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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Trevor Weigle,
Health Officer (M0040N), Paterson

CSC Docket No. 2015-1410

Request for Reconsideration

ISSUED: JUL 17 2015 (CSM)

Trevor Weigle requests reconsideration of *In the Matter of Thakur Persaud* (CSC, decided October 22, 2014), which ordered the permanent appointment of Thakur Persaud to the title of Health Officer effective July 7, 2011.

By way of background, Persaud was the first ranked resident eligible on the open competitive lists for Health Officer (M0991L) and (M0040N), Paterson. These eligible lists were consolidated by combining the names of the eligibles by their scores and the consolidated lists were separated into sub-lists by the residency requirement as provided by applicable law and ordinance. Persaud was the only Paterson resident eligible on the consolidated list and the remaining three eligibles were on the Passaic County or one of the contiguous county sub-lists. On May 18, 2011, the names of each of the four eligibles were certified (OL110497), Persaud's name was bypassed, and Weigle, who was ranked second on the contiguous county eligible list, was permanently appointed. Persaud appealed the bypass of his name to the Civil Service Commission (Commission), arguing that he was the only Paterson resident eligible on the list and he possessed superior qualifications for the position than Weigle. The Commission determined that there was nothing in the record to support the assertion that the appointing authority did not properly exercise its discretion in accordance with the "Rule of Three" when it appointed a lower ranked eligible it deemed more suitable for the position. Subsequently, Persaud appealed the Commission's decision to the Appellate Division, which remanded the matter to consider the appeal in light of Paterson's "special expertise" exemption in its residency ordinance.

On remand, after the impacted parties were provided an opportunity to provide additional information and argument, the Commission determined that the appointing authority's argument that Weigle's prior service as a Health Officer, both as its provisional appointee and as the Health Officer for the Township of Bloomfield, was not a special talent or expertise necessary for the operation of its health department that was *not* available among Paterson residents. Since the appointing authority's ordinance required residency in Paterson as a condition of employment, absent qualifying for an exception, Persaud possessed the necessary qualifications to be a Health Officer, *i.e.*, licensure as a Health Officer. As such, the Commission found that it was not necessary for the appointing authority to seek out a non-resident with this expertise as Persaud possessed the necessary qualifications. Therefore, the Commission ordered that Persaud be permanently appointed as Health Officer effective July 7, 2011. Paterson's compliance with the Commission's order resulted in Weigle being separated since his appointment was considered conditional as Persaud had appealed his bypass. *See N.J.A.C. 4A:4-1.4(a).*

On reconsideration, Weigle asserts that Paterson's residency ordinance was improperly applied. In this regard, he states that by imposing a residency requirement, Paterson has limited and/or eliminated licensed Health Officers and Registered Environmental Health Specialists from being eligible for appointment. In this regard, Weigle contends that the Commission did not consider in its decision *N.J.S.A. 26:3-21*, which states that any licensed Health Officer shall be eligible for appointment to the position for which the license is required by any local board. Thus, Weigle maintains that *N.J.S.A. 26:3-21* permitted him to be eligible for appointment. Therefore, since he was appointed both provisionally and conditionally as Health Officer, he was a suitable choice for appointment. Under these circumstances, Weigle requests reinstatement as Health Officer effective July 7, 2011 with back pay, benefits and seniority.

Although provided the opportunity, Paterson did not submit any additional information or argument for the Commission to review.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

N.J.S.A. 40A:9-1.4 provides, in pertinent part, any local unit having adopted the provisions of Title 11A (Civil Service Act), which has also adopted a *bona fide* residency ordinance or resolution, may, by ordinance or resolution, limit the

eligibility of applicants for positions and employment in the classified service of such local unit to local residents.

N.J.S.A. 40A:9-11 states, in pertinent part, that a non-resident of any municipality may hold the office of health officer and no such office shall be deemed vacated by a change of residence of any such person.

N.J.S.A. 26:3-19.1 states, in pertinent part, that all health officers selected to fill available positions in a local board of health in any municipality, which has adopted the provisions of the Civil Service Act, shall be appointed in accordance with the provisions of Title 11A.

N.J.S.A. 26:3-21 states that any holder of a license required under section 41 of P.L. 1947, 177 (C.26:1A-41) shall be eligible for appointment to the position for which the license is required by any local board.

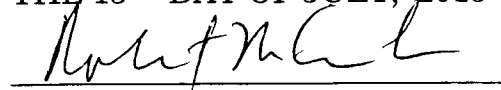
In the instant matter, Weigle has not met the standard for reconsideration. Essentially, Weigle asserts that since *N.J.S.A.* 26:3-21 states that licensed Health Officers are eligible for appointment by a local Health Board, notwithstanding Paterson's residency ordinance, his appointment was proper. The Commission disagrees. While it is true that Weigle was eligible for appointment to the title of Health Officer on the basis of his licensure, *N.J.S.A.* 26:3-21 does not mandate his appointment. Eligibility for appointment only means that an individual possesses the necessary qualifications to be considered for appointment. After eligibility has been established, the actual appointment to the position is governed by various statutory provisions. As a Civil Service jurisdiction, Paterson was required to appoint its Health Officer in accordance with the provisions of Title 11A. In this case, Paterson adopted an ordinance requiring residency in the City as a condition of employment for those individuals who possessed the necessary qualifications. As such, it was not necessary for the appointing authority to utilize the non-resident eligible list as Persaud, a resident, possessed the necessary qualifications. Accordingly, the Commission properly ordered that Paterson comply with its residency ordinance governing appointments to its residents.

ORDER

Therefore, it is ordered that this request for reconsideration 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 15TH DAY OF JULY, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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Attachments

- c: Trevor Weigle
Charles C. Festa, Assistant Corporation Counsel
Kenneth Connolly
Joseph Gambino



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Thakur Persaud,
Health Officer (M0040N), Paterson

CSC Docket No. 2014-2625

Court Remand

ISSUED: **OCT 27 2014** (CSM)

The Appellate Division, Superior Court of New Jersey, reversed and remanded the determination of the Civil Service Commission (Commission) *In the Matter of Thakur Persaud, Health Officer (M0040N), Paterson*, Docket No. A-1783-12T1 (App. Div. May 2, 2014) which denied Thakur Persaud’s appeal of the bypass of his name on the eligible list for Health Officer (M0040N), Paterson.

By way of background, the appellant was the first ranked resident eligible on the open competitive lists for Health Officer (M0991L) and (M0040N), Paterson. These eligible lists were consolidated by combining the names of the eligibles by their scores and the consolidated lists were separated into sub-lists by the residency requirement as provided by applicable law and ordinance. The appellant was the only Paterson resident eligible on the consolidated list and the remaining three eligibles were on the Passaic County or one of the contiguous county sub-lists. On May 18, 2011, the names of each of the four eligibles were certified (OL110497), the appellant’s name was bypassed, and Trevor Weigle, who was ranked second on the contiguous county eligible list, was permanently appointed. The appellant appealed the bypass of his name to the Commission, arguing that he was the only Paterson resident eligible on the list and he possessed superior qualifications for the position than Weigle. The Commission determined that there was nothing in the record to support the appellant’s assertion that the appointing authority did not properly exercise its discretion in accordance with the “Rule of Three” when it appointed a lower ranked eligible it deemed more suitable for the position. Subsequently, the appellant appealed the Commission’s decision to the Appellate Division, which remanded the matter to consider the appellant’s appeal in light of Paterson’s “special expertise” exemption in its residency ordinance.

On remand, the parties were provided the opportunity to provide additional information and argument for the Commission to review in this matter. The appointing authority, represented by Charles C. Festa, III, Assistant Corporation Counsel, presents that its ordinance provides for a number of exceptions to its residency requirement. Specifically, the ordinance provides that an officer or employee may be appointed without complying with the residency provision if “[s]pecial talent or expertise is necessary for the operation of government which is not available among Paterson residents.” Accordingly, when the list was certified, it appointed its provisional appointee to the title, Weigle, since, as it explained in disposing of the certification, “he ha[d] been serving in the title for a few years.” The appointing authority underscores that it relied on Weigle’s experience and knowledge in the position of Health Officer in its decision making process. While the appellant had many areas of education and experience in the health field, the appointing authority noted that he had never held the position of a Health Officer before. In contrast, Weigle had served as the Health Officer for the Township of Bloomfield from August 2003 to January 2009 and as the Health Officer for Paterson from January 2009 to September 2010 and since July 2011. As such, the appointing authority maintains that his years of experience as an actual Health Officer constitute the “special talent and experience” that permits deviation from the residency requirement and justifies Weigle’s selection in accordance with the “Rule of Three.” In support of its position, the appointing authority provides a copy of Weigle’s resume that details, *inter alia*, his experience as a Health Officer since August 2003.

In response, the appellant, represented by John J. Segreto, Esq., states that the only issue the Commission needs to decide on remand is if Weigle possesses “special talent or expertise” “necessary for the operation of government [Health Officer position] which is not available among Paterson residents” as required by the ordinance. The appellant argues that the burden is on the appointing authority to show that Weigle possesses special talent and expertise as well as to show that the Paterson resident does not possess the special talent and expertise. The appellant provides an affidavit detailing his education, training, and work experience. Specifically, he is a medical doctor, possesses a Master’s degree in Public Health, a Ph.D in Public Health Epidemiology, and a license as a Health Officer. He lists work experience as a physician in the West Indies and as a Program Manager, Disease Prevention and Control since 2005 with Paterson. The appellant emphasizes that as a Program Manager, Disease Prevention Control, an individual needs four years of prior experience in planning, development, and/or implementation of health programs but the Health Officer job specification requires no prior experience. The appellant also provides a letter signed by members of the Paterson City Council indicating that it believes a Paterson resident with the necessary credentials should be given strong consideration for the position of Health Officer. Therefore, the appellant maintains that he possesses the extensive, unique and special talent and expertise required to fill the Health Officer position.

CONCLUSION

N.J.S.A. 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3 allow an appointing authority to select any of the top three interested eligibles on an open competitive list, provided that no veteran heads the list. At the time of this certification, *N.J.A.C.* 4A:4-4.8(b)4 stated that in disposing of a certification, an appointing authority must, when bypassing a higher ranked eligible, give a statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tie score. *See also, In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 *N.J.* 38 (2011) (Supreme Court held that, as bypassing a higher-ranked eligible is facially inconsistent with the principles of merit and fitness, the appointing authority must justify its selection of a lower-ranked eligible with a specific reason).¹ *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 the evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper.

The Paterson residency ordinance provides, in pertinent part:

Except as hereinafter provided, all officers and employees ... or who shall hereafter become employees of the City are hereby required as a condition of their continued employment to have their place of abode in the City and to be bona fide residents therein.

However, the ordinance provides for an exception if:

(c) Special talent or expertise is necessary for the operation of government which is not available among Paterson residents.

At the time of the examinations, the open competitive requirements for Health Officer were possession of a valid Health Officer License issued by the New Jersey Department of Health.

In this matter, the appointing authority is essentially arguing that Weigle's prior service as a Health Officer, both as its provisional appointee and as the Health Officer for the Township of Bloomfield, is the special talent or expertise necessary for the operation of its health department that was *not* available among Paterson residents. The Commission disagrees. The appointing authority's residency ordinance is clear. In order to be employed by Paterson, absent qualifying for an exception, a condition of employment is residency in the City. In this case, a

¹ Effective May 7, 2012, *N.J.A.C.* 4A:4-4.8, Disposition of a certification, was amended and the requirement for a statement of reasons, paragraph (b)4, of the rule, was deleted. *See* 44 *N.J.R.* 1333(b).

resident of the city, the appellant, possessed the necessary qualifications to be a Health Officer, *i.e.*, licensure as a Health Officer. Thus, it was not necessary for the appointing authority to seek out a non-resident with this expertise as the appellant possessed the necessary qualifications.

While the appointing authority may or may not have known that the appellant possessed the qualifications for the position at the time it provisionally appointed Weigle in January 2009, it had to be aware that the appellant, a resident of the City, possessed the qualifications for Health Officer when the open competitive list for Health Officer (M0991L) list was promulgated on December 17, 2009. Moreover, there is nothing in the residency ordinance that specifies that the appointing authority can disregard its residency ordinance if it simply determines that a non-resident has superior qualifications. Although this may appear inconsistent with the tenets of the "Rule of Three," provisional service as the Health Officer, in this case, cannot be considered the special talent or expertise contemplated by the ordinance. Indeed, as observed by the Appellate Division, for the appointing authority to escape its own residency requirement simply by provisionally appointing a non-resident, and then using that provisional experience to determine he is better suited for the position, eviscerates the residency ordinance. Thus, as the appellant possessed the required qualifications to be a Health Officer and he is a resident of Paterson, he should have been appointed on July 7, 2011. With regard to Weigle's appointment, *N.J.A.C.* 4A:4-1.4(a) provides, in pertinent part, that a conditional regular appointment may be made in the competitive division of the career service when disputes or appeals concerning higher ranking eligibles may affect the final appointments. Accordingly, since the appellant appealed his bypass, Weigle's appointment was conditional pending the outcome in this matter. Therefore, the appellant is to be retroactively appointed to the title of Health Officer effective July 7, 2011, and, upon successful completion of a current working test period, his appointment shall be considered permanent.

However, the Commission finds that the appellant is not entitled to back pay. In non-disciplinary appeals, such as an appeal of a bypass, the standard for determining whether an appellant is entitled to back pay is governed by *N.J.A.C.* 4A:2-1.5(b). *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that back pay for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff "may be granted...where the Commission finds sufficient cause based on the particular case." A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

In this case, there is no evidence of bad faith or invidious motivation. Rather, it appears that the appointing authority simply misapplied its own ordinance *not* to prevent the appellant's appointment, but because it believed it had a highly qualified candidate in Weigle. Additionally, the appellant has not presented any

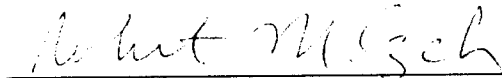
evidence of bad faith and he has been employed by the appointing authority in another title during the entire time this matter was being reviewed by the Commission and the Appellate Division. Therefore, the appellant is not entitled to back pay.

ORDER

Therefore, the Civil Service Commission orders the permanent appointment of Thakur Persaud to the title of Health Officer effective July 7, 2011.

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 22ND DAY OF OCTOBER, 2014



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Chairperson
Civil Service Commission

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Attachments

c: Charles C. Festa, Assistant Corporation Counsel
John J. Segreto, Esq.
Thakur Persaud
Todd A. Wigder, DAG
Kenneth Connolly
Joseph Gambino

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1783-12T1

IN THE MATTER OF THAKUR
PERSAUD, HEALTH OFFICER
(M0040N), PATERSON.

Argued April 8, 2014 – Decided May 2, 2014

Before Judges Fisher, Espinosa and Koblitz.

On appeal from the State of New Jersey Civil
Service Commission, Docket No. 2012-227.

John J. Segreto argued the cause for
appellant Thakur Persaud (Segreto, Segreto &
Segreto, attorneys; Mr. Segreto, of counsel
and on the briefs).

Charles C. Festa, III, Assistant Corporation
Counsel, argued the cause for respondent
City of Paterson (Domenick Stampone, Acting
Corporation Counsel, attorney; Mr. Festa, on
the brief).

John J. Hoffman, Acting Attorney General,
attorney for respondent New Jersey Civil
Service Commission (Todd A. Wigder, Deputy
Attorney General, on the statement in lieu
of brief).

PER CURIAM

Dr. Thakur Persaud appeals from the November 8, 2012
decision of the Civil Service Commission, which denied his
second appeal of his non-appointment from the eligible list for
the position of Health Officer in the City of Paterson. We

reverse and remand to the Commission to determine whether Thakur, as the only resident of Paterson on the approved list, was improperly passed over.

This is the second appeal filed by Persaud in a short period of time, both seeking the same position. We incorporate the facts and procedural history set forth in our prior decision. In re Thakur Persaud, Docket No. A-5339-10 (App. Div. January 16, 2013) (slip op. at 3-6). A combined list was made up of three separate lists: a list of Paterson residents; a list of Passaic residents; and a list of residents of Bergen, Essex, Morris and Sussex Counties. Persaud, a Paterson resident, was number one on the combined list. Trevor Weigle, the fourth-ranking candidate, moved up to number two on the combined list because one candidate was disqualified and another was not interested in the position. Weigle is not a resident of Paterson or even of Passaic County. He had been appointed provisionally and then was permanently appointed as the Health Officer.

Our role in reviewing the decision of an administrative agency is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We will affirm an agency decision so long as it is supported by the evidence, even if we may question the wisdom of the decision or would have reached a different result. Ibid.

A "strong presumption of reasonableness attaches" to an agency decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.) (citation omitted), certif. denied, 170 N.J. 85 (2001). With respect to factual findings, agency findings "'are considered binding on appeal when supported by adequate, substantial and credible evidence[.]'" In re Taylor, 158 N.J. 644, 656-57 (1999) (quoting Rova Farms Resort Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

We will reverse an agency's judgment if we find that the agency's decision is "'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)).

In determining whether an agency's action is arbitrary, capricious or unreasonable, we must examine:

(1) whether [it] violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).]

The burden of proving that an agency action is arbitrary, capricious, or unreasonable is on the challenger. Bueno v. Bd. of Trs., 422 N.J. Super. 227, 234 (App. Div. 2011).

We "should give considerable weight to an agency's interpretation of a statute the agency is charged with enforcing." G.S. v. Dep't of Human Servs., 157 N.J. 161, 170 (1999). This court, however, is "not bound by an agency interpretation of a strictly legal issue . . . when that interpretation is inaccurate or contrary to legislative objectives." Ibid.

Pursuant to N.J.S.A. 26:3A2-14, "[e]very local health agency shall be administered by a full-time health officer[,]" and appointed in accordance with the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6. The Code of the City of Paterson (Code), §5-11(A)(1) requires that "all officers and employees of the City . . . are hereby required as a condition of their continued employment to have their place of abode in the City and to be a bona fide resident therein." Exceptions exist to the City's residency requirement. "[F]or good cause shown," a director may appoint a non-resident with "[s]pecial talent or expertise [that] is necessary for the operation of government which is not available among Paterson residents," id. at §5-11(A)(2)(c), or

may do so when "State or federal law preempts municipal residency requirements," id. at §5-11(A)(2)(d).¹

The Commission possesses a duty to "review and enforce residence requirements relating to appointment and continued employment." N.J.A.C. 4A:4-2.11(f). The City contends that there was no residency requirement for the Commission to enforce because N.J.S.A. 40A:9-11 preempts the residency requirement of §5-11(A)(1). We disagree. The State law provides: "A nonresident of any municipality may hold office as . . . health officer . . . of such municipality and no such office shall be deemed vacated by a change of residence of any such person." N.J.S.A. 40A:9-11.

The statute and the City's residency provision are not expressly in conflict, nor does State policy conflict with local policy. N.J.S.A. 40A:9-11 permits but does not require that non-residents hold the position of municipality's health officer, stating that a non-resident "may hold office as . . . health officer[.]" The Legislature left up to the municipality whether to require that the health officer be a local resident.

¹ Other exceptions exist to Paterson's residency requirement, but they are not relevant to this appeal.

The City made its choice. In a large city such as Paterson,² there may well be an expectation that the City's employees will reside in Paterson. There is no evidence the Legislature intended for N.J.S.A. 40A:9-11 to preempt local residency requirements. See, e.g., N.J.S.A. 40A:14-122.1 (expressly prohibiting all municipalities from adopting a residency requirement for police officer positions).

On appeal, the City also contends that an exception in the Code enabling the appointment of non-residents with "[s]pecial talent or expertise . . . necessary for the operation of government which is not available among Paterson residents," justified the Weigle appointment. §5-11(A)(2)(c). The Code requires that the appointing authority "submit documentation as to the nature of the special talent or expertise required and of the efforts made to recruit persons of such special talent or expertise within the City[.]" §5-11(A)(3)(b).

The City frames this argument with a discussion of the "rule of three," N.J.A.C. 4A:4-4.8(a)(3), which was addressed by the Commission in its determination. In essence, the rule of three "permits an appointing authority to select one of the

² The United States Census lists Paterson's population in 2012 as 145,219. Paterson (city) Quick Facts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/34/3457000.html> (last visited, April 23, 2014).

three highest scoring candidates." In re Foglio, 207 N.J. 38, 45 (2011) (quoting Local 518, N.J. State Motor Vehicle Emps. Union v. Div. of Motor Vehicles, 262 N.J. Super. 598, 603 (App. Div. 1993)). The rule both "recognizes employment discretion and seeks to ensure that such discretion is not exercised in a way inconsistent with 'merit' considerations." Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 149-50 (1981). "The purpose of the [r]ule of [t]hree is to limit, but not to eliminate, discretion in hiring," and, consistent with this purpose, "does not stand as 'an immutable or total bar to the application of other important criteria' by a government employer," Foglio, supra, 207 N.J. at 46 (quoting Terry, supra, 86 N.J. at 150).

The rule of three provision was amended effective May 7, 2012. See 44 N.J.R. 1333(b); L. 2008, c. 29. That amendment eliminated N.J.A.C. 4:4-4.8(b)(4), which required an appointing authority who "bypass[ed] a candidate who ranked higher on a competitive examination" for someone ranked lower on the certified list to "report to the Department of Personnel (DOP) why it did so." Foglio, supra, 207 N.J. at 40. The purpose of this report was "to assure that the appointing power was not exercised arbitrarily and to provide a basis for review." Ibid.

This requirement was still in place during the City's appointment process now at issue.

The only explanation for why the City bypassed Persaud in favor of Weigle came in response to a deficiency notice demanding the City provide a "statement of reasons for selecting" Weigle, accompanied by "specific statement(s)" justifying his appointment. The City's response claimed that the City "bypass[ed] other eligibles in the best interests of the City" and stressed that "Weigle has demonstrated highly qualified experience and knowledge of the position" while serving as the provisional appointee.

Weigle has been in the position since January 2009. It is this experience that the City highlights on appeal as "special expertise" not available among Paterson residents, thus excusing its appointment of a non-resident. See Code of the City of Paterson, §5-11(A)(2)(c). The Commission found Weigle's experience sufficient reason to bypass Persaud, noting that seeking to appoint a provisional appointee through the rule of three, if possible, is generally reasonable and desirable. For the City to escape its own residency requirement simply by provisionally appointing a non-resident to the post eviscerates the residency provision.

The City acknowledged Persaud's "impressive" resume and interview, and the Commission admitted that "[n]otwithstanding" the fact that it is generally desirable to hire a provisional appointee when possible, "the appellant . . . presented unrefuted arguments that his qualifications exceed Weigle's." Yet, these extensive qualifications, including a medical degree, Master's degree, a Health Officer license, and twenty-five years of healthcare experience, came in second, in the eyes of the City, to the fact that Weigle was temporarily assigned to the post. We note that although Weigle has experience as Health Officer, appellant also possesses City-employee experience as the full-time Disease Prevention and Control Program manager since 2004. See Foglio, supra, 207 N.J. at 46 (the purpose of the statement of reasons is to "guard 'against favoritism and arbitrary actions by an appointing authority and facilitate[] administrative review by the DOP.'" (quoting Local 518, supra, 262 N.J. Super. at 605)). The Commission did not address the issue of State preemption or Weigle's "special expertise" exception to the residency requirement in its decision, although Persaud raised the residency issue before the Commission. We remand to the Commission to consider Persaud's appeal in light of the Paterson residency requirement, met by Persaud but not by the City's appointee. Although the City did not respond to

Persaud's appeal before the Commission, counsel assures us the City will participate in the remand hearing.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5339-10T4

IN THE MATTER OF THAKUR
PERSAUD, HEALTH OFFICER
(M0991L), PATERSON.

Argued October 24, 2012 - Decided January 16, 2013

Before Judges Koblitz and Accurso.

On appeal from the State of New Jersey Civil
Service Commission, Docket No. 2011-1628.

John J. Segreto argued the cause for
appellant Thakur Persaud (Segreto, Segreto &
Segreto, attorneys; Mr. Segreto, of counsel
and on the briefs).

Charles C. Festa, III, Assistant Corporation
Counsel, argued the cause for respondent
City of Paterson (Paul J. Forsman,
Corporation Counsel, attorney; Mr. Festa, on
the brief).

Todd A. Wigder, Deputy Attorney General,
argued the cause for respondent Civil
Service Commission (Jeffrey S. Chiesa,
Attorney General, attorney; Lewis A.
Scheindlin, Assistant Attorney General, of
counsel; Mr. Wigder, on the brief).

PER CURIAM

Dr. Thakur Persaud appeals from the June 1, 2011 decision
of the Civil Service Commission (Commission), which denied his
appeal of his non-appointment from the eligible list for the

position of Health Officer (M0991L) in the City of Paterson (Paterson). Persaud argues that he was permanently appointed Health Officer prior to the change in administration in Paterson and therefore could not be denied the job by the new administration. After reviewing the record in light of the contentions advanced on appeal, we affirm.

Paterson is classified as a distressed city pursuant to the Special Municipal Aid Act, N.J.S.A. 52:27D-118.24 to -118.31. Therefore, in order to receive Special Municipal Aid,¹ Paterson entered into a Memorandum of Understanding (MOU) with the Division of Local Government Services (DLGS) in January 2010. Under the MOU, DLGS required Paterson to impose a hiring freeze or obtain a DCA waiver to overcome the prohibition.

Specifically, the MOU provides in pertinent part:

1. The City shall impose a hiring freeze on new employees. Any request for new positions (request of waiver) shall be made to the Director [of DLGS] with justification for the need of the new positions and the funding source for the positions. Advertising or posting for new employees is not permitted without prior approval by the Director of a waiver. This freeze shall include not [sic] replacements for persons who have left the employment of the municipality, whose positions are deemed as an essential service by the City and who are

¹ Paterson received \$27,000,000 in special aid for fiscal year 2010, which began July 1, 2009.

being replaced with no addition[al] appropriation to the budget, whose position is not filled at the time of the award.

. . . .

BE IT FURTHER AGREED that the City, for any requested creation of a new position, shall prepare and submit a waiver to the Director for the hiring of any new personnel and/or the transfer of any employee

On January 20, 2009, Paterson provisionally appointed Trevor Weigle as its Health Officer at a salary of \$98,000 pursuant to an approved waiver. The provisional appointment triggered the civil service examination process. N.J.S.A. 11A:4-5.

Persaud took the exam and ranked first, followed by Jadwiga Warwas and then Weigle. At the time, Persaud was actively serving as Paterson's Program Manager for Disease Prevention and Control, a position he held since 2005. Persaud is a Paterson resident, has a medical degree from Cuba, a Masters Degree in Public Health from Columbia University, a Ph.D. in Public Health in Epidemiology from Walden University, and is a licensed Health Officer by the State of New Jersey.

Paterson initially discontinued Weigle's provisional service effective July 1, 2010. On June 15, 2010, Mayor Jose Torres' personnel director sent a letter to the Commission, with a copy to Persaud, "reflecting the permanent appointment of

Thakur Persaud as Health Officer for the City of Paterson effective July 1, 2010[,] attaching a certification indicating Persaud's salary as Health Officer of \$80,000, as well as an unapproved Department of Community Affairs (DCA) waiver.² The Commission updated its County and Municipal Personnel System (CAMPS) to reflect Persaud's appointment as Health Officer.³

Persaud then received two letters from Mayor-elect Jeffery Jones, both dated June 30, 2010. One letter indicated:

[a]s soon as possible after being sworn in as Mayor of the City of Paterson on July 1, 2010, it is my intention to make official appointments of Acting Directors in City Departments according to the Code of Paterson, Section 5-8. My appointee will assume the duties of the office you have held, effective July 1, 2010.

The other letter indicated the same "intention to make official appointments of Acting Directors" but also proposes, "[e]ffective July 1, 2010 an invitation is hereby extended for

² The Commission indicates in its opinion that when submitting its application to permanently appoint Persaud, Paterson included a waiver for Persaud that was not yet approved by the DCA. After oral argument, we were supplied with a copy of this unapproved waiver as well as a June 24, 2010 "Disposition Deficiency Notice" from the Commission indicating that "[t]his certification is being returned for correction" because the "DCA waiver [is] not signed by the DCA Director." The unapproved preprinted waiver form indicates that a waiver is required "for any personnel action[.]"

³ The Commission maintains that this entry was a mistake by an unidentified employee.

you to continue working in your current job position/title for a period of 60 days; until such time that a permanent appointment is selected."⁴ Jones also extended Weigle's provisional position as Health Officer for an additional sixty days, ending on August 31, 2010.

On September 3, 2010, Paterson notified the Commission that it would not appoint a Health Officer from an incomplete list and instead sought to enter into a shared services agreement with the County of Passaic. Paterson deemed the list incomplete because the second-ranked individual, Warwas, failed to notify Paterson of her interest in the position and was removed from the list.⁵

Ultimately, the shared services agreement failed to materialize. On December 28, 2010, Paterson posted another job announcement for the position of Health Officer. Despite this appeal, which was then pending before the Civil Service Commission, on December 30, 2010, Persaud applied for the position of Health Officer. On March 24, 2011, the Commission

⁴ This letter does not specify Persaud's "current job" or position.

⁵ Warwas filed an appeal after her name was removed from the eligible list. The Commission later determined that the removal was in error and restored her name to the eligible list for future certifications.

issued the May 2011 certification for the Health Officer position, in which Persaud ranked number one.⁶

In its June 1, 2011 written decision, the Commission found that because no DCA waiver was issued for the appointment of Persaud, no funding was appropriated. Therefore, "[s]ince [] [Persaud]'s proposed appointment was never approved by the DCA or this agency, it cannot be recognized." The Commission also found that the December 2009 certification was an incomplete list due to Warwas' removal.

Our role in reviewing the decision of an administrative agency is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We will affirm an agency decision so long as it is supported by the evidence, even if we may question the wisdom of the decision or would have reached a different result. Ibid.

"A 'strong presumption of reasonableness attaches'" to an agency decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.) (citation omitted), certif. denied, 170 N.J. 85 (2001). With respect to factual findings, agency findings "'are considered binding on appeal when supported by adequate, substantial and credible evidence[.]'" In re Taylor, 158 N.J. 644, 656-57 (1999) (quoting Rova Farms Resort Inc. v. Investors

⁶ On June 1, 2011, Paterson notified Persaud that it did not select him as its Health Officer. Instead, Paterson appointed Weigle to that position effective July 7, 2011.

Ins. Co. of Am., 65 N.J. 474, 484 (1974) and citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

We will reverse an agency's judgment if we find that the agency's decision is "'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)).

In determining whether an agency's action is arbitrary, capricious or unreasonable, we must examine:

"(1) whether [it] violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors."

[Ibid. (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).]

The burden of proving that an agency action is arbitrary, capricious, or unreasonable is on the challenger. Bueno v. Bd. of Trs., 422 N.J. Super. 227, 234 (App. Div. 2011) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)).

Further, we "should give considerable weight to an agency's interpretation of a statute the agency is charged with enforcing." G.S. v. Dep't of Human Servs., 157 N.J. 161, 170 (1999). "[H]owever, [we] are not bound by an agency interpretation of a strictly legal issue . . . when that interpretation is inaccurate or contrary to legislative objectives." Ibid. (citation omitted).

Persaud first argues that the Commission erroneously concluded that, "this position, even if vacant, was not funded." Relying on Local Budget Law, N.J.S.A. 40A:4-57, Persaud asserts that Paterson was required to appropriate money for the position in order to appoint Weigle as the provisional Health Officer. Under the statute,

[n]o officer, board, body or commission shall, during any fiscal year, expend any money . . . , incur any liability, or enter into any contract which by its terms involves the expenditure of money for any purpose for which no appropriation is provided, or in excess of the amount appropriated for such purpose.

[N.J.S.A. 40A:4-57.]

Persaud argues that because Paterson appointed Weigle as the provisional Health Officer at an annual salary of \$98,000, and Persaud was to replace Weigle at an annual salary of \$80,000, sufficient money was appropriated for the permanent position.

Pursuant to N.J.S.A. 26:3A2-14, "[e]very local health agency shall be administered by a full-time health officer[,]" and appointed in accordance with the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6.

In its June 1, 2011 decision, the Commission concluded

there is no dispute that Paterson, pursuant to the MOU . . ., must receive DCA approval prior to the funding of vacant positions. In this case, there is no indication that [Paterson] ever received DCA approval to fill the position at issue. Therefore, this position, even if vacant, was not funded. In order to constitute a genuine vacancy, [Paterson] must have the current ability, including the fiscal ability, to fill the position.

[(citation omitted).]

The Commission also cited N.J.A.C. 4A:4-1.10(a), which requires the Commission's approval for "[a]ll initial and subsequent appointments, promotions, and related personnel actions in the career, unclassified, or senior executive service[.]" A career service appointment is "subject to an examination process and successful completion of a working test period." N.J.A.C. 4A:4-1.1(a). The Commission concluded that because an approved DCA waiver did not accompany the December 2009 certification, the DCA never recognized Persaud's appointment.

Persaud concedes that a waiver was not obtained from DCA for his appointment, but argues that a waiver was not necessary because a Health Officer is an essential employee pursuant to N.J.S.A. 26:3A2-14, and he was willing to work for \$18,000 less than Weigle, thus no additional budget appropriation was necessary. He asserts that under section one of the MOU, no DCA waiver was required for his appointment as Health Officer. Through their actions, however, Paterson and the DCA clearly interpreted the somewhat unclear language of the MOU to require a waiver for the appointment or transfer of any employee. A waiver was sought and obtained by the Torres administration to appoint Weigle as Health Officer. That waiver was particular to Weigle and did not serve as a waiver for Persaud. Only an unapproved DCA waiver for Persaud was submitted.

The Commission's acceptance of DCA's interpretation of the MOU, specifically that a DCA waiver was required before permanently appointing Persaud as Paterson's Health Officer, was not "'arbitrary, capricious, or unreasonable'" and it was sufficiently "'supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (quoting Henry, supra, 81 N.J. at 579-80). DCA has the authority to impose efficiency and oversight measures, as well as management and fiscal audits, as conditions of receipt of

special municipal aid. N.J.S.A. 52:27D-118.29(a). An appointment is not final until formally approved by the Department of Civil Service. See Thomas v. Mc Grath, 145 N.J. Super. 288, 296-300 (App. Div. 1976) (Morgan, J.A.D., dissenting), rev'd on dissent, 75 N.J. 372 (1978). In spite of the mistaken entry into the CAMPS system, Persaud was not formally appointed because no approved DCA waiver was supplied by Paterson. Also, Persaud never served in the position of Health Officer.

Because we find the lack of an approved DCA waiver sufficient reason for the Commission's determination that Persaud was never appointed as Paterson's Health Officer, we need not address the validity of the other reasons expressed by the Commission.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION