



STATE OF NEW JERSEY

In the Matter of Peter Fabiani, Police
Lieutenant (PM4156C), Pennsauken

CSC Docket No. 2023-642

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

List Bypass Appeal

ISSUED: February 22, 2023 (SLK)

Peter Fabiani represented by Thomas A. Cushane, Esq., appeals the bypass of his name on the Police Lieutenant (PM4156C), Pennsauken eligible list.

By way of background, the appellant, a nonveteran, appeared on the PM4156C eligible list, which promulgated on April 21, 2022, and expires on April 20, 2025. The appellant's name was certified on August 12, 2022 (PL221136) for a position in the subject title. A total of three names were certified, and the appellant was the first ranked candidate. The appellant was bypassed, and J.K., the second ranked candidate, was appointed.

On appeal, the appellant argues that he is exceptionally more qualified to be promoted than J.K. He states that he supervised more specialized units than J.K., J.K. previously was his subordinate and he trained J.K. prior to his promotion to Police Sergeant, J.K. had substantially more citizen and departmental complaints lodged against him, including substantially more sustained internal affairs complaints, he has more training than J.K., and he has more awards, commendations, and decorations than J.K.

Additionally, the appellant asserts that pervasive nepotism and political cronyism prevented him from a merit-based promotion. He presents that the appointing authority hired a firm to survey law enforcement personnel within the Department due to concerns about nepotism and cronyism. The appellant states that in early 2021, then Police Lieutenant Ph.O. and then Police Sergeant M.K. each had

brothers serving on the Pennsauken Township Committee, Pa.O. and T.K. Further, he indicates that M.K. was close friends with Township Administrator, J.P. The appellant states that it is common knowledge that M.K. and J.P. are close friends and he cites examples where they socialized at functions that Police Officers witnessed.

The appellant indicates that in June 2021, Committeeman T.K. was appointed to Town Administrator, J.P. was appointed to Director of Public Safety, which made him the Police Department's ultimate authority, and Ph.O was appointed to Acting Police Chief, a position he still holds. He states that M.K. would boast that he regularly texted his brother and J.P. The appellant also highlights a 2018 speech where J.P. credited T.K. and M.K. for his political success. He states that on numerous occasions in 2021 and 2022, M.K. referred to him in derogatory terms to others in the Police Department. The appellant indicates that in May 2021, Ph.O. accused him in front of a Police Captain of "spreading rumors" of nepotism and cronyism in the Police Department. He also states that J.P. wanted to tell him himself to stop taking about him, but Ph.O said that he would "take care of it." Further, at that same meeting, Ph.O. accused him of labeling J.P. a "power-hungry tyrant." While the appellant agrees with that opinion, he told Ph.O. and the Police Captain that he had no recollection of stating this, and they responded that he should "stop spreading rumors."

Shortly thereafter, the appellant received notice that interviews were being conducted for promotions. He states that this had never been the past practice and he believes that this was done to bypass him since he was the first ranked candidate on the subject certification. The appellant indicates that the interviews conducted by Ph.O and J.P. were biased as his interview was vastly shorter than others, resulting in M.K.'s¹ promotion to Police Lieutenant. Subsequently, he presents that in February 2022, a Police Captain advised him that Ph.O. was "not pleased with him" and he did not want the appellant promoted because he attended a fellow officer's funeral with Police personnel who were political enemies of the current administration.

The appellant presents that under Civil Service law and rules, promotions are to be made based on merit. He contends that the appointing authority's conclusion that he was the inferior candidate defies logic as he has superior credentials than J.K. Therefore, the appellant believes that he was bypassed based on who he was *not*. He states that the promotional process is not supposed to be an endeavor in which personal opinions, political alliance, and political enmity become the basis for promoting an inferior candidate. Additionally, he submits documentation to show that a Police Captain within the Department filed a Conscientious Employee Protection Act (CEPA) complaint against Pennsauken, J.P. and other Pennsauken personnel.

¹ The record indicates that M.K. was ranked higher than the appellant on the subject eligible list.

In response, the appointing authority, represented by Michael J. DiPiero, Esq., and Jose A. Calves, Esq., asserts that it had several legitimate, non-discriminatory reasons for bypassing the appellant. It highlights that during the promotional process until November 1, 2022, the appellant was ineligible to carry a firearm in the State, which severely limited his ability to serve as a Police Lieutenant. The appointing authority states that J.K. was well qualified, had varied supervisory experience, and performed well on his interview. It contends that the appellant has made wild and irrelevant accusations against it without any evidence.

The appointing authority presents that in February 2022, the appellant was involved in an incident where he barricaded himself in his family home, with access to firearms, and made threats to harm himself. It indicates that various Pennsauken personnel teams were called to his house, and after several hours of negotiations, convinced him to exit the residence and undergo a crisis evaluation. Further, although the County Prosecutor announced that it would not pursue domestic violence charges against the appellant, it did not clear Pennsauken to return his firearm, nor was he deemed fit for duty or cleared by Internal Affairs until after the promotional process concluded. The appointing authority presents a letter that shows that it was supportive of the appellant in the aftermath of the incident and it treated that situation as an officer wellness issue.

Concerning the promotional process, the appointing authority presents that the appellant's interview in June 2021, lasted 13 minutes and 24 seconds. It indicates that all the candidates were asked the same questions, but the length was determined by the candidates' answers. It notes that M.K.'s interview was 14 minutes and three seconds and presents other interviews that lasted around 18 and 21 minutes. Further, contrary to the appellant's statements, interviews had been used intermittently for years, including Ph.O.'s interview for Police Sergeant in 2008.

The appointing authority asserts that it is untrue that the appellant is more qualified than J.K. as both were hired in 2005, and both had supervisory and training experience. Further, while the appellant alleges that J.K. had more Internal Affairs complaints and sustained investigations against him, it provides that J.K. did not have any sustained Internal Affairs investigations, while the appellant had two. Additionally, it indicates that neither candidate had any discipline more severe than a written reprimand and their training was comparable as J.K. completed 22 trainings while the appellant completed 33. Moreover, the appointing authority states that J.K. performed substantially better in his interview than the appellant and it describes why J.K.'s interview was better. Additionally, it contends that the appellant was frequently unreliable and unavailable as a Traffic Sergeant who was tasked with responding to fatal and serious motor vehicle accidents, which resulted in it having to create an "on-call" system to address the lack of coverage and to call senior officers to cover accidents.

The appointing authority argues that the appellant's accusations are unsupported allegations. It notes that there is no allegation that J.K. was related to any of the relevant decision makers. The appointing authority highlights that the appellant's interview was conducted well before the examination results were published and, therefore, it did not know that the appellant's rank at the time of the interviews. Further, the appointing authority contends that even if the Civil Service Commission (Commission) found that the appellant presented a *prima facie* case, it reiterates its legitimate and non-discriminatory reasons that it provides for the bypass.

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.

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 he was bypassed based on nepotism and cronyism as mere

allegations, without evidence², is insufficient to establish a *prima facie* case. See *In the Matter of Chirag Patel* (CSC, decided June 7, 2017). Further, even, *arguendo*, that the appellant established a *prima facie* case, the appointing authority presents that due to the appellant's involvement in a domestic incident in February 2022, the Prosecutor's Office required it to take away the appellant's firearm. Further, a review of the subject certification indicates that the appointing authority made its decision to bypass the appellant on or around September 1, 2022, which was prior to the completion of the appellant's fitness for duty examination and the appointing authority's Internal Affairs' Investigation. Moreover, the appointing authority indicates that the Prosecutor's Office did not authorize it to re-arm the appellant until November 1, 2022. Therefore, the record indicates that the appointing authority had a legitimate business reason for bypassing the appellant.

Additionally, the record demonstrates that the appellant and J.K. were comparably experienced candidates and J.K.'s superior interview performance also provided a legitimate business reason for the bypass. Concerning the appellant's comments that the appointing authority previously did not interview candidates, which the appointing authority disputes as it states that it has interviewed intermittently over the years, 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 true that the appointing authority's past practice was to not 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). Finally, the appellant has not persuasively demonstrated that the interviews were otherwise biased or problematic.

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.

² At most, the appellant has submitted "potential" evidence as he presents that the appointing authority hired an external firm to survey personnel regarding allegations of "nepotism" and "cronyism" and another Officer filed a "CEPA" lawsuit against J.P., Pennsauken, and other Pennsauken personnel. However, the results of the survey and the lawsuit have not been presented.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 22ND DAY OF FEBRUARY, 2023

Allison Chris Myers

Allison Chris Myers
Acting 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: Peter Fabiani
Thomas A. Cushane, Esq.
T.K.
Michael J. DiPiero, Esq.
Jose A. Calves, Esq.
Division of Human Resource Information Services
Records Center