



STATE OF NEW JERSEY

In the Matter of T.A, Data Entry
Operator 4 (PS0455U), Department
of the Treasury

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

CSC Docket No. 2024-445

Bypass Appeal

ISSUED: March 20, 2024 (HS)

T.A. appeals the bypass of his name on the Data Entry Operator 4 (PS0455U), Department of the Treasury eligible list.

The appellant appeared as the fifth ranked non-veteran eligible on the subject eligible list, which promulgated on March 26, 2020 and expired on March 25, 2023. A certification, consisting of the names of six non-veteran eligibles, was issued on February 6, 2023 (PS230167) with the appellant listed in the fifth position. In disposing of the certification, the appointing authority appointed, effective March 25, 2023, the first three listed eligibles and the sixth listed eligible, who was ranked equally with the appellant. The fourth listed eligible and the appellant were bypassed. It is noted that PS230167 was the sole certification from the eligible list.

On appeal to the Civil Service Commission (Commission), the appellant claims that the appointing authority bypassed his name based on race, gender, and sexual orientation. He states that he has filed discrimination complaints in the past. The appellant highlights the nearly three years that passed between the promulgation of the eligible list and the issuance of the certification and that two vacancies under the subject title were posted two months after the eligible list expired. Specifically regarding those two vacancies, he provides a copy of an e-mail where the Office of Human Resources (HR) informed him that “there are currently two approved vacancies to fill from this posting. At the time of the certification, final approvals were not in place for these two vacancies to allow additional appointments from the list.” The appellant registers his disagreement and maintains that the two positions

were vacant months before because a co-worker had retired. Per the appellant, the appointing authority could have filled the vacancies from the certification. He alleges that the appointing authority decided to wait until the list expired so he could not be selected.

In response, the appointing authority describes the selection process as follows. Interviews were conducted by an interview panel consisting of three interviewers: Chief, Assistant Chief, and an Administrative Assistant. The Chief and Assistant Chief evaluated the candidates based on a set of six standardized interview questions. Each candidate was asked the same questions in the same order. As a result of the interview questions, each candidate was evaluated by the panel using a matrix and scoring of one (lowest) to five (highest). The overall rating was based on each candidate's responses to the six interview questions in relation to the following factors: applicable work experience; applicable work skills; problem-solving; communication skills; attitude/motivation; and working relationships. Based on the overall evaluation criteria, the candidates were offered an appointment to the title based on the total overall rating for each candidate. The appellant scored an overall rating of two, placing him last on the outcome of the interview process. As such, the appellant was not offered an appointment. The four candidates appointed from the certification were all reachable pursuant to the "Rule of Three" and scored overall ratings of five, five, four, and four, respectively. The appointing authority maintains that there were only four approved vacancies.

In reply, the appellant asserts that the four appointees had been working in the subject title for almost three years before they were interviewed and selected. The appellant contends that the interview questions were not fair to some degree because he was not given a chance to work in the subject supervisory title, even on a temporary basis, while the four appointees already had experience working in the title. He relates that one of the questions was, "Have you ever supervised before?" The appellant answered that he had done so on nights during tax season but that this had occurred some time ago. According to the appellant, in his 23 years of State service, he has never heard of anyone choosing to hold interviews and basing appointments on the interview scores. He states that the appointing authority would normally go down the eligible list.

The appellant also states his belief that he was not appointed due to his negative experiences with his former division director. Specifically, the appellant relates that the former division director made a disturbing comment in 2020 during the COVID-19 pandemic. According to the appellant, he reported the comment to HR, which investigated and substantiated that the comment was made. The appellant states that he is "pretty sure" that his name was mentioned. The appellant also maintains that the former division director had created a toxic work environment for minorities and states his belief that the former division director is the reason he was not appointed.

Further, the appellant relates that “a few years ago” during the month of October, the Chief and Assistant Chief held a Halloween party for his floor. They decided to make and print out “vouchers” and that whoever had the best Halloween costume would win an extra lunch hour. The appellant reported that incident to HR, and the Chief and Assistant Chief had to take back the hour “prize.” The appellant states his belief that this was another reason that he did not receive an appointment. He adds that he believes the Assistant Chief is homophobic and does not want to see him progress in his title series.

It is noted that per the definition section of the job specification for Data Entry Operator 4, the incumbent supervises a data entry unit responsible for entering, editing and/or updating data from a source document into a prescribed computer system for storage, processing or data management purposes; supervises staff and work activities; and prepares and signs official performance evaluations for subordinate staff.

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).

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.

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 appointment made. The appellant maintains that he has never heard of interviews being held with appointments based on the interview scores and that the appointing authority would normally go down the eligible list. However, it is well established that appointing authorities are permitted to interview candidates and base their hiring decisions on the interview. This is within the appointing authority's discretion and may apply to all positions, including Data Entry Operator 4. However, interviews, whether structured or not, are not required. See *In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012). 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. Here, the appellant complains that the question, "Have you ever supervised before?" demonstrates that the interview was unfair to a degree because he had not been given a chance to work in the subject supervisory title even on a temporary basis. The Commission is not persuaded. The subject title is clearly supervisory per the job specification, so the question is reasonable. Further, the question was open-ended as to supervisory experience, so a candidate could discuss *any* supervisory experience the candidate may have possessed.

Neither has the appellant shown that the appointing authority's proffered reason was pretextual. In this regard, the appellant suggests that he was bypassed due to his race; gender; sexual orientation; past discrimination complaints he has filed; negative experiences with his former division director; and his reporting an incident where the Chief and Assistant Chief awarded an extra lunch hour as a prize for winning a Halloween costume contest. However, these claims are speculative as the appellant has not offered any substantive evidence that would suggest a plausible link between any of those factors and the decision to bypass him.

The appellant also highlights the nearly three years that passed between the promulgation of the eligible list and the issuance of the certification and that two vacancies under the subject title were posted two months after the eligible list expired when there had been a previous retirement. However, the appellant has not provided any substantive evidence that the timing of the vacancies was suspect, and the determination as to whether a vacancy exists and/or will be filled is generally left to the discretion of the appointing authority. See *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). See also, *In the Matter of Todd Sparks* (MSB, decided April 6, 2005); *In the Matter of Deputy Fire Chief (PM3654F), Borough of*

Roselle (MSB, decided March 23, 2005); *In the Matter of Institutional Fire Chief* (MSB, decided January 12, 2005).

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 antiunion 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 his 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 a legitimate reason for the appellant’s bypass that has 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 his 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 20TH DAY OF MARCH, 2024



Allison Chris Myers
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: T.A.
Antoinette Sargent
Division of Human Resource Information Services
Records Center