



STATE OF NEW JERSEY

In the Matters of M.S. and A.V.,
Police Sergeant (PM5120N),
Jersey City

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket Nos. 2023-331
and 2023-718

Bypass Appeals

ISSUED: May 24, 2023 (JET)

M.S. and A.V., represented by Nicholas P. Milewski, Esq., appeal the bypass of their names on the Police Sergeant (PM5120N), Jersey City, eligible list. Since these matters involve similar issues, they have been consolidated herein.

By way of background, the subject eligible list of 275 names, including M.S., a non-veteran, tied at rank 82, and A.V., a non-veteran, tied at rank 84, promulgated on February 19, 2015 and expired on February 18, 2018. Thereafter, *In the Matter of Jersey City Police Promotional Appointments* (CSC, decided June 20, 2018), the Civil Service Commission (Commission), ordered that since the list for Police Sergeant (PM5120N), Jersey City had expired prior to the time the appointing authority issued a certification, that the PM5120N list be revived in order to effectuate various appointments. As a result, a certification (PL181243) of 22 names was issued with a retroactive certification date of May 14, 2018. It is noted that M.S. and A.V. appeared as the 16th and 17th listed eligibles on the subject certification. In disposing of the certification, the appointing authority bypassed M.S. and A.V., and appointed eligibles below them appearing as the 19, 20, 21 and 22nd listed eligibles, effective May 14, 2018. The disposition of that certification was recorded on October 17, 2018. It is noted that the list had previously certified five times and 59 appointments had been made.

On appeal to the Commission (Commission), the appellants assert that the appointing authority improperly bypassed them from the subject certification as a

result of their involvement in an FBI investigation.¹ The appellants state that, while the FBI investigation was ongoing, they were assigned to paid leave status at the time promotions were made from the subject certification. The appellants state that, if they had been instead assigned to modified duty, it is possible that they could have been promoted from the subject certification.² The appellants explain that, although the FBI investigation was dismissed and they were not criminally charged, the appointing authority decided to issue minor disciplinary charges against them. The appellants contend that, although they accepted the minor discipline as a result of the disciplinary charges against them, it should not have resulted in their bypass from the subject certification.³ Moreover, the appellants request the subject certification be revived so that they can be retroactively appointed from the subject certification.

Additionally, the appellants assert that the instant appeals should not be considered untimely. The appellants state that since they received notice of the minor disciplinary charges on August 24, 2022, that should be used as the date that to determine whether the appeals were timely filed. In this regard, they argue that the issuance of minor discipline marked the end of the FBI investigation that led to their bypass. Moreover, the appellants contend that, based on the ongoing investigation, it would have been impossible for them to have filed an appeal of the bypass in 2018.

In response, the appointing authority, represented by Kyle J. Trent, Esq., maintains that the instant appeal is untimely and should be dismissed. The appointing authority maintains that it correctly bypassed the appellants based on their involvement in the FBI investigation. Further, the appointing authority asserts that the appellants had 20 days to file an appeal from the date they were bypassed on the May 14, 2018 subject certification, and an appeal submitted beyond the 20-day timeframe is untimely and cannot be accepted, as the 20-day timeframe is a statutory limitation. The appointing authority maintains that, since the appellants waited over 1,500 days to file the appeals in the instant matter, such appeals cannot now be considered as they are untimely. Moreover, the appointing authority asserts that the July 2022 minor discipline that the appellants accepted cannot be considered in this matter as it constitutes a separate matter from their bypass, and even if it did not, the Commission lacks jurisdiction to address an appeal of the minor disciplinary action. *See N.J.A.C. 4A:2-3.1(d)*. In this regard the appointing authority contends that, since the Commission does not have jurisdiction to address the minor disciplinary action, the appellants cannot now link the 20-day timeframe to file the

¹ On May 9, 2017, the appellants were suspended from duty with pay from their Police Officer positions based on the FBI investigation.

² The appellants contend that, had they been promoted to Police Sergeant, they could have taken an examination for Police Lieutenant.

³ The record reflects that appellants gave up five-days paid leave time as a result of the minor disciplinary action.

appeals of their bypass based on the August 24, 2022 date they received notice of the minor disciplinary charges.

CONCLUSION

N.J.A.C. 4A:2-1.1(b) states that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed.⁴

Initially, the appellants were aware that they were bypassed no later than October 17, 2018, the date the subject certification was disposed. In this matter, A.V. admitted in his appeal submissions dated July 22, 2022 (date-stamped July 26, 2022) and October 11, 2022 (date-stamped October 13, 2022), and M.S. admitted in her September 12, 2022 submission (received by this agency on September 13, 2022) and October 11, 2022 (date-stamped October 13, 2022) that they were bypassed from the May 14, 2018 subject certification, and that they did not file an appeal of the bypass within the required 20-day timeframe. Rather, they waited until July 22, 2022 and September 12, 2022, nearly four years later, to file the appeals of their bypass. Pursuant to the above noted rule, since the appellants were on notice of their bypass no later than October 17, 2018, they were required to file an appeal of their bypass no later than 20 days thereafter. The responsibility to file timely appeals rests solely with the appellants.

Additionally, neither the FBI investigation, nor the minor discipline tolled the time to file an appeal with the Commission. Bypass matters are not subject to the minor disciplinary process and must be filed in accordance with *N.J.A.C.* 4A:2-1.1. With respect to the August 24, 2022 date the appellants received notice of the minor disciplinary charges, the Commission does not have jurisdiction to address the appellants' minor disciplinary matters, and as such, the date the appellants received notice of the minor disciplinary charges does not overcome that their bypass appeals are untimely. In this regard, minor discipline constitutes a formal written reprimand or a suspension or fine of five working days or less. *See N.J.A.C.* 4A:2-3.1(a). Appeals of minor disciplinary actions taken against county or municipal government employees are not reviewable by the Commission since the Legislature has limited such reviews to employees of State service. *See N.J.S.A.* 11A:2-16. Since the appellants' contentions with respect to the minor disciplinary charges cannot be addressed, the date the appellants' received notice of the minor disciplinary charges is of no moment. It is noted that if there is no mechanism available for the appellants to pursue a minor disciplinary action under the standards and procedures established by the appointing authority or by a negotiated labor agreement, they may seek relief

⁴ While the appointing authority argues this timeframe is statutory and cannot be relaxed, the 20-day timeframe is only statutory for certain appeal actions, such as appeals of major discipline. *See e.g., N.J.S.A.* 11A:2-15.

through the Law Division of the Superior Court of New Jersey. *See Romanowski v. Brick Township*, 185 *N.J. Super.* 197 (Law Div. Ocean County 1982).

Although the appellants argue, since they were subjected to an FBI investigation, they could not file an appeal at the time they were bypassed in 2018, the Commission disagrees. The appellants' involvement in the FBI investigation does not, in and of itself, constitute a valid reason for failing to file an appeal of the underlying bypass within the above noted 20-day timeframe. Although the appellants state it would have been impossible to file the appeals in 2018, they have not pointed to any specific information that supports that claim in this matter. Even if the appellants believed they might be criminally charged as a result of the FBI investigation, it did not prevent them from filing the bypass appeal in this matter. Therefore, the appellants' appeals of their bypasses to the Commission are untimely as they are well beyond the 20-day timeframe, and are dismissed solely on those grounds.

Moreover, even if the appellants filed timely appeals, they have not made any arguments that the appointing authority's decision to bypass them was not in compliance with *N.J.A.C.* 4A:4-4.8(a)3. In this regard, *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of evidence that an appointing authority's decision to bypass the appellant on a list was improper. If discretion is properly utilized, an appointing authority's decision will not be overturned. Moreover, for informational purposes only, the appellants have presented no substantive information in this matter to show that there was any invidious motivation involved in the selection process or that they were any more qualified than any of the selected candidates. An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate's history and qualifications to determine the best candidate from a list of eligibles, any of whom may be selected under *N.J.A.C.* 4A:4-4.8(a)3. In this matter, as the appellants were subject to an FBI investigation at the time of the certification, the appointing authority clearly could have used that as a basis to bypass them from the promotional certification.⁵ Accordingly, the appellants have not met their burden of proof in this matter.

ORDER

Therefore, it is ordered that these appeals be denied.

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

⁵ Moreover, the Commission notes that minor discipline, such as the five-day suspensions received by the appellants, can also be used as a legitimate basis to bypass a candidate from a promotional certification.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF MAY, 2023

Allison Chris Myers

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