

she was told by another WDC employee that appointments “must be offered to the highest ranking individuals” and V.L. and D.W. were only listed in the third and fourth positions on the subject certification. The appellant maintains that she was told by WDC’s Human Resources Department that they did not have to interview candidates before disposing of the September 15, 2016 certification because they were appointing the two candidates who were already serving provisionally in the subject title.

In response, the appointing authority states that it selected V.L. and D.W. for appointment from the subject certification based upon the fact that they had been serving provisionally in the subject title.² The appointing authority maintains that its appointment of V.L. and D.W. on that basis was appropriate and consistent with the “Rule of Three.”

CONCLUSION

N.J.A.C. 4A:4-4.8, *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. *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(b)4, 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 an eligible list was improper. As long as that discretion is properly utilized, an appointing authority’s decision will not be overturned.

In the instant matter, the appellant, a non-veteran, was the second listed name on the September 15, 2016 certification. The appointing authority has indicated that it selected D.W. and V.L. for permanent appointments to the subject title because they had held the positions provisionally since March 2016 and April 2016, respectively. It is noted that, on appeal, the appellant does not suggest that her bypass was motivated by an invidious reason. It is also noted that since the September 15, 2016 certification did not contain any veterans, it was within the appointing authority’s discretion to select any of the top three eligibles for each appointment. *See N.J.A.C.* 4A:4-4.8(a)3. Thus, even assuming, *arguendo*, that the appellant was more qualified for the position at issue, the appointing authority still had selection discretion under the “Rule of Three,” absent any unlawful motive. *See id.; In re Foglio*, 207 *N.J.* 38, 49 (2011). In reviewing this matter, the Commission finds no evidence that the appellant was bypassed for an unlawful reason. As such, the appointing authority’s selection of D.W. and V.L. for permanent appointments on the basis that they already held the title provisionally was a permissible exercise

² The appointing authority maintains that it selected D.W. and V.L. for provisional appointments, pending promotional examination procedures, based on an interview process the appellant was a part of, that followed two “promotional opportunity” announcements in February and March 2016. It indicates that V.L. and D.W. received the highest rating based upon their interview performances.

of its discretion. *See In the Matter of Terrence Crowder* (CSC, decided April 15, 2009) (The Commission noted that it was reasonable for appointing authorities to select provisional appointees reachable under the “Rule of Three” for permanent appointments on the basis of their status as provisional appointees in the subject title). Therefore, the appointing authority properly exercised its discretion in accordance with the “Rule of Three” to select D.W. and V.L. for permanent appointments to the subject title. Additionally, the Commission emphasizes that individuals whose names merely appear on a list do not have a vested right to appointment. *See In re Crowley*, 193 *N.J. Super.* 197 (App. Div. 1984), *Schroder v. Kiss*, 74 *N.J. Super.* 229 (App. Div. 1962). 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 Assistant Supervisor of Recreation (PS1125K), WDC, eligible list was proper and the appellant has failed to meet her 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 13TH DAY OF JULY, 2017



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