



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jose E. Cartagena,
Sheriff's Officer Sergeant (PC1002N),
Passaic County

CSC Docket No. 2015-3251

List Bypass Appeal

ISSUED: **NOV 30 2016** (DASV)

Jose E. Cartagena appeals the bypass of his name on the eligible list for Sheriff's Officer Sergeant (PC1002N), Passaic County.

The appellant, a nonveteran, appeared on the subject eligible list, which promulgated on September 20, 2012 and expired on September 19, 2015. The appellant's name was certified on April 16, 2015, along with seven other names. In disposing of the certification, the appointing authority appointed the third, fourth, and sixth ranked eligibles effective May 28, 2015. It also appointed the seventh and eighth ranked eligibles effective September 9, 2015. The first and fifth ranked eligibles retired, and thus, they were removed from the list. The appellant, who ranked second, was bypassed.

On appeal to the Civil Service Commission (Commission), the appellant indicates that on May 26, 2015, he was called into work to meet with three Undersheriffs. An Undersheriff advised him that appointments were going to be made from the subject eligible list. However, the appellant "was not in their plans." The appellant emphasizes that no one on the certification was bypassed except for him. Moreover, the appellant contends that the Sheriff and an Undersheriff would not meet with him. The Sheriff supposedly indicated that he was "sticking to the [R]ule of [T]hree" in not appointing the appellant. However, the appellant asserts that the promotions were not made in accordance with merit and fitness since he possesses more experience and training and has better qualifications than the other appointees, having been assigned to the Patrol Division, Courthouse Division, and the Mounted Patrol Division. The appellant notes that reassignments had to be

made based on the experience of the new appointees. He has also made numerous arrests, has no suspensions, and has above average evaluations. Additionally, the appellant indicates that he is Hispanic and there are only two Hispanic Sheriff's Officer Sergeants, despite that there are approximately 40 superior officers. Thus, the appellant maintains that he could have served in any one of the divisions, and, being Hispanic and fluent in Spanish, he would have diversified the superior ranks and aided the agency in its contact with the public.¹ The appellant contends that he "best fits the needs of the agency/department." Thus, he concludes that based on the foregoing, "a reasonable person [is led] to believe that [he] was bypassed because of [his] ethnic background." In support of his appeal, the appellant submits his performance appraisals.

In response,² the appointing authority, represented by Jose R. Santiago, Assistant County Counsel, indicates that the appellant failed to present a *prima facie* claim of discrimination on five counts. First, it states that the appellant's "general lament" that the agency lacks Hispanic superior officers can be explained by the rankings on the subject eligible list. The first Hispanic candidate ranked 15th on the subject eligible list, and the next candidate ranked 21st. Second, the appellant admits that these Hispanic officers were in fact appointed, which belies his claim that he was bypassed based on his ethnicity. Third, the appointing authority emphasizes that a lower ranked Hispanic female was later appointed on the subject certification. Fourth, its review committee for promotions includes African-American executive level administrators and a Hispanic Undersheriff. Fifth, the appointing authority notes that between the two divisions of the Passaic County Sheriff's Department, Corrections and Patrol, there are 18 superior officers with ethnic minority backgrounds. Thus, it maintains that minority officers, including Hispanic officers, as a group are not being bypassed for promotion.

Additionally, the appointing authority contends that prior to the appellant's certification, he was "in the unfortunate position of having had domestic violence charges filed against him." As a result, the appellant was placed on alternate duty and could only possess his service weapon while on duty. He was required to sign his firearm in and out. The appellant was also required to undergo a fitness for duty examination and personal counseling. Under these circumstances, the review committee determined that the appellant "would be better served by not being burdened at this time with additional responsibilities and stress associated with"

¹ The appellant also alleges that a Hispanic female was tied with Caucasian males on the subject eligible list. However, she ranked seventh out of eight eligibles on the certification and both eligibles were later appointed on September 9, 2015.

² The appointing authority initially argues that the appellant's appeal is untimely, as he filed his appeal more than 20 days from his meeting with the Undersheriffs when he discovered that he would not be appointed. However, the appellant's appeal was received on June 17, 2015, prior to the disposition of the certification. His appeal was held in abeyance pending the disposition of the certification, which was not recorded until November 18, 2015. Thus, the appellant's appeal is considered timely.

being a Sergeant. Therefore, the appointing authority indicates that the appellant has not presented any substantive evidence demonstrating that it abused its discretion to bypass him under the "Rule of Three." The appointing authority further notes that the appellant does not possess a vested property interest in a position. In support of its position, the appointing authority submits, among other things, the appellant's daily weapon sign in/sign out log sheet from December 8, 2014 through May 1, 2015; a Notice of Motion from the Passaic County Prosecutor, filed on July 17, 2014, petitioning the Superior Court of New Jersey for forfeiture of the appellant's weapons; a letter from the Passaic County Prosecutor's Office, dated May 5, 2015, that the appellant may be rearmed without restrictions; and a memorandum, dated May 6, 2015, from the Special Investigation Division that the appellant was being returned to full status and was no longer required to sign his duty weapon in and out.

In reply, the appellant states that, during the May 26, 2015 meeting with the Undersheriffs, he was never advised that his bypass was due to the domestic violence charge. Rather, he was just told that he was not in the Sheriff's plans. Thus, he "was forced to assume that it could have been due to [his] ethnic background." The appellant reiterates that he is well qualified for the position. He also explains the domestic violence charge. He indicates that he and his wife were having marital problems and once he told her that he was seeking a divorce and would be asking her to move out of the house he owned prior to their marriage, she filed a restraining order against him on July 14, 2014. The appellant claims that his wife filed the restraining order because she thought he was going to ask her to move out immediately, which was not the case. Thereafter, his weapons were seized. However, the restraining order was dismissed in August 2014 and he underwent a fitness for duty examination, which he passed, and attended all mandated counseling. The appellant emphasizes that he was rearmed on a full-time basis without restrictions on May 6, 2015, which was prior to the promotions and 20 days prior to the meeting with the Undersheriffs. The appointing authority had no objections to returning him to full duty. The appellant also notes that he has since received his final judgment of divorce and there have been no other incidents. He states that "[t]his was the embarrassing process [he] had to endure when [he] was wrongfully charged." After complying with all the procedures, he was then bypassed as if he were guilty. The appellant stresses that the appointing authority did not dispute his abilities, including his fluency in Spanish which is spoken by a large population of Passaic County. He maintains that pursuant to *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, Ocean City, 207 N.J. 38 (2011), the appointing authority must demonstrate a merit-based criteria for his bypass, which it has failed to do.

In response, the appointing authority contends that the appellant acknowledged that his bypass was not based on his ethnic background and it was "simply an assumption on his part." Thus, with the discrimination claim no longer

at issue, the appointing authority maintains that its basis for bypassing the appellant was not an abuse of discretion. It argues that issues of character, personal circumstance, and behavior can be considered in determining merit and fitness, which it had considered in the appellant's case. The appointing authority reiterates that it bypassed the appellant pursuant to the "Rule of Three," since it did not want the additional burden of supervisory responsibilities to affect the appellant's personal circumstance. It contends that the appellant minimizes the timeline of his domestic violence issue, which was ongoing for a period of almost one year.

The appellant responds that he still believes that his bypass was due to his ethnic background. He argues that it was more difficult to have bypassed the two higher ranked Hispanics because of their rank. He also claims that the Hispanic female was not appointed with the first group of appointees, despite that the Caucasian appointees who were tied in her rank had less experience and training than her. The appellant indicates that the Hispanic female was appointed after he filed his appeal and after the National Coalition of Latino Officers sent a letter to the appointing authority. The appellant notes that the New Jersey president of the coalition, a Sheriff's Officer Sergeant, was reassigned as a response to the letter. Moreover, the appellant contends that other officers have had disciplinary infractions and personal family issues, but yet they were still promoted. He indicates that he has had only one verbal reprimand in his entire career with above average evaluations, yet he was not promoted. Further, the appellant emphasizes that his appeal is not based on the fact that the appointing authority has never appointed minority candidates. Rather, he alleges that when the appointing authority is given a choice of qualified, experienced, and trained Hispanics, such as himself and the female Hispanic, the appointing authority selects less experienced Caucasian males. Further, the appellant contends that, despite that the female Hispanic was appointed, she now has less seniority than the other individuals whom she had tied with in rank.

In reply, the appointing authority contends that the appellant merely restates his previous arguments. It maintains that his appeal should be denied.

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)3 allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. At the time of disposition of the certification, *N.J.A.C. 4A:4-4.8* no longer required that an appointing authority must, when bypassing a higher ranked eligible, give a statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tie score. The rule amendment became effective on May 7, 2012, upon publication in the *New Jersey Register*. As such, the

appointing authority was not required to provide a statement as to why it appointed lower ranked eligibles on the April 16, 2015 certification. Regardless, on appeal, the appointing authority has provided its reasons. Moreover, it is noted that that the appellant has the burden of proof in this matter. See *N.J.A.C. 4A:2-1.4(c)*

Additionally, 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, supra*. In *Jamison*, at 445, the Court outlined the burden of proof necessary to establish discriminatory and 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 then has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

Moreover, the "Rule of Three" allows an appointing authority to use discretion in making appointments. See *N.J.S.A. 11A:4-8* and *N.J.A.C. 4A:4-4.8(a)3*. As long as that discretion is utilized properly, an appointing authority's decision will not be overturned. Compare, *In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union 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).

In the instant matter, the appellant alleges that he was bypassed due to his ethnic background, despite that he is more qualified than lower ranked eligibles. However, other than mere allegations and speculation, the appellant has not presented any substantive evidence that would lead the Commission to conclude that his bypass was improper or an abuse of the appointing authority's discretion under the "Rule of Three." The appointing authority addresses the appellant's discrimination claims with compelling facts to the contrary. Moreover, it presents legitimate, non-discriminatory reasons for the appellant's bypass, which have not been refuted. In that regard, the appellant had a documented domestic violence

charge against him and he was placed on alternate duty. His firearms were seized and his service weapon was monitored. He was also required to undergo a fitness for duty examination and attend counseling. In addition, regardless of whether the restraining order against the appellant was dismissed, the appellant was not returned to full-duty status with his service weapon until after the subject certification was issued. It is of no consequence that the first appointments were made afterward because the appointing authority could have made an appointment on the date of the certification's issuance. Regardless, the appellant was restored to duty without restrictions only a few weeks prior to the first appointments. Therefore, notwithstanding the appellant's disagreement, the appointing authority's reason for bypassing him was not discriminatory. It is noted that the fact that the appellant was not advised of the actual reason during the May 26, 2015 meeting does not negate its legitimacy. In that regard, the appointing authority is not obligated to provide a candidate with the reasons why the lower ranked candidate was appointed. See *Local 518, New Jersey State Motor Vehicle Employee Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles*, 262 N.J. Super. 598 (App. Div. 1993); *In the Matter of Brian McGowan* (MSB, decided April 6, 2005). Nevertheless, in the context of this appeal, the appellant has had an opportunity to learn the specific reasons for his bypass and to dispute those reasons. Accordingly, since the appellant's assertions of discrimination are unsupported in the record, he has not established by a preponderance of the evidence a *prima facie* case as outlined above.

In addition, the appellant attempts to argue that the reason for his bypass was not merit based, as the appointing authority has not disputed his qualifications and other officers have been promoted with disciplinary infractions and personal family issues. However, 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," absent any unlawful motive. See *N.J.A.C. 4A:4-4.8(a)3*. Furthermore, the appellant has not provided any specific information regarding the identities or the adverse employment histories of individuals he claims have been promoted with such issues. While the Commission has, in some cases, reviewed the background reports of other candidates hired by an appointing authority due to allegations similar to the appellant's, the Commission has limited such review to specific individuals named by the party making the allegations. See *e.g., In the Matter of Joseph Jensen* (MSB, decided May 29, 2002); *In the Matter of Scott Sista* (MSB, decided February 27, 2002); *In the Matter of Benny Cardona* (MSB, decided January 29, 2002). Additionally, the appellant has not shown that similarly situated individuals have been promoted based on domestic violence issues in their record. Nevertheless, each case is distinct and must be reviewed under the totality of the circumstances. In the appellant's case, the Commission finds that the appellant's domestic violence issue and the resulting consequences provide a sufficient basis to bypass his name on the subject eligible list. As such, the appellant's bypass was not due to invidious reasons. It is noted that the appellant does not possess a vested property interest in the position. The only

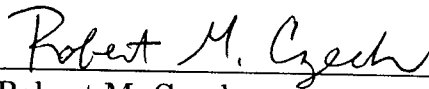
interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name on the Sheriff's Officer Sergeant (PC1002N), Passaic County, eligible list was proper and the appellant has failed to meet 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 23RD DAY OF NOVEMBER, 2016



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