



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Derek Slimmer,  
Correction Lieutenant (PS6072I),  
Department of Corrections

CSC Docket No. 2017-2342

Bypass Appeal

ISSUED: OCT 10 2017 (EG)

Derek Slimmer, a Correction Sergeant with Bayside State Prison, Department of Corrections, represented by Frank M. Crivelli, Esq., appeals the bypass of his name for Correction Lieutenant (PS6072I), Department of Corrections.

By way of background, the appellant, a non-veteran, appeared on the promotional list for Correction Lieutenant (PS6072I), Department of Corrections, which promulgated on September 6, 2012 and expired on September 5, 2015. The appellant was listed as the 108<sup>th</sup> ranked eligible. Records indicate that the appellant did not receive an appointment from the subject list.

It is noted that the appellant filed the instant appeal on January 23, 2017. By letter dated March 28, 2017 from the Division of Appeals and Regulatory Affairs (DARA), the appellant was informed that, since his appeal was not filed in accordance with *N.J.A.C. 4A:2-1.1(b)*, it was untimely and would not be presented to the Civil Service Commission (Commission) for a determination. Thereafter, the appellant filed an appeal with the Appellate Division of the Superior Court, which on September 11, 2017, remanded the matter to this agency to issue a decision within 30 days. It also retained jurisdiction

On appeal, the appellant argues that he was bypassed for appointment on the subject list due to a disciplinary action. Specifically, he indicates that on August 25, 2014, he was served with a Final Notice of Disciplinary Action (FNDA) in which various charges against him were sustained and he was given a 30-day suspension. He appealed his suspension to the Commission and the matter was transmitted to

the Office of Administrative Law (OAL). Subsequently, on March 17, 2016, the appellant and the appointing authority settled the matter with the 30-day suspension being reduced to a letter of counseling. Additionally, the settlement indicated that the appointing authority would take no position with regard to any appeal filed by the appellant pertaining to "a promotions list." Thereafter, on October 24, 2016, the appellant sent a letter to the appointing authority stating that since the disciplinary charges had been dismissed, he should receive a retroactive appointment to Correction Lieutenant. The appointing authority responded in a letter dated December 30, 2016 indicating that it would not promote the appellant or provide him with a retroactive date. It stated that it acted properly in bypassing the appellant at the time due to the discipline on the record and also indicated that the subject list had expired. The appellant argues that because the reason for his bypass no longer exists he should be promoted. Further, the appellant submits a certification from the President of the New Jersey Law Enforcement Supervisors Association, William Toolen, which states that the appointing authority's long standing practice was to not utilize the rule of three but instead to promote straight down the list. Finally, the appellant contends that he is entitled to a retroactive date of appointment, back pay, seniority, and other economic benefits he would have received had he not been unjustifiably bypassed for promotion.

### 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)*. Further, *N.J.A.C. 4A:2-1.1(b)* provides that an appeal must be filed within 20 days after either the appellant has notice or reasonably should have known of the decision, situation or action being appealed.

In the instant matter, the appellant's appeal does not indicate the precise certification(s) or dates that he was bypassed for appointment. Therefore, the commission finds that it is appropriate to utilize the date the eligible list expired, September 5, 2015, as the latest reasonable date as to when the appellant should have known of his bypass on the subject eligible list. The appellant's appeal to the Commission is clearly untimely as it was dated January 23, 2017, more than one year after the list expired. In this regard, the Commission notes that a pending disciplinary matter does not toll the time the appellant had to file a bypass appeal with the Commission. Further, the Commission notes the appellant waited six months after the date of the settlement to raise the question of his bypass with the appointing authority. In this regard, the appellant provides no valid explanation for the delay in filing his appeal. Moreover, the purpose of time limits is not to eliminate or curtail the rights of the appellant, but to establish a threshold of



finality. In this matter, the delay in filing the appeal unreasonably exceeds that threshold of finality. Therefore, the appellant's appeal is untimely.

In addition, there is no basis in this particular case to extend or to relax the time for appeal. See *N.J.A.C. 4A:1-1.2(c)* (the Commission has the discretionary authority to relax rules for good cause). In this regard, it is appropriate to consider whether the delay in asserting his right to appeal was reasonable and excusable. *Appeal of Syby*, 66 *N.J. Super.* 460, 464 (App. Div. 1961) (construing "good cause" in appellate court rules governing the time for appeal); *Atlantic City v. Civil Service Com'n*, 3 *N.J. Super.* 57, 60 (App. Div. 1949) (describing the circumstances under which delay in asserting rights may be excusable). Among the factors to be considered are the length of delay and the reasons for the delay. *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982). In this case, the appellant has not presented any reason that would excuse his extensive delay in filing his appeal. The appellant does not claim that he attempted earlier to assert his rights or file an appeal but was somehow precluded or misled. See, e.g., *Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993) (allowing relaxation of the appeal rules where police officer repeatedly, but unsuccessfully, sought clarification of his employment status). Accordingly, based on a thorough review of the record, the appellant has not met his burden of proof in this matter.

Moreover, even assuming, *arguendo*, that the appellant's appeal had been timely filed, the appointing authority's bypass of the appellant on the subject list was proper. Absent any unlawful motive, it is permissible for an appointing authority to consider an individual's pending discipline as a basis for bypassing him on a certification. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). See also, *In the Matter of Gary R. Kern, et al.* (MSB, decided October 11, 2000) (It was determined that appellant was not entitled to retroactive date of appointment, nor were Civil Service law or rules violated, when the appointing authority initially bypassed him due to pending disciplinary charges that were departmentally dismissed); *In the Matter of Michael Boylan* (MSB, decided October 22, 2003) (It was within the appointing authority's discretion to bypass appellant due to two discrimination complaints filed against him, which were transmitted to the OAL for a hearing and which might have resulted in disciplinary charges). In the present matter, the appellant has not argued or shown any unlawful motive in the appointing authority's decision to discipline the appellant or to bypass his name for promotion.

Furthermore, the appellant presents a certification from the President of the New Jersey Law Enforcement Supervisors Association claiming that the appointing authority's past practice has been to appoint according to rank on the eligible list. However, the fact that the appointing authority did not previously bypass candidates did not preclude it from doing so in the instant matter. In addition, the appellant has not argued that he is more qualified than any lower ranked appointed

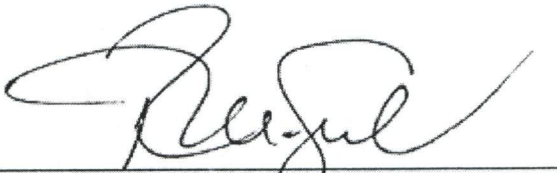
individuals. Further, the appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." *Compare, In re Crowley*, 193 N.J. Super. 197 (App. 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). Finally, the Commission notes that the appellant, a non-veteran, did not possess a vested property interest in the Correction Lieutenant 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). The record in this case shows that the appellant's bypass for appointment was not in contravention of any Civil Service law or rules. Accordingly, based on a thorough review of the record, 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 4TH DAY OF OCTOBER, 2017




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