



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matters of Lee Rosenthal and  
Susan Vandy, Assistant  
Administrative Supervisor of Income  
Maintenance (PC2607T), Burlington  
County Board of Social Services

Bypass Appeals

CSC Docket Nos. 2017-1913 and  
2017-1872

ISSUED: **AUG 17 2017** (HS)

Lee Rosenthal and Susan Vandy appeal the bypass of their names on the Assistant Administrative Supervisor of Income Maintenance (PC2607T), Burlington County Board of Social Services eligible list. These appeals have been consolidated due to common issues presented.

Rosenthal appeared as the second listed non-veteran eligible, and Vandy appeared as the fourth listed non-veteran eligible on the subject eligible list, which promulgated on June 16, 2016 and expires on June 15, 2019. A certification was issued on July 19, 2016 (PL160887).<sup>1</sup> In disposing of the certification, the appointing authority appointed the first, third, fifth and sixth listed non-veteran eligibles effective October 10, 2016. The disposition of the certification was recorded by this agency on November 22, 2016.

In his appeal to the Civil Service Commission (Commission) filed December 14, 2016, Rosenthal claims that he was bypassed due to gender discrimination and retaliation for his July 2015 request for a classification review of his position. As background, he states that he received a commendable evaluation of his work performance in September 2016, with commendable being the highest level available. In addition, during a public meeting in August 2016, Acting Director Charles SanFilippo praised his work on the record. Rosenthal argues that his

<sup>1</sup> A certification issued on June 23, 2016 (PL160768) was cancelled on July 14, 2016. Vandy and the appointing authority disagree as to whose actions led to the cancellation. However, the Civil Service Commission does not find this dispute relevant to the instant appeal and will not address it.

bypass despite these accolades could only have been due to retaliation for his request for a classification review. He also states that prior to the instant appointments, there were three females serving in the title. The four appointees from the July 19, 2016 certification were, again, all females. Therefore, Rosenthal maintains that the appointing authority has violated his federal civil rights with both retaliation and gender discrimination. He also notes that he filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), which is under investigation.<sup>2</sup>

In her appeal filed December 14, 2016, Vandy claims that she was bypassed due to age discrimination, retaliation for her union activities and favoritism. She asserts that she was clearly more qualified than many of the other, younger, candidates as she has no disciplinary history, served in the military, and possesses pertinent education while one of the lower-ranked appointees has a degree in music. Vandy contends that the appointing authority chose whomever it wanted based on factors that were clearly not part of any job qualifications and that the Commission must correct the "ongoing travesty that is the so called interview process." She states that management was looking to promote the fifth and sixth listed eligibles as they had previously received provisional appointments to the subject title in April 2016. She asserts that four appointments were ultimately announced when the appointing authority had previously advised that there were two vacancies. Vandy claims that her use of sick time and "late minutes" was used against her in the interview. She asserts that her performance in the interview was great as she was calm and collected, answered all questions quickly and correctly and kept eye contact. Vandy argues that if this subjective area was "low balled," her assertions are supported. Vandy also points to a list kept in human resources, which groups employees into the following categories: over 55 with 25 years of service (the appellant's category); over 55 with less than 25 years of service; and under 55 with 25 years of service. She states that the purpose of this list was "obvious."

In response, the appointing authority initially argues that the appellants' appeals are untimely. Specifically, it states that the appellants were made aware of the appointing authority's selections on September 22, 2016, but they did not file their appeals until almost three months later.

With respect to the merits, the appointing authority states that the fifth and sixth listed eligibles received provisional appointments to the subject title in April 2016. In August 2016, the appointing authority learned of its Director's retirement application. The Director's interim replacement, SanFilippo, was serving permanently in the title of Administrative Supervisor of Income Maintenance. Therefore, due to the likelihood that SanFilippo would continue in his role as Director, it was decided that two additional appointments to the subject title would need to be made. The appointing authority states that in September 2016, it

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<sup>2</sup> There is no determination from the EEOC in the record.

interviewed eight eligibles on the certification for four permanent appointments to the subject title.

Additionally, the appointing authority maintains that it has discretion to develop its selection criteria and that its evaluation process, used in the subject and past promotional opportunities, was fair, uniform and based on legitimate criteria. In this regard, there was a three-member screening panel, Chairperson Geraldine Nardello, SanFilippo and an individual serving in the title of Administrative Supervisor of Income Maintenance. A representative from human resources observed the interviews to ensure the integrity of the process. The evaluation was based on 12 selection criteria separated into two parts, and each criterion was scored on a scale of 1 to 10, with 10 being the highest. Part 1 included the following selection criteria: Performance Appraisal, Education, Experience, Attendance, Disciplinary History, and Resume or Job Application. The appointing authority asserts that as Part 1 criteria are more quantifiable, each candidate's scores for these criteria were agreed to by consensus before the interview. Part 2 included the following selection criteria: Professionalism, Enthusiasm, Communication Skills, Appropriate Responses to Questions, Maturity/Sense of Responsibility and Customer Service Skills. Part 2 criteria related directly to the interview and were scored by each panel member independently. The candidate's overall interview performance was evaluated in terms of the Part 2 criteria. Prior to the interviews, candidates had to submit an updated resume and answers to four take-home essay questions. The interview questions were determined in advance. Each panel member selected questions from a bank of title-appropriate sample questions, and each candidate was asked the same questions. Following the interviews, the candidates' selection criteria scores were tallied and ranked. The candidates with the highest scores who were reachable on the certification pursuant to the "Rule of Three" were unanimously recommended by the panel for promotion. The appointing authority maintains that the "Rule of Three" granted it discretion to select from among the top six eligibles on the certification to fill the four vacancies. Based on the appellants' scores, they were not recommended for promotion.

Specifically regarding Rosenthal's arguments, the appointing authority denies his allegations of gender discrimination and retaliation for requesting a classification review. The appointing authority states that he received the lowest score of all candidates in the Disciplinary History criterion. It notes that on June 13, 2011, Rosenthal received a five-day suspension on the record (three days served) on charges of conduct unbecoming and insubordination. The specific infractions included breaching an administrator's confidentiality and lying to his administrator. The appointing authority argues that such discipline is even more troubling given that Rosenthal was a supervisor at the time.<sup>3</sup> Regarding the claim of gender discrimination, the appointing authority states that at the time of the

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<sup>3</sup> The appointing authority also notes two written warnings. However, written warnings are not considered discipline under Chapter 2 of Title 4A of the New Jersey Administrative Code.

selection process, it employed a lower than average count for males given the extremely low number of males applying for entry level positions. It contends that it is unremarkable that four females were appointed over Rosenthal given the ratio of men to women and that he was the only male on the certification. The appointing authority notes that one of the panel members, SanFilippo, is male and that Rosenthal has previously been appointed from a certification after the bypass of a female and has previously been appointed from a certification where the appointing authority could have appointed a female. The appointing authority also notes that Performance Appraisal was only one of 12 selection criteria and that Rosenthal received the same score for this criterion as six of the seven other candidates with the seventh receiving a lower score. It further argues that it did not retaliate against Rosenthal for requesting a classification review given that Rosenthal received a commendable performance appraisal after he had filed that request.

Specifically regarding Vandy's arguments, the appointing authority denies her allegations of age discrimination and retaliation for her union activities. The appointing authority states that she received the lowest score of all candidates in the Resume or Job Application criterion. It contends that Vandy's resume was unprofessional. It also maintains that her essay answers were substandard as they were superficial, lacked depth of thought and failed to fully address the issues posed. Vandy further did not respond appropriately to interview questions and received the lowest score of all candidates in the Appropriate Responses to Questions criterion. Regarding Vandy's claim that she is more qualified than many of the appointees, the appointing authority states that experience was only one of the 12 selection criteria. It states that candidates must exhibit a high degree of professionalism in word and action. It asserts that while soft skills are perhaps more difficult to measure than hard skills, they are at least as important as education or years served in the current title. People skills such as patience, problem-solving and communication are critical attributes for candidates. In addition, the appointing authority denies that Vandy was bypassed due to her age. It states that the appointees' ages were 48, 52, 57 and 57 respectively. It argues that it is absurd for Vandy, who is 60 years of age, to claim age discrimination when the appointees shared her protected class (*i.e.*, 40 years of age and over per the federal Age Discrimination in Employment Act of 1967) and two appointees are within three years of her age. The appointing authority also states that the list in human resources grouping employees by age is an internal report entitled "Retirement Information," which is used for strategic planning and budgeting rather than any nefarious reason. It states that this report allows it to gauge future losses due to retirement and take steps to transition the employee's decades of accumulated organizational knowledge to others. The appointing authority states that the category "over 55 with 25 years of service" includes not only Vandy but also two appointees. Further, the appointing authority denies that her bypass was retaliation for her union activities as it does not consider union affiliation in promotions and has a history of promoting employees who held high-ranking union

positions to administrative titles. It states that the sixth listed eligible, who was appointed in the instant case, was holding the position of Deputy Chief Steward for the supervisor's union, the Office & Professional Employees International Union (OPEIU), at the time of her promotion.

In support, the appointing authority submits its Equal Employment/Affirmative Action Policy; a sample promotional interview score sheet; the interview panel scoring instructions; Rosenthal's notice of minor disciplinary action; and Vandy's resume, among other documents.

In reply, Rosenthal maintains that his appeal was timely and that the appointing authority's response was untimely as it was submitted more than 20 days after receiving this agency's correspondence acknowledging receipt of his appeal. With respect to the merits, Rosenthal questions how the Chairperson could arrive at impartial, informed scores since the Chairperson spends limited time at the agency and has not been seen mingling with employees. Rosenthal claims that his suspension was the result of the intense dislike his former administrator had for him, which caused a hostile work environment. He also asserts that he could not have successfully had the penalty reversed due to a personal relationship between his superiors, though his attorney was able to have the initially proposed penalty reduced. Rosenthal contends that the appointing authority violated the intent and spirit of the OPEIU collective bargaining agreement in that the agreement provides that discipline is to be "corrective in intent" rather than vindictive and punitive. He claims that the sixth listed eligible also has a disciplinary record. Rosenthal states that there have been cases of gender discrimination where the parties involved were of the same gender, so the presence of SanFilippo on the panel proves nothing. He also states that his past appointments are not relevant to the present situation. Rosenthal disputes that he received a commendable performance appraisal immediately after filing his classification review request, stating that that particular evaluation was just satisfactory. He contends that his selection criteria scores were arbitrary and unrealistic and that the interview process unfairly emphasized how well candidates could sell themselves rather than the candidates' ability to perform the job. Rosenthal maintains that he should have received higher scores in many of the selection criteria and been appointed. He describes a conversation in which SanFilippo praised his management of the Child Support Department and wanted him to become the administrator of that department. In support, Rosenthal submits a memorandum from this agency regarding his classification review in which his performance was recognized as commendable; an e-mail praising him for the results of an Internal Revenue Service inspection; e-mails of congratulations regarding Burlington County's receipt of the CWA Agency of the Year Award for 2016; and an excerpt from the OPEIU collective bargaining agreement, among other documents.

In reply, Vandy maintains that her appeal was timely. With respect to the merits, Vandy contends that the appointing authority increased the number of vacancies from two to four so that the fifth and sixth listed eligibles on the certification could be appointed. She argues that most of the selection criteria are arbitrary and open to manipulation and personal bias and that the appointing authority does not properly credit education and characteristics pertinent to the position being interviewed for. She contends that the appointing authority should also have provided the actual score sheets, essays and notes from the selection process in support of its response. Vandy denies that her resume was unprofessional and maintains that it is the content that makes a good resume. She maintains that she is a very good writer, that she had no trouble answering the interview questions and that her answers were on point and not superficial. Vandy further states that prior to interviewing for the subject position, she was accused of writing "bossy" e-mails but disagreed with that assessment. She also states that the individuals identified by the appointing authority as having been promoted after holding high-ranking union positions either had "issues" getting promoted or had comparatively very minor roles in union activities.<sup>4</sup>

It is noted that per the job specification, the requirements for Assistant Administrative Supervisor of Income Maintenance are a Bachelor's degree and two years of experience examining, adjusting, determining or authorizing eligibility or entitlement for cash awards or benefits in a public or private financial assistance program, one year of which shall have been in a supervisory capacity. Applicants who do not possess the required education may substitute experience as indicated on a year-for-year basis. A Master's degree in public or business administration may be substituted for one year of the non-supervisory experience.

### CONCLUSION

*N.J.A.C.* 4A:2-1.1(b) provides that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. This agency recorded the disposition of the certification on November 22, 2016, thereby approving the appointments. There is no indication that the appellants were provided with actual notice of this agency's recording of the certification disposition. Thus, the appellants' appeals filed December 14, 2016, 22 days after the disposition of the certification, were filed within a reasonable period of time. As such, there is not a sufficient basis to dismiss these appeals on the basis of untimeliness.

In addition, Rosenthal contends that the appointing authority provided an untimely response. However, there is no jurisdictional statutory timeline within which a party is required to respond to an appeal. *See e.g., In the Matter of Michael*

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<sup>4</sup> The Commission does not find the remainder of Vandy's claims relevant to whether Vandy's bypass in the instant matter was proper and therefore will not address them.

*Compton* (MSB, decided May 18, 2005). In addition, in order for the Commission to make a reasoned decision in a matter, it must review a complete record. See e.g., *In the Matter of James Burke* (MSB, decided June 22, 2005). Moreover, Rosenthal had the opportunity to reply to the appointing authority's response. As such, there is no basis to disregard the appointing authority's response.

*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. Moreover, it is noted that the appellants have the burden of proof in these matters. See *N.J.A.C.* 4A:2-1.4(c).

Additionally, 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 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 discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

As an initial matter, it is noted that Vandy contends that the appointing authority increased the number of vacancies from two to four so that it could appoint the fifth and sixth listed eligibles, who had previously received provisional appointments to the subject title. However, *N.J.A.C.* 4A:4-1.5(a) provides an appointing authority with the discretion to make provisional appointments until a competitive examination and employment roster can be promulgated. See *In the Matter of Doris Dingle* (MSB, decided October 6, 2004). Further, the determination as to whether a vacancy exists and/or will be filled is generally left to the discretion of the appointing authority. See *In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). See also, *In the Matter of Todd Sparks* (MSB, decided April 6, 2005); *In the Matter of Deputy Fire Chief (PM3654F), Borough of Roselle* (MSB, decided March 23, 2005); *In the Matter of Institution Fire Chief* (MSB, decided January 12, 2005). Moreover, the appointing authority has articulated a reason for

the increase in the number of vacancies, namely that SanFilippo was serving permanently in the title of Administrative Supervisor of Income Maintenance and was likely to continue in his role as Director.

Since the appellants, non-veterans, were the second and fourth listed names on the certification, it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification for each vacancy filled. See *In the Matter of Kathie DeSando* (CSC, decided May 3, 2017). Nevertheless, the appellants allege that they were bypassed for improper reasons. Specifically, Rosenthal alleges gender discrimination and retaliation for requesting a classification review, and Vandy alleges age discrimination, retaliation for her union activities and favoritism. However, the appellants have not provided any substantive evidence beyond mere allegations that their bypass was motivated by such improper reasons. Although Vandy implies that a list kept in human resources grouping employees by age evidences age discrimination, the appointing authority notes that this document is a retirement information report used for strategic planning and budgeting and that the category "over 55 with 25 years of service," and includes not only Vandy but also two of the appointees.

The appointing authority indicates that the appellants were bypassed because they were not among the four highest scoring candidates in its evaluation process. With regard to the appellants' complaints regarding the selection process utilized by the appointing authority, the Commission notes that it is within the appointing authority's discretion to choose its selection method. Appointing authorities are permitted to develop and utilize an objective standard in order to determine how to use that discretion. The use of a panel of evaluators familiar with the position and the assignment of numerical scores in a number of criteria related to the position is a permissible way for the appointing authority to make a hiring decision, so long as that hiring decision is in compliance with *N.J.A.C. 4A:4-4.8(a)3*. See *In the Matter of Paul Mikolas* (MSB, decided August 11, 2004) (Structured interview utilized by appointing authority that resulted in the bypass of a higher ranked eligible was based on the objective assessment of candidates' qualifications and not in violation of the "Rule of Three"). The appointing authority presents sufficient details regarding the structured evaluation process that preceded the appointments at issue. The scores were tallied, and the candidates were ranked according to their scores. The four reachable candidates who were appointed ranked ahead of the appellants following this evaluation process. The appellants have not presented any substantive evidence, beyond their mere disagreements, to suggest that any of the criteria were inappropriate or that the scores awarded by the panel members in those criteria were based on anything other than the panel's objective assessment of the candidates' qualifications.

Rosenthal contends that the appointing authority's consideration of his suspension in bypassing him was contrary to the OPEIU collective bargaining



agreement. However, the Commission generally does not enforce or interpret items that are contained in a collective bargaining agreement negotiated between the employer and the majority representative. See *In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001). The proper forum to bring such concerns is the Public Employment Relations Commission. See *N.J.S.A. 34:13A-5.3* and *N.J.S.A. 34:13A-5.4(c)*. Nevertheless, under Civil Service law and rules, it is well-established that disciplinary actions may be considered in bypassing an individual for appointment. See *In the Matter of Paul DeMarco* (MSB, decided April 6, 2005). Although Rosenthal claims that his suspension resulted from the intense dislike his then-administrator had for him and that he could not have had the penalty reversed due to a personal relationship between his superiors, the Commission will not address such claims.<sup>5</sup> In addition, although Rosenthal claims that the sixth listed eligible has a disciplinary record, he provides no evidence in support.

The Commission is also not persuaded by Rosenthal's suggestion that the Chairperson could not arrive at impartial, informed scores based on his claim that she spends limited time at the agency and has not been seen mingling with employees. The Chairperson is a high-level employee, and the Commission has not been presented with any substantive reason to doubt that she was familiar with the position at issue or show that she was otherwise unqualified to sit on the panel.

Additionally, the appellants suggest that they were more qualified for the position. However, the appellants and all of the appointees were determined by this agency to meet the requirements for the subject title prior to admission to the examination. Moreover, the subject title does not require any specialized Bachelor's degree. Even assuming, *arguendo*, that the appellants are more qualified for the position at issue, the appointing authority still has selection discretion under the "Rule of Three" to appoint a lower-ranked eligible absent any unlawful motive. See *N.J.A.C. 4A:4-4.8(a)3*; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, *Ocean City*, 207 *N.J.* 38, 49 (2011). 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). Moreover, the appellants do not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the eligible 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.*

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<sup>5</sup> Appeals of minor disciplinary actions taken against county or municipal government employees are not reviewable by the Commission since the Legislature has limited such reviews to employees of State service. See *N.J.S.A. 11A:2-16*. However, if there was no mechanism available to Rosenthal to pursue a minor disciplinary action under standards and procedures established by the jurisdiction or by a negotiated labor agreement, he could have sought relief through the Law Division of the Superior Court of New Jersey. See *Romanowski v. Brick Township*, 185 *N.J. Super.* 197 (Law Div. Ocean County 1982).

*Super.* 494 (App. Div. 1990). The appellants have not presented any substantive evidence regarding their bypass that would lead the Commission to conclude that their 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 appellants' bypass that have not been persuasively refuted.

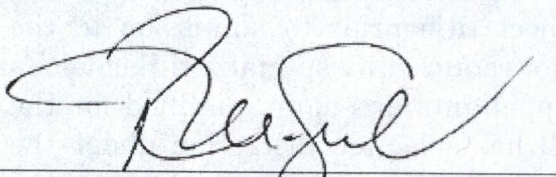
Based on the foregoing, the Commission finds that the evaluation process was conducted appropriately. Further, since the appellants have presented only their mere disagreements with the selection criteria and the panel's assessment, it is not necessary to compel production of interview notes, essays or similar materials. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellants' names was proper and the appellants have not met their burden of proof in these matters.

### ORDER

Therefore, it is ordered that these appeals 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 16<sup>TH</sup> DAY OF AUGUST, 2017




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