



B-16

STATE OF NEW JERSEY

In the Matter of Jaime Colon, Police
Captain (PM7506M), Elizabeth

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2014-453

Bypass Appeal

ISSUED: APR - 2 2015 (CSM)

Jaime Colon, represented by Arthur G. Margeotes, Esq., appeals the bypass of his name on the Police Captain (PM7506M), Elizabeth eligible list.

The appellant, a non-veteran, took the subject promotional examination, achieved a passing score, and was ranked on the resultant eligible list. The appellant's name was certified to the appointing authority on January 15, 2013. In disposing of the certification, the appointing authority bypassed the appellant, who was the number one ranked eligible on the PL130070 certification, and appointed the second and third ranked eligibles effective February 1, 2013. The appointing authority maintained that it bypassed the appellant because he had an unsatisfactory employment record. Specifically, the appellant was suspended for 21 working days effective January 13, 2013. The appellant appealed the matter of his bypass to the former Division of Classification and Personnel Management (CPM)¹ arguing that the appointing authority improperly bypassed his name in favor of a lower ranked candidate. CPM determined that the appointing authority disposed of the certification in accordance with the Rule of Three.

On appeal, the appellant states that he has an exemplary service record and that his bypass was arbitrary and without legitimate reason designed to thwart his promotion. In this regard, the appellant states that Police Director James Cosgrove filed a Preliminary Notice of Disciplinary Action (PNDA) against him and then acted as the hearing officer despite this apparent conflict of interest. Additionally,

¹ Now the Division of Agency Services.

the appellant states that Cosgrove then made the appointments from the subject certification. Therefore, as he has appealed the matter of his 21 working day suspension, the appellant maintains that the suspension cannot be used as a basis to bypass his name until his disciplinary appeal is resolved.

In response, the appointing authority, represented by Raymond T. Bolanowski, First Assistant City Attorney, states that it bypassed the appellant due to his unsatisfactory employment record, which included a 21 working day suspension effective January 15, 2013, an official reprimand in 1993, and minor rule infractions in 1999 and 2005. Regardless, it states that subsequent to the initial appointments made on February 1, 2013, the appointing authority had a need to fill four additional positions, and the appellant was appointed to the subject title effective April 1, 2013.

It is noted that the Civil Service Commission (Commission) upheld the charges against the appellant regarding accountability and performance and neglect of duty, but modified the 21 working day suspension to a 10 working day suspension. *See In the Matter of Jaime Colon* (CSC, decided December 18, 2013).

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. *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.

Initially, since the appellant, a non-veteran, headed the certification, it was within the appointing authority's discretion to select any of the top three eligibles remaining on the certification. The appellant, the first-ranked eligible, was bypassed on the January 15, 2013 certification of the eligible list in favor of the eligibles ranked 2nd and 3rd. The appointing authority indicated that it selected lower-ranked eligibles because the appellant was suspended effective January 15, 2013 for 21 working days. The appellant challenges the appointing authority's proffered reasons, and asserts, among other things, procedural irregularities as the individual who issued the PNDA charging him with various infractions, Cosgrove, also acted as the departmental hearing officer, who sustained the charges and imposed the suspension. Additionally, as Cosgrove is the designated appointing authority, who has the authority to make appointments from certifications, the appellant essentially argues his suspension was concocted in order to provide a basis for his bypass. The Commission disagrees.

With respect to his assertion that his departmental hearing was somehow tainted because Cosgrove signed the PNDA and was the hearing officer, procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the OAL. See *Ensslin v. Township of North Bergen*, 275 N.J. Super. 352, 361 (App. Div. 1994), *cert. denied*, 142 N.J. 446 (1995); *In re Darcy*, 114 N.J. Super. 454 (App. Div. 1971). In this case, the appellant appealed the matter of his suspension to the Commission, and, after a *de novo* hearing, the charges were sustained. Therefore, no basis exists to question the validity of the suspension as a reason for the appellant's bypass. Regardless, 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).

Additionally, 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). Other than his mere allegations, 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." Moreover, the appointing authority presented legitimate reasons for the appellant's bypass which have not been persuasively refuted.

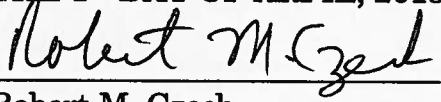
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name was proper and the appellant has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that the 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 1ST DAY OF APRIL, 2015**



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and
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