



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Charles Martina, Jr.,  
Police Sergeant (PM5146N),  
Plainfield

CSC Docket No. 2017-2098

List Bypass Appeal

ISSUED: **JUL 17 2017** (SLK)

Charles Martina, Jr., represented by Wolodymyr Tyshchenko, Esq., appeals the bypass of his name on the Police Sergeant (PM5146N), Plainfield eligible list.

By way of background, on November 13, 2014, the subject list was certified (PL141429) and the eligibles in the first three positions were appointed. The appellant was listed in the 4<sup>th</sup> position on that certification. Thereafter, on December 28, 2015, the list was again certified (PL151403). The appellant, who was listed in the 1<sup>st</sup> position, and the eligible in the 2<sup>nd</sup> position were bypassed, the eligibles in the 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> positions were appointed, the eligible in the 4<sup>th</sup> position was interested in future certifications only, and the eligibles in the 5<sup>th</sup> and 6<sup>th</sup> position were removed. The appellant did not appeal his bypass on certification PL151403. Thereafter, on December 21, 2016, the list was certified (PL161524). The appellant, who was listed in the 1<sup>st</sup> position, and the eligible in the 2<sup>nd</sup> position were bypassed and the eligibles in the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> positions were appointed. The appellant appealed his bypass on certification PL161524.

On appeal, the appellant presents that he was not called to have a meeting with the Public Safety Director while there were meetings with other Police Officers who were lower ranked on certification PL161524. Thereafter, the appellant requested a meeting with his superiors who advised him that he was being bypassed again even though he was the first ranked eligible on the list. Consequently, the appellant believes that he was arbitrarily bypassed or bypassed with an unlawful motive.



In response, the appointing authority, represented by Little Rau, Esq., presents that it was within its discretion to bypass the appellant in accordance with the Rule of Three. Specifically, the Police Director recommended that the appellant be bypassed as he had an unresolved disciplinary matter involving a serious charge, untruthfulness, that would significantly impede his capabilities as a Police Officer if that charge is upheld. It highlights that one of the duties for the subject title is to testify in court. The appointing authority also notes that the second ranked officer was also bypassed. The appointing authority states that the appellant has not presented any evidence to support his accusation that he was bypassed for an invidious reason.

### 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)3i allow an appointing authority to select any of the top three interested eligibles on a promotional list provided no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

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 action 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 and/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 motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, the appellant was in the 1<sup>st</sup> position on the subject certification. However, it was within the appointing authority's discretion to select



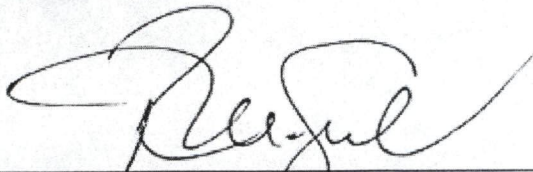
any of the top three eligibles for each appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. However, other than his mere allegations, the appellant has not presented any substantive evidence regarding his bypass that would lead the Civil Service Commission (Commission) to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." See *In the Matter of Chirag Patel* (CSC, decided June 7, 2017). 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). Additionally, the appointing authority has presented a valid business reason for bypassing the appellant, namely, that the appellant was facing a pending disciplinary charge involving untruthfulness, which, if upheld, would affect his ability to serve in the subject title, especially since one of the duties of the subject title is to testify in court. Thus, the Commission finds that the appellant did not meet his initial burden of establishing a *prima facie* case that his bypass was based on invidious motivation.

### 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 13<sup>th</sup> DAY OF JULY, 2017



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