



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of Lewis Coutts,  
Environmental Engineer 4  
(PS1866G), Department of  
Environmental Protection

Bypass Appeal

CSC Docket No. 2017-1636

ISSUED: SEP 06 2017 (HS)

Lewis Coutts appeals the bypass of his name on the Environmental Engineer 4 (PS1866G), Department of Environmental Protection eligible list.

The appellant appeared as the fifth ranked non-veteran eligible on the subject eligible list, which promulgated on May 5, 2016 and expires on May 4, 2018. A certification was issued on August 19, 2016 (PS161129). The appellant was listed in the third position on the certification. In disposing of the certification, the appointing authority bypassed the first listed non-veteran eligible and the appellant and appointed the second, fourth and fifth listed non-veteran eligibles.

On appeal to the Civil Service Commission (Commission), the appellant argues that the bypass of his name was inappropriate and flawed as it violated the principle of merit and fitness. The promotional examination announcement indicated that applicants would be judged for eligibility by their applications and could be scored by the Supervisory Test Battery but did not indicate that interviews would be required and be relevant to the selection process. The appellant states that another candidate was informed by the interviewer from his element that the selection would be made solely upon the interview results and contends that this ignored the candidates' respective ranks on the eligible list. He asserts that neither a matrix on the interview scoring methodology nor a ranking of interviewed candidates was provided. The interviewers consisted of a representative from human resources and three other interviewers, two of whom have no work experience in the bureau for which he was applying. The appellant states that the sole interviewer from his element had to provide her subjective views for the other



interviewers as to whether the questions were answered correctly, which the appellant argues afforded a patent bias in favor of the selected candidates. In addition, the appellant asserts that the candidates were not officially informed that the interview process included positions from several different bureaus within the division. He claims that as this information was not common knowledge but was made available to selected candidates, an unfair advantage was provided to the informed candidates for interview preparation. Further, the appellant claims that he is more qualified than the selected candidates, as evident through his latest performance appraisal and his possession of certifications, licenses, advanced degrees, skills, knowledge and experience that they lack. He requests that his appeal be upheld based on equity as he is being harmed through no fault, action or inaction on his part. In support, he submits his resume and promotional examination application, among other documents.

In response, the appointing authority states that its interview process used consensus scoring with all panel members remaining the same throughout the process. The panel consisted of higher-level managers or supervisors, a human resources representative and an Office of Equal Opportunity representative. All interviewees were given a copy of the questions to follow along with during the interview. The panel members discussed the answers to the questions and how they would expect an excellent candidate to respond. The appointing authority states that all interviewees were advised of the number of positions and the locations of said positions, if available, and all interviewees received the same information. The appointing authority disagrees with the appellant's statement that selections were based solely on the interview, noting that it also follows Civil Service rules and regulations, including *N.J.A.C. 4A:4-4.8(a)3*.

It is noted that the appellant did not reply.

### CONCLUSION

*N.J.S.A. 11A:4-8*, *N.J.S.A. 11A:5-7*, and *N.J.A.C. 4A:4-4.8(a)3ii* allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. Moreover, it is noted that the appellant has the burden of proof in this matter. See *N.J.A.C. 4A:2-1.4(c)*.

Initially, since the appellant, a non-veteran, was the third listed name 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. The appointing authority indicates that the appellant was bypassed because he did not perform as well as the selected candidates in its scored interview process. In this regard, it was 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 Fotocki* (MSB, decided January 28, 2004). An appointing authority is permitted to interview candidates and base its hiring decisions on the interviews, so long as the hiring decisions are in compliance with *N.J.A.C. 4A:4-4.8(a)3ii*. See *In the Matter of William Ippolitto* (CSC, decided June 26, 2013); *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"). Thus, the appellant's complaint that interviews were held is unpersuasive. Further, the appellant has provided no substantive evidence other than mere allegations that candidates were selectively provided with advantageous information or that the interviews were otherwise biased.

Additionally, 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" 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, as the appellant does not possess a vested property interest in the position, his claim of harm is unpersuasive. In this regard, 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). The appellant has not presented any substantive evidence regarding his bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "Rule of Three." Moreover, the appointing authority presented a legitimate reason for the appellant's bypass that has not been persuasively refuted.

Based on the foregoing, the Commission finds that the interview process was conducted appropriately. Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name was proper and the appellant has not met his burden of proof in this matter.

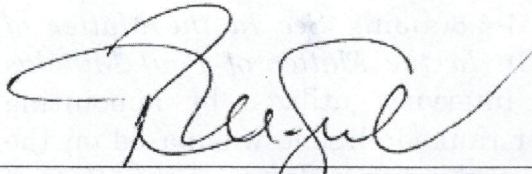
### ORDER

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 6<sup>TH</sup> DAY OF SEPTEMBER, 2017



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