement under Civil Service law and rules that only "severe" discipline can be considered to justify a bypass. Concerning the appellant's argument that her discipline was too remote to be considered adverse for the promotion, it is noted that the record indicates that her last discipline was September 18, 2019, which was less than three years prior to the appointing authority returning the subject certification on April 1, 2022. Regardless, under Civil Service law and rules, there is no prohibition against using a "remote" disciplinary history as a basis for a bypass.

### 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 2<sup>ND</sup> DAY OF NOVEMBER, 2022




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Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

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<sup>5</sup> A review of official personnel records indicates that R.B-S. has no disciplinary history and R.L.W. only had one disciplinary action against her, a five-day suspension, effective August 6, 2009. Based on the FNDAs on file, it appears that the appellant and R.L.W. were both disciplined for the same incident. However, the Commission notes that while its records are considered official personnel records, oftentimes an appointing authority does not enter all minor disciplines into the system. As such, the above recitation may not be fully accurate.

<sup>6</sup> Moreover, and also as previously noted, an eligible's attendance record, even if not disciplinary, can be utilized as a factor in determining to bypass that eligible.

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