

B-13



STATE OF NEW JERSEY

In the Matter of Debra King,  
Assistant Administrative Supervisor,  
Income Maintenance (PC1582S),  
Hudson County

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

CSC Docket No. 2016-1845

Bypass Appeal

ISSUED: MAR 13 2017 (JET)

Debra King appeals the bypass of her name on the Assistant Administrative Supervisor, Income Maintenance (PC1582S), Hudson County.

The appellant took the promotional examination for Assistant Administrative Supervisor, Income Maintenance (PC1582S), achieved a passing score, and was ranked on the subsequent eligible list. The appellant's name was certified (PL150713) to the appointing authority on the June 29, 2015. In disposing of the certification, the appointing authority bypassed the appellant, the fourth ranked eligible, and appointed Siapno Donato, the fifth ranked eligible, Sandra Abreu, the sixth ranked eligible, Ajit Munjal, the seventh ranked eligible, Maryann Malanaphy, the eighth ranked eligible, and Maritza Aybar, the ninth ranked eligible, effective September 8, 2015.

On appeal, the appellant asserts, among other things, that the appointing authority inappropriately bypassed her in violation of the "Rule of Three." Specifically, the appellant states that she was ranked fourth on the list based on her examination score and the appointing authority planned to fill eight vacant positions. She also states that she is the only eligible with prior management experience and possesses a Master's degree and a Bachelor's degree. Further, the appellant states that her performance evaluations have been excellent and asserts that she was bypassed for filing harassment and hostile work environment grievances in June 2015. As such, she argues that she should have been appointed from the list.

In response, the appointing authority, represented by Louis C. Rosen, Deputy County Counsel, maintains that the appellant's name was properly bypassed. Specifically, the appointing authority asserts that the appellant's disciplinary history including her suspensions, and issues pertaining to the performance of her duties, were sufficient to bypass her name from the list. In support, the appointing authority submits a January 21, 2016 memorandum from Angelica M. Harrison, Director, Hudson County Division of Welfare, who states that the appellant was suspended on five occasions. In this regard, she received a 10-day suspension in 2010, a three-day suspension in 2003, a one-day suspension in 2002, and a one-day suspension in 2000. Additionally, Ms. Harrison contends that the appellant's work product is less than satisfactory, as she has failed to submit various reports and projects on time. In support, the appointing authority provides memoranda issued to the appellant from September 2014 to December 2014 detailing various issues in her work performance, such as delaying cases to be batched for processing. Moreover, the Director asserts that the appointed candidates possess extensive experience in areas including SNAP benefits (food stamps), Medicaid benefits, and the Affordable Care Act.

In reply, the appellant asserts, among other things, that her attendance has not been at issue since 2012 and her absences occurred before she was serving in her current title. In addition, the appellant maintains that there are no disciplinary actions pending against her at this time, and she continues to be cooperative with her supervisors and other employees. Additionally, she states that her 10-day suspension was reduced to a five-day suspension via a settlement agreement. Moreover, the appellant contends that she has worked at the appointing authority for 23 years and she has never received an employee evaluation indicating that her work performance was less than satisfactory. In fact, her work was considered thorough and accurate in the April 2015 evaluation.

Official personnel records reflect that the appellant received a five-day suspension effective January 31, 2012, a three-day suspension effective August 10, 2010, a three-day suspension effective July 27, 2010, a three-day suspension effective March 29, 2005, a three-day suspension effective September 9, 2003, a three-day suspension effective October 22, 2002, and a three-day suspension effective March 29, 2000.

### 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, provided that disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned.

*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.

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 actions 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 retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish 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-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 retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the retaliatory motive.

In this matter, other than the appellant's mere contentions, she did not provide any substantive evidence to show that she was retaliated against for filing a grievance. However, the appointing authority provided documentation from 2002 to 2015 pertaining to the appellant's disciplinary record and work performance issues. Therefore, the appellant has not established that she was bypassed in retaliation for filing a harassment grievance.

Additionally, the factors cited by the appointing authority, including the appellant's disciplinary record, provide a sufficient basis for not appointing the appellant from the subject certification in favor of the lower-ranked eligibles. In this regard, it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification for each vacancy filled. In this regard, the appellant, the fourth ranked eligible, and a non-veteran, was permissibly and properly bypassed in favor of the eligibles who ranked first through third, and fifth through ninth. It is clear that the appellant's disciplinary record, which contains a five-day suspension in 2012 and several other minor disciplinary suspensions, could be considered in whether she could be bypassed on the list. See *e.g.*, *In the Matter of Andrew Ross, Correction Sergeant, Department of Corrections (PS7099I)* (MSB, decided January 17, 2001) (Sufficient basis to bypass a Correction Sergeant list for employee with numerous remote minor disciplinary actions and several more recent criminal complaints); *In the Matter of Sheree K. Culvert*,

*Correction Lieutenant, Department of Corrections (PS63201)* (MSB, decided October 11, 2000) (Sufficient basis to bypass on a Correction Lieutenant list for employee with 20 minor disciplinary infractions, including three very recent infractions). The appellant has not shown any evidence to refute the appointing authority's assertions or shown that the other candidates possess worse disciplinary records.

The Commission notes that an appointing authority has discretion under the "Rule of Three" to appoint a lower-ranked eligible absent any unlawful motive. *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). Even assuming, *arguendo*, that the appellant is more qualified for the position at issue than the appointed candidates, the appointing authority still has selection discretion under the "Rule of Three," absent any unlawful motive. In this regard, it is noted that 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 her mere allegations, the appellant has not presented any substantive evidence regarding her 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."

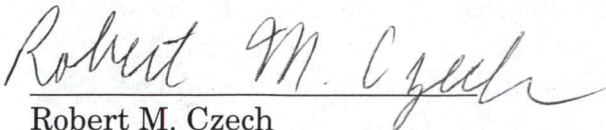
Accordingly, the appellant has failed to meet her burden of proof in this matter.

### 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 9<sup>th</sup> DAY OF MARCH, 2017



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