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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Brian J. Bonomo,
Principal Investigator, Parole and
Secured Faculties (PS0511I),
Department of Corrections

List Bypass Appeal

CSC Docket No. 2016-4298

ISSUED: SEP 07 2017 (DASV)

Brian J. Bonomo, represented by David Beckett, Esq.,¹ appeals the bypass of his name on the Principal Investigator, Parole and Secured Faculties (PS0511I), Department of Corrections (DOC), eligible list.

By way of background, the appellant, a nonveteran, appeared on the subject eligible list, which promulgated on November 28, 2013 and expired on December 28, 2016.² The appellant and 11 candidates were certified on April 11, 2016. The appellant ranked fourth on the certification. In disposing of the certification, the appointing authority removed the first ranked eligible for failure to respond to the Notice of Certification and bypassed the second ranked eligible and the appellant pursuant to the "Rule of Three," *N.J.A.C. 4A:4-4.8(a)*³. It appointed the third and seventh ranked eligible effective June 25, 2016. Additionally, the fifth and sixth

¹ Beckett filed an appeal on behalf of the employees represented by the New Jersey Investigators Association, FOP Lodge 174, who appeared on the subject certification, which included the appellant. Beckett was advised that in order to perfect the appeals, a \$20 appeal fee or fee waiver information was required for each candidate. Alternatively, Beckett was informed that his arguments could be included and considered in the appellant's appeal, as their arguments regarding the selection process were similar. The latter occurred. Beckett stressed that the union "does not takes sides" as to who was appointed. However, he requested that the two promotions made from the subject certification be rescinded and the appointing authority "redo the process" in compliance with Civil Service law and rules.

² The subject eligible list was extended to November 27, 2017 or until a new list becomes available. See *In the Matter of Principal Investigator, Parole and Secured Faculties (PS0511I), DOC* (CSC, decided December 7, 2016). The new eligible list (PS2734I) promulgated on December 29, 2016 and expires on December 28, 2019. The appellant appears on this eligible list and ranks seventh.

ranked eligible remained on the list, but were not appointed due to a late response to the Notice of Certification³ and not being interested in the location of the position, respectively. The remaining eligibles on the certification were not reachable or retired.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority violated the "Rule of Three" by "certifying a list of 10 eligible candidates" for two positions and did not provide him with a written statement as to why he was bypassed. It is noted that, although 12 individuals were certified, the appellant states that 10 eligibles were interviewed. The appellant maintains that the appointing authority went beyond the top four eligibles⁴ in making its selection, and thus, violated the "Rule of Three." The appellant also alleges that he was not informed that he would have to pass a Civil Service test and submit to a panel interview at the time of his application for the promotional opportunity. In addition, the appellant indicates that he was advised by the Chief Investigator that the appellant was bypassed because the lower ranked appointee scored higher in the panel interview than he did. Moreover, according to the appellant, the Chief Investigator asserted that he was "bound by policy to select the individual" with the higher score. The appellant submits that test scores, time and service, and career accomplishments were not considered. The appellant further maintains that the Chief Investigator's assertion is inaccurate because according to DOC's policies on staff selection, promotions, and panel interviews, the interview is to be used as a "tool to aid in the objective selection of candidates." Thus, the appellant contends that the appointing authority "does not have a clear understanding of its own policies." Further, he claims that the appointing authority has historically selected the eligible with the highest test score, unless there is disciplinary action in the eligible's record. Additionally, the appellant states that he had served "in the capacity of a supervisor" prior to the appointments of the third and seventh ranked eligibles. In addition, he alleges that a direct supervisor of two of the eligibles conducted the panel interviews, which violated DOC's policy that "[w]henver possible, current direct supervisors of applicants to be interviewed should not interview subordinates." The appellant contends that the appointing authority had adequate staffing not to use a current supervisor. He also claims that his work history and experience "were never requested," and therefore, they were not factored into the decision as to whether to promote him. Therefore, he maintains that the appointing authority's promotional procedures violated Civil Service law and rules.

³ Although the appellant refers to this candidate as not being allowed to interview, neither the fifth ranked eligible nor his union representative pursued an appeal concerning the late response. Nonetheless, contrary to the appellant's assertion, the appointing authority's disposition of this candidate was proper.

⁴ The appellant indicates that for each permanent appointment, three individuals must be certified with one additional person certified for a second vacancy. See *N.J.A.C. 4A:4-4.2(c)2*.

In response, the appointing authority indicates that it requested that 12 names be certified from the subject eligible list in order to ensure that there would be three interested eligibles available for consideration for each location. The two vacant positions were at Northern State Prison and South Woods State Prison. Eight candidates, who were interested and provided timely responses, were interviewed by a three-member panel. The panel included a representative from the human resource office, who was the lead panelist and did not report any disparate scoring. The panel evaluated the candidates by reviewing their credentials and rating their responses to pre-set interview questions. The panel also assessed the candidates' oral communication skills and understanding of the tasks associated with the position. Additionally, the appointing authority indicates that "the panel interview was given significant consideration determining who should be selected for the position." After the interviews, the appointing authority sent an e-mail to the individuals to respond as to which location they were interested. Based on the responses, it offered the position at Northern State Prison to the third ranked eligible, as the eligible was only interested in that location and was reachable for appointment. The first ranked eligible had been removed for failure to respond to the Notice of Certification and the second ranked eligible was bypassed. For the second position, the appointing authority bypassed the appellant, who had chosen both locations and was ranked fourth on the certification, and appointed the seventh ranked eligible. The appointing authority emphasizes that the fifth ranked eligible was late in responding to the Notice of Certification and the sixth ranked candidate was not interested in the remaining position at South Woods State Prison. Additionally, it states that it did not request the removal of any individual due to location preference. The appointing authority submits the certification of Lisa Gaffney, a Manager 2, Human Resources, who was involved in the promotional process and attests to the truth of the foregoing information.

In reply, the appellant indicates that the appointing authority has failed to provide the specific reasons for his bypass and how it reached its decision to appoint a lower ranked candidate.⁵ He contends that the "appointing authority employs hiring practices to support favoritism and nepotism." It manipulated the eligible list to select a candidate who is less qualified and scored lower on the examination than the appellant. The appellant notes that the candidates were asked three times prior to the interviews if they were interested in a position. Regarding the interview, the appellant states that he was asked questions regarding the "Duty to Warn" policy which was effective in November 2015. However, the appellant claims that it was not posted in the Special Investigations Division policy section and was only made available on May 6, 2016. The appellant contends that even if he was made aware of this policy, he would have had only days to familiarize himself with it prior to his interview. Moreover, the appellant alleges that the questions were

⁵ The appellant notes that during a departmental grievance, the appointing authority failed to address numerous appeal questions that he had presented. However, this grievance was not before the Commission, and no specific information has been provided.

“narrowly selected to conform towards the candidate” whom the appointing authority wanted to promote. Furthermore, the appellant contends that the appointing authority’s explanation as to why it needed 12 names “makes no sense,” as the regulation explicitly states that, for two vacancies, the certification “is to be limited” to four eligibles. The appellant cites *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 N.J. 38 (2011), to support his arguments. He states that the New Jersey Supreme Court emphasized the constitutional mandate that appointments are to be made based on merit and fitness and that the “Rule of Three” limits the appointing authority’s discretion to “reach down into the bottom” to “pick its favorite candidates.” The appellant asserts that the e-mail sent to the candidates violates this mandate and creates two different lists. Therefore, he requests that the promotions be rescinded.

CONCLUSION

Initially, the appellant questions the certification of the 12 eligibles and argues that only four eligibles should have been certified. In this regard, *N.J.A.C. 4A:4-4.2(c)2* states in relevant part that an appointing authority shall be entitled to a complete certification for consideration in making a permanent appointment, which means: from promotional and open competitive lists, the names of three interested eligibles for the first permanent appointment, and the name of one additional interested eligible for each additional permanent appointment. Thus, certifying four names provides the *minimum* number of eligibles to be considered when there are two appointments to be made. *N.J.A.C. 4A:4-4.2(c)2* **does not** limit the number to four eligibles for two vacant positions. Indeed, contingencies may arise, as in this case, where individuals may not be interested or removed for various reasons. Moreover, if only four eligibles were certified, the appointing authority would not have been required to offer the second position to the remaining eligibles, as there would not have been a complete list,⁶ since the first ranked eligible was removed and the third ranked eligible was appointed. Only two of the four eligibles would have remained. Thus, this may have resulted in the appointing authority requesting a new certification and having another round of interviews, causing an inefficient use of government resources. It is emphasized that this agency has the authority to issue the necessary certification when it is determined that there is a need for certification. Specifically, *N.J.A.C. 4A:4-4.1(a)* states that “[w]hen a vacancy is to be filled in the competitive division of the career service from an eligible list, the appointing authority shall request a certification of names for regular appointment. Such request shall be submitted in advance under

⁶ *N.J.A.C. 4A:4-4.2(c)2i* provides that when fewer than three interested eligibles are certified and and no provisional currently serving in the title is listed on the certification, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.

procedures set by the Chairperson or designee to enable the appropriate Commission staff to issue or authorize the necessary certification or advise that there is no appropriate eligible list” [emphasis added]. Given that there were two positions at different locations, it was reasonable for this agency to approve the appointing authority’s request and issue a certification with additional names above the appointing authority’s entitlement. Furthermore, contrary to the appellant’s arguments, two different lists were not created. The appointing authority has the discretion to fill a vacancy at any one of its location. Neither the appellant nor any other candidate were disadvantaged by being provided the option of choosing a preferred location as they could have chosen both. It is noted that deference is normally given to an appointing authority’s choice in organizing its functions, considering its expertise, so long as the selection is responsive to the purpose and function of the agency. See *In the Matter of Gloria Iachio*, Docket No. A-3216-89Y3 (App. Div. January 10, 1992). Therefore, under these circumstances, the Commission does not find that Civil Service law or rules were violated in the selection and appointment process.

As to the appellant’s bypass, *N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3 allow an appointing authority to select any of the top three interested eligibles (“Rule of Three”) on a promotional list, provided that no veteran heads the list. In bypass appeals, the appellant has the burden of proof. See *N.J.A.C.* 4A:2-1.4(c). Additionally, when bypassing a higher ranked eligible, *N.J.A.C.* 4A:4-4.8 no longer requires an appointing authority to provide 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.⁷ As such, the appointing authority was not required to provide this agency with a statement as to why it appointed the seventh ranked eligible over the appellant.⁸ See e.g., *Foglio, supra* (The 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).⁹ Moreover, it is well established that the appointing authority is not obligated to provide a candidate with the reasons why the lower ranked candidate was appointed. See *Local 518, New Jersey State Motor Vehicle Employee Union, S.E.I.U., AFL-CIO v. Division of Motor Vehicles*, 262 *N.J. Super.* 598 (App. Div. 1993) and *In the Matter of Brian*

⁷ The rule amendment was effective May 7, 2012.

⁸ Apart from the claims that the appointing authority created “two lists,” the validity of the appointment of the third ranked eligible is not in dispute. The first ranked eligible was removed, the second ranked eligible did not file an appeal of her bypass, and the appellant ranked lower than the appointee.

⁹ For subsequent history, see *In the Matter of Nicholas R. Foglio* (CSC, decided February 22, 2012), *on temporary remand* (CSC, decided November 7, 2012) (On remand from the Supreme Court, the Commission found that appointing authority provided a proper statement of reasons when bypassing the appellant when it indicated that based on its interviews, the appointees demonstrated the maturity and temperament for the position. Subsequently, however, the Commission acknowledged a settlement providing for Foglio’s appointment).

McGowan (MSB, decided April 6, 2005). Therefore, the appellant's arguments in that regard are not persuasive. Nonetheless, in response to the appellant's appeal, the appointing authority has justified the reason for the appellant's bypass, consistent with *Foglio, supra*.

Although the appellant contends that the appointing authority did not provide him with specifics and did not consider his accomplishments and experience, which included serving "in the capacity of a supervisor," it is clear that the appointing authority relied on the panel interview and the location preferences of the eligibles when selecting the candidates to be appointed. The panel evaluated the credentials of the eligibles and rated their responses to pre-set interview questions. While the appellant takes exception to one of the questions posed in the interview, the question is not facially inappropriate or unlawful. It is emphasized that appointing authorities are permitted to interview candidates and base their hiring decision on the interview. *See e.g., In the Matter of Wayne Rocco*, Docket No. A-2573-05T1 (App. Div. April 9, 2007) (Appellate Division determined that it was appropriate for an appointing authority to utilize an oral examination/interview process when selecting candidates for promotion); *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"). However, interviews, whether structured or not, are not required. It is within the appointing authority's discretion to choose its selection method, *i.e.*, whether or not to interview candidates and ask hypothetical questions. *See e.g., In the Matter of Angel Jimenez* (CSC, decided April 29, 2009); *In the Matter of Abbas J. Bashiti* (CSC, decided September 24, 2008); *In the Matter of Paul H. Conover* (MSB, decided February 25, 2004); *In the Matter of Janet Potocki* (MSB, decided January 28, 2004). So long as the hiring decision is in compliance with *N.J.A.C. 4A:4-4.8(a)3*, the Commission cannot find that the interview was conducted inappropriately. In the present case, there is no credible evidence in the record that questions were geared to the appointment of a specific individual. Further, there is no obligation under Civil Service law or rules to have informed the appellant upon his application for the promotional opportunity that he would be subject to an examination and panel interview. Firstly, the method by which an individual can achieve a permanent appointment in a competitive title is if the individual applies for and passes an examination, is appointed from an eligible list, and satisfactorily completes a working test period. Secondly, as noted above, a panel interview is a discretionary tool. Thus, the appellant's arguments in that regard are without merit.

In addition, the Commission does not find the Chief's Investigator's alleged statement and the DOC's policies on panel interviews to be inconsistent. The policy indicates that the interview is a tool to aid in the objective selection of the candidates. As set forth by the appointing authority "the panel interview was given

significant consideration determining who should be selected for the position." Furthermore, the appellant questions the fact that supervisors conducted the panel interview. However, a representative from the human resource office was the lead panelist and did not report any disparate scoring. Additionally, the appellant contends that the appointing authority has historically appointed in rank order. However, the "Rule of Three" allows an appointing authority to use discretion in making appointments. See *N.J.S.A. 11A:4-8* and *N.J.A.C. 4A:4-4.8(a)3*. As long as that discretion is utilized properly, an appointing authority's decision will not be overturned. 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, the appointing authority still has selection discretion under the "Rule of Three," absent any unlawful motive. In reviewing this matter, the Commission has not found that the appellant's bypass was due to invidious reasons. The fact that the appointing authority has not previously utilized the "Rule of Three" in prior promotions, but did so in disposing of the subject certification, does not evidence invidious motives. The appellant's allegation that the "appointing authority employs hiring practices to support favoritism and nepotism" is unfounded and unsupported in the record. The appellant presents absolutely no evidence of this claim regarding any of the appointed eligibles, especially the seventh ranked eligible, who had been reachable for appointment. 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).

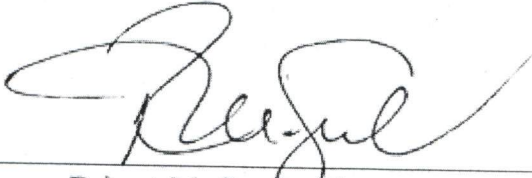
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant on the Principal Investigator, Parole and Secured Faculties (PS0511I), DOC, eligible list was proper and the appellant has failed to meet his burden of proof.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF SEPTEMBER, 2017



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