



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Robert Brown, Police
Sergeant (PM0622N), City of Salem

CSC Docket No. 2017-2287

List Bypass Appeal

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

Robert Brown, represented by Lauren Sandy, Esq., appeals the bypass of his name on the Police Sergeant (PM0622N), City of Salem eligible list.

By way of background, on November 13, 2014 the subject list was certified (PL141432) and the appellant was listed in the 4th position. The eligible in the 1st position was appointed, the eligible in the 2nd position was removed, the eligible in 3rd position and the appellant were reachable but not appointed, and the eligibles in the 5th and 6th positions were not reachable. Thereafter, on August 1, 2016 the subject list was certified (PL160952) and the appellant was listed in the 2nd position. The appellant was bypassed and the 1st, 3rd, and 4th eligibles were appointed.

On appeal, the appellant, who is African-American, claims that he has been treated differently than other Caucasian officers throughout his 16 years as a Police Officer. He presents that he and another African-American officer complained of discriminatory practices by the Chief of Police (Chief) to the former Mayor. The appellant states that he had previously filed a Civil Service appeal against the appointing authority when it failed to permanently appoint officers to the position of Police Sergeant or request an examination when there were six acting employees¹

¹ There is no such designation as an "acting" appointment under Civil Service rules. *N.J.S.A. 11A:4-13* and *N.J.A.C. 4A:4-1 et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. See *In the Matter of Russell Davis* (MSB, decided August 10, 2005); *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006).

servicing in the subject title for more than six months in violation of Civil Service regulations. At the same time, he also filed an Equal Employment Opportunity Commission (EEOC) complaint alleging racial discrimination. Thereafter, the appellant indicates that these matters were resolved amicably as the appointing authority agreed to permanently appoint officers to the vacant Sergeant positions.

He presents that on certification PL160952, he was listed in the second position and that two of the three officers who were promoted had less seniority. The appellant states that he also served as Acting Sergeant and that two of three officers who were promoted never served as Acting Sergeant. Additionally, he asserts that one of the officers who was promoted, Officer M., had been caught asleep in his patrol vehicle while on duty in early 2016 and there were complaints about this officer's ability to interact with the community. In comparison, the appellant represents that he does not have any complaints from public interactions, any disciplinary history, and he has been honored several times for outstanding service. Consequently, he alleges that the appointing authority's failure to promote him in accordance with its own past practices, which is to promote based on seniority and to promote based on those who had served in an acting capacity, was done in retaliation for his prior complaints.

In response, the appointing authority, represented by Andrea Rhea, Esq., states that the appointing authority did not violate the Rule of Three by not appointing the appellant. Specifically, while it acknowledges that the appellant had seniority over two officers on the list who were appointed, the appointing authority disputes his claim that it engaged in a past practice of making seniority a deciding factor for making promotional appointments. Further, it indicates that the appellant was not the only officer on the list who acted as a supervisor for his shift. The appointing authority presents that it was his performance while supervising other officers that caused concern during the promotional process and leadership capabilities are permissible criteria for evaluation in determining a promotion to a supervisory position. The appointing authority states that the appellant has not provided any evidence that he was not promoted in retaliation for his prior complaints. It highlights that the appellant's Civil Service appeal in 2014 was resolved, which resulted in the appointing authority making a promotion to the subject title which was not challenged or appealed by the appellant.

The appointing authority submits a certification from the Police Chief that indicates that the appellant was bypassed because the other candidates scored higher on their evaluations. Specifically, the appellant's last performance evaluation indicated that he needed to improve his performance while supervising his shift and the other candidates' evaluations did not contain any areas in need of improvement. The Chief stated that the appellant did not hold the title of "Acting Sergeant" and explained that the collective bargaining unit provides that an officer who acts as a shift supervisor when on duty receives the pay of the higher rank. The Chief indicated that he was not aware of any representations made to the

appellant stating that prior promotions were historically based on seniority as there is a record of prior promotions where less senior officers were promoted over officers with greater seniority. The Chief acknowledges that the appellant received awards and recognition for his services, but indicated that the other candidates also received awards and recognition.

In reply, the appellant submits an e-mail from the appointing authority's Solicitor after the settlement from his prior complaints, that states that the Mayor proceeded to provisionally appoint Officer H. to the subject title pending a promotional examination and advised that Officer H. would not receive superior rights to the permanent position, but did continue the Department's "seniority" tradition which was in accordance with the Mayor's wishes. Further, the appellant indicates that Officer H. was permanently appointed to the subject title after the promotional examination was announced. He states that the appointing authority acknowledges in its response that two of the promoted officers had less seniority. The appellant reiterates that the promotion of officers with less seniority and lower ranking is in violation of the appointing authority's past practice to promote based on seniority and emphasizes that two of the promoted officers never served as Acting Sergeant.

He highlights that the appointing authority took extra steps to effect the promotion of Officer M., who was first on the list, by sending him to communications class after there were several civilian complaints about his demeanor and communications skills. Therefore, the appellant questions why, if there was an issue with his leadership skills, he was not given the opportunity to address his alleged shortcomings. Further, he argues that the fact that Officer M. was sent to training is evidence that he was more qualified than Officer M. and this also shows that the appointing authority took steps to make Officer M. a more appealing candidate so it could justify his bypass. Consequently, he believes that the appointing authority's allegation regarding his performance was a pretext for retaliation for his prior complaints. The appellant indicates that on certification PL160952, Officer S., who was ranked lower than him, but had the most seniority, was the first officer appointed in accordance with the appointing authority's acknowledged "seniority tradition." Thereafter, the appellant was the remaining eligible with the most seniority. However, the appointing authority then violated its own acknowledged seniority tradition and promoted one lower ranked officer with less seniority and another officer with less seniority who had several civilian complaints against him. The appellant asserts that the appointing authority failed to provide any proof regarding his alleged leadership issues and if it had such concerns, he questions why he was repeatedly assigned as Acting Sergeant over a seven month period. Further, he asserts that the appointing authority cannot claim that he was bypassed due to alleged leadership concerns when two of the appointed officers never served as Acting Sergeant and therefore had no opportunity to have their leadership capabilities assessed.

In further response, the appointing authority reiterates that the appellant has not provided any evidence that his failure to be promoted was in retaliation for prior complaints. Further, the appellant does not cite any disparate treatment or any events that would support his allegation that the appointing authority's promotional decisions were in bad faith or retaliatory. It submits a certification from the Chief that states that, contrary to the appellant's assertion, the other officers did in fact have supervisory experience that could be assessed. The appointing authority explains that the appellant's assignment as a supervising officer on his shift in the absence of a Sergeant was based on his seniority and not necessarily by merit. It presents that its Solicitor's e-mail that references seniority is clearly referring to provisional appointments as the e-mail states that no preference would be given once the list was generated. Further, the Chief certifies that there were two prior promotions where a senior officer was not appointed which further supports the appointing authority's position that it selected individuals based on merit and fitness in conformity with Civil Service rules. Additionally, the Chief states that Officer M. was afforded the opportunity to attend a class where there was only room for one in the class and a review of Internal Affairs investigations would show no substantiated complaints against this officer. The Chief also cites examples that raised concerns about the appellant's leadership capabilities. Specifically, the Chief presents that there was a near riot last year where a tactical briefing was held during the appellant's shift while he was "Acting Sergeant." However, less senior officers took control of the briefing because the appellant was attending to personal phone calls. Further, on another occasion, the appellant received verbal counseling for failure to teach a junior officer who he was with on patrol the proper protocol related to "arrest, search and seizure," digital in-care video use, and "prisoner handcuffing/handling." The Chief indicates that the appellant was afforded the opportunity to attend field training school for improvement in those areas. The appointing authority also submits documentation that shows that the appellant had received prior discipline, which is contrary to his statement otherwise.

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 2nd 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. Specifically, the appellant contends that he was bypassed in retaliation for a prior Civil Service appeal and EEOC complaint. In support of this assertion, the appellant contends that the appointing authority violated its past practice of making permanent appointments based on seniority and submits an e-mail from the appointing authority's Solicitor as evidence of this policy. He also states that the appointing authority previously selected candidates who had served as Acting Sergeant and only in his case was someone who had served in this position bypassed for candidates who had not been Acting Sergeant. Therefore, he believes that the appointing authority's purported reason for bypassing him, his alleged lack of leadership capabilities, was a pretext for its retaliation. Additionally, the appellant alleges that one of the appointed eligibles had a disciplinary history while he does not and that same eligible was able to attend a class to address his deficiencies while the appellant was not afforded that opportunity as further evidence that the appointing authority's stated reason was pretextual.

However, a review of the record does not indicate that the appointing authority had a policy of appointing candidates based on seniority. Specifically, the Solicitor's e-mail indicates that Officer H's provisional appointment was based on seniority; however, his permanent appointment was not as the e-mail stated "this does not give him any superior rights to the permanent appointment" and this statement only makes sense if the "seniority" policy applies to provisional and not

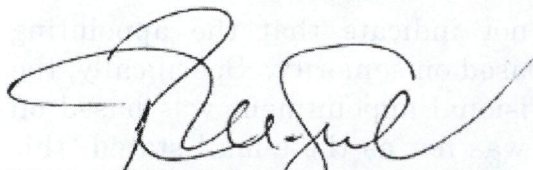
permanent appointments. Additionally, contrary to the appellant's statement that the other candidates did not serve as "Acting Sergeant" and there was no opportunity to address their leadership skills, the Chief certified that all of the candidates served as "Acting Sergeant." However, the Chief also stated that the appellant was the only candidate that had leadership performance issues and cited specific examples to support his claim regarding the appellant's deficiencies. Further, the Chief explained that the appellant, along with the other candidates, were assigned the position of "Acting Sergeant" based on the terms of their collective bargaining agreement and not based on their performance so the fact that the appellant was repeatedly assigned the duties of "Acting Sergeant" was not an indicator that there were no issues with his leadership skills. Moreover, the Chief gave past examples where candidates with less seniority were appointed over candidates with greater seniority. Additionally, the Chief presented that, contrary to the appellant's assertions, there were no substantiated disciplinary charges against Officer M. while the appellant had in fact been disciplined as evidenced by documentation submitted. Finally, the Chief explained that Officer M. was offered a training class due to an opening in the class and certified that the appellant was offered the opportunity to take classes related to the incident with the junior officer. Consequently, 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).

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



Robert M. Czede, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Robert Brown
Lauren Sandy, Esq.
David Crescenzi
Andrea Rhea, Esq.
Kelly Glenn
Records Center
