

Chesler argues that the appointing authority violated the “Rule of Three” by bypassing her on three separate certifications due to discriminatory reasons and to retaliate against her. She highlights that she was the only eligible on the list who was not appointed.

In response, the appointing authority, represented by Scott W. Carbone, Assistant Corporation Counsel, does not dispute Chesler’s record of service. However, it asserts that her bypass was not related to her lawsuit. In support of this assertion, the appointing authority presents that another Officer filed a similar complaint, but was appointed. Therefore, the appointing authority argues it is implausible that it would bypass Chesler for an unlawful reason while appointing this other Officer who instituted similar litigation. Instead, it indicates that Chesler was bypassed because she was criminally indicted for official misconduct related to her service with the Jersey City Police Department, which led to her indefinite suspension without pay pending the disposition of the criminal charges. The appointing authority presents that she was under indictment each time a promotional appointment was made and remains in this status. Therefore, it argues that its bypass was proper under the “Rule of Three.”

In reply, Chesler acknowledges that she is under indictment and will stand trial in this matter. She believes that the outcome of the criminal matter must be determined before the Civil Service Commission (Commission) can fully consider this appeal. Therefore, Chesler requests that this matter be held in abeyance until a verdict has been rendered in her criminal trial.

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 on a promotional list provided no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) 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 from 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 action 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/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or 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-discriminatory or 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 motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

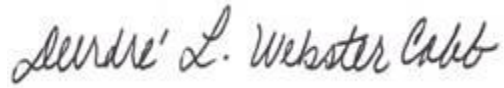
In the instant matter, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment and, therefore, Chesler was reachable for potential appointment on the above-mentioned certifications. Nevertheless, Chesler alleges that she was bypassed for improper reasons. Specifically, she contends that she was bypassed because of discriminatory reasons and in retaliation for a lawsuit that she filed against the appointing authority and certain employees. However, Chesler acknowledges that she was under indictment for alleged activity related to her employment with the Jersey City Police Department at the time the appointing authority bypassed her name and appointed other Officers. Further, the Hudson County Prosecutor's Office, and not the appointing authority, charged Chesler with certain crimes related to her employment. Thereafter, pursuant to *N.J.A.C. 4A:2-2.4*, the appointing authority suspended her indefinitely as there is a pending indictment against her. Moreover, it is permissible for an appointing authority to consider an individual's pending discipline as a basis for bypassing an eligible on a certification. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). Consequently, the Commission finds that the appointing authority's decision to bypass Chesler on the above-mentioned certifications was appropriate based on the indictment against her. Moreover, the Commission finds that there is no reason to hold this matter in abeyance as, other than mere allegations, there is no evidence that has been presented that indicates that the appointing authority's decision to bypass her was based on anything other than her pending charges. However, if the resolution of the criminal complaint against the Chesler indicates new facts, she may pursue appropriate relief from the Commission at that time.

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 19th DAY OF DECEMBER, 2018



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