



STATE OF NEW JERSEY

In the Matter of Nancy Shoukry,
Deputy Director Welfare (PC4831C),
Essex County

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

CSC Docket No. 2023-1218

List Bypass Appeal

ISSUED: February 1, 2023 (SLK)

Nancy Shoukry, represented by Lisa Maddox Douglas, President, Public Employees Supervisors’ Union, appeals the bypass of her name on the Deputy Director Welfare (PC4831C), Essex County eligible list.

By way of background, the appellant, a nonveteran, appeared on the PC4831C eligible list, which promulgated on March 10, 2022, and expires on March 9, 2024. The appellant’s name was certified on March 14, 2022 (PL220299) for a position in the subject title. A total of three names were certified. As all three candidates were ranked first, the candidates were positioned on the certification based on alphabetical order, with the appellant being the second positioned candidate. The first and third positioned candidates were appointed while the appellant was bypassed.

On appeal, the appellant complains that she was not notified by the appointing authority that the first and third positioned candidates were appointed on the subject certification, retroactive to the certification date, while she was not appointed. She notes that she responded to the subject certification notice indicating that she was interested in the position, but the appointing authority did not interview her, and a fair and impartial interview has been the past practice. Further, the appellant complains that the appointing authority did not respond to her multiple requests for her status regarding her candidacy. She highlights her Master’s level education and her 20 years of experience with the appointing authority. The appellant asserts that she has a lengthy history of complaints regarding harassment, which has contributed

to the suffering that she endures from the appointed candidates. She believes that she was discriminated against in the selection and appointment process due to her being an Egyptian woman with a Caucasian complexion and her position in the union as Second Vice-President.¹

In response, the appointing authority, represented by Sylvia Hall, Esq., notes that the candidates had the same rank and, therefore, it did not appoint a lower ranked candidate. Therefore, it believes that under the “Rule of Three,” the appellant was not bypassed, and it does not have to provide a reason as to why it appointed the selected candidates. Similarly, the appointing authority argues that the appellant’s appeal is without legal merit and must be dismissed for failure to state a claim upon which any relief may be granted. However, it explains that it appointed the first and third positioned candidates because these candidates had successfully provisionally served in the subject title. Therefore, the appointing authority states that it made its appointments based on legitimate business reasons.

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.

Initially, it is noted that prior to an appeal, an appointing authority has no obligation under Civil Service law and rules to inform a candidate that the candidate has been bypassed. However, once a candidate appeals, the appointing authority is obligated to provide a statement of reasons for the bypass. *See In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012) *on temporary remand* (CSC, decided November 7, 2012). Moreover, contrary to the appointing authority’s belief, as all the candidates had the same rank, the appellant’s non-appointment is considered a bypass, which required the appointing authority to submit its reasons upon appeal. It is only the non-appointment for a *higher-ranked* candidate, which is not considered a bypass and cannot be challenged.

Regarding the merits, 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*

¹ The appellant also states that her union previously filed an appeal contesting the eligibility of the first positioned candidate. This agency sent her union a letter explaining why the first positioned candidate met the eligibility requirements of the subject examination and, therefore, it was closing that matter. However, the appellant indicates that her union never received a determination in that matter. Therefore, this agency re-sent the letter to her union.

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 she was bypassed based on retaliation for prior harassment complaints, her being an Egyptian woman with a Caucasian complexion and/or her position in the union as Second Vice-President, as mere allegations, without evidence, is insufficient to establish a *prima facie* case. See *In the Matter of Chirag Patel* (CSC, decided June 7, 2017). Further, the appointing authority indicates that it made its appointments based on the appointed candidates' successful provisional service in the subject title, which is a legitimate business reason and is not persuasively disputed by the appellant. Moreover, while the appellant's appeal implies that she believes that she is the more qualified candidate, as this agency found the appointed candidates eligible, there is no evidence in the record that indicates that she is more qualified. Further, even if it is true that the appellant is "more qualified," under the "Rule of Three," the appointing authority can choose any of the top three candidates, as long as such appointments were not based on illegal or invidious motivation, and there is nothing in the record to suggest that the appointments were improperly motivated. Concerning the appellant's comments that she was not interviewed, it is within the appointing authority's discretion to choose its selection method. See *In the Matter of Daniel Dunn* (CSC, decided August 15, 2012). Further, even if it was the appointing authority's past practice to interview candidates, there is no obligation under Civil Service law or rules that the appointing authority continue this practice. See *In the Matter of Chad Hutchinson* (CSC, decided July 20, 2022).

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 1ST DAY OF FEBRUARY, 2023



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