



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Dean Testa, Police
Sergeant (PM0861V), Rockaway
Township

Bypass Appeal

CSC Docket No. 2019-1865

ISSUED: OCTOBER 29, 2019 (ABR)

Dean Testa, represented by Robert K. Chewning, Esq., appeals the bypass of his name on the Police Sergeant (PM0861V), Rockaway Township (Rockaway) eligible list.

By way of background, the subject examination was announced with a closing date of July 21, 2017. The subject eligible list, containing 16 names, promulgated on May 24, 2018 and expires on May 23, 2021. The appellant was ranked third on the subject eligible list. Certification PL181541 was issued on December 4, 2018 containing the names of seven eligibles, including the appellant. In disposing of the certification, the appointing authority bypassed the appellant's name, in the second position on the certification, and appointed Thomas Takacs, James Iannelli and Matthew Tanis, the eligibles in the first, third and fourth positions, respectively.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority's decision to bypass him was arbitrary, capricious and done with an invidious purpose. Specifically, he claims that the appointing authority bypassed him in retaliation for several complaints that he had made about policies that he believed to be illegal or against public policy. As such, he requests to be appointed to the title of Police Sergeant, back pay, seniority, counsel fees and costs.

In response, the appointing authority, represented by Thomas N. Ryan, Esq., asserts that it selected Iannelli and Tanis because it believed their service in its Detective Bureau left them better prepared to understand how to address situations

that might arise during a work shift and how to evaluate the work of the subordinate officers they would be assigned to supervise. In this regard, it notes that their work in the Detective Bureau provided them with significant experience with taking statements, evidentiary matters, and thoroughness in reporting and documentation.

In reply, the appellant states that he is highly qualified for the position. In this regard, he states that he has 16 years of experience. He maintains that he has never received an “unacceptable” rating for any criteria in which he has been graded on as a Police Officer and he notes that his supervisors have made favorable statements in these evaluations which highlight his following up on all assignments and putting forth an extra effort when investigating all incidents. As evidence of this, he submits his performance evaluations from 2010-2013, 2016 and 2018. He also notes that within these evaluations he has been commended for having the third-highest self-initiated motor vehicle stops in the department in 2018, demonstrating extra effort when investigating, and his performance as a firearms instructor. He further submits that he has received numerous commendations and awards for his service.

Furthermore, the appellant asserts that he was bypassed because of bad faith on the part of the former mayor of Rockaway, and because of his objections to changes to departmental policies by the Chief. He maintains that the former mayor told him repeatedly throughout his career, including in 2018, that he would never be promoted to the title of Police Sergeant because of his friendship with a Rockaway resident who had sued the former mayor and Rockaway, and who had multiple physical confrontations with the former mayor. He also contends that the former mayor retaliated against him for issuing a traffic ticket to his son’s girlfriend. Moreover, the appellant asserts that the former mayor told him that even if he were to lose the re-election, the appellant would still not receive a promotion, as the next mayor would “handle it and take over.” He also asserts that his repeated objections to the policies of the Chief of Police were also a factor in his bypass. He states, in part, that the Chief openly discussed complaints that he received about supervisory police personnel not adequately performing their responsibilities. In addition, he submits that when he told the Chief in 2018 that a change to the Police Department’s scheduling procedures appeared to be retaliation for complaints that the Police Department was not stopping enough cars and/or writing enough tickets, the Chief remarked that “he c[ould] do whatever he fe[el]t was] best for the department and that he didn’t care if he bankrupted the FOP.” The appellant also notes that the change to the scheduling procedures did not affect him personally.

Moreover, the appellant asserts that there is other evidence that the appointing authority’s proffered explanation for his bypass is pretextual. In this regard, he asserts that this is the first instance, in which he is aware of, that the

appointing authority utilized the “Rule of Three,” *N.J.A.C.* 4:4-4.8(a)3, to bypass a candidate on a Police Department promotional list. Moreover, it is also the first time, to his knowledge, that the appointing authority has cited Detective Bureau experience as a factor in selecting a candidate for promotion to the title of Police Sergeant. For example, he claims that the candidates ranked first and second on the prior Police Sergeant (PM5149N), Rockaway eligible list did not have any Detective Bureau experience, but that they were promoted ahead of the third-ranked candidate, who had such experience.¹ He indicates that while he was never assigned to the Detective Bureau, he has participated in and assisted detectives in several investigations, including a county and municipal initiative to catch criminals who had been robbing automated teller machines. The appellant asserts that the totality of the record establishes a *prima facie* case for retaliation, thereby shifting the burden of proof to the appointing authority. He maintains that the appointing authority has not met this burden, as it failed to produce anything that would demonstrate who was responsible for making the decision to exercise the “Rule of Three,” what factors were considered in exercising this discretion, and the performance records of the lower-ranked Police Officers for whom he was bypassed. As such, he asserts that his bypass should be reversed. Alternatively, he argues that the matter should be referred to the Office of Administrative Law as a contested case based on the material and controlling dispute as to the reasons behind the appellant’s bypass.

In further reply, the appointing authority argues that the appellant has not provided the Commission with a reason to second-guess its decision to bypass him. It notes that the appellant does not contest that the other two candidates actually had Detective Bureau experience while he did not. It argues that because it has presented a statement of reasons as to why the appellant was bypassed, he bears the burden of proving that its action was arbitrary or capricious. It asserts that the former mayor’s alleged animosity towards the appellant is irrelevant to the appointment of candidates from the subject certification, as the former mayor passed away on August 14, 2018, well before the bypass of the appellant. It further argues that the appellant has not established that he was discriminated against for engaging in a “protected activity,” as defined by the Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* Moreover, it contends that even if the appellant is found to have established a *prima facie* case, it has provided a legitimate reason for the appellant’s bypass, which the appellant has not disputed.

¹ Agency records indicate that the first certification from the PM5149N list was issued on December 16, 2014 (PL141536). In disposing of this certification, the appointing authority appointed the first- and third-ranked eligibles, effective January 10, 2015, and removed the second-ranked eligible. The second-ranked eligible was restored to the PM5149N eligible list by the Commission in a subsequent decision and was appointed to the Police Sergeant title from a later certification.

CONCLUSION

Consistent with *N.J.A.C. 4A:4-4.8(a)3*, an appointing authority has selection discretion under the “Rule of Three” to appoint a lower ranked eligible absent any unlawful motive. *See In the Matter of Michael Cervino* (MSB, decided June 9, 2004). *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).

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 436, 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 employer 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 this 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.

Initially, the appellant requests a hearing in this matter. Bypass appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

In the instant matter, the appellant was in the second position on the subject certification. However, it was within the appointing authority's discretion to select any of the top three eligibles for each appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. Specifically, he contends that the bad faith of the former mayor of Rockaway and his complaints to the Chief

about changes in departmental policy were the reasons for his bypass. However, the appellant has not established a *prima facie* case of retaliation based upon a preponderance of the evidence. The appellant maintains that the former mayor told him that he would ensure that the appellant did not receive a promotion and that the next mayor would continue to prevent him from being promoted. However, as the appointing authority notes, the former mayor died nearly four months prior to the issuance of the December 4, 2018 certification. Moreover, the appellant provides no evidence that the current appointing authority, Rockaway's Business Administrator, bypassed him because of the actions of the former mayor or because of any other animus towards him.

Moreover, while the appellant indicates that he voiced objections to a change in departmental scheduling policy in 2018 to the Chief, he does not provide any evidence that connects these disagreements with his bypass. In this regard, the appellant acknowledged that the changes in policy did not affect him and he fails to establish a nexus from his complaint to his bypass. Furthermore, the appellant does not otherwise establish how his disagreement with the Chief related to his bypass, particularly as the Chief was not the appointing authority who exercised selection discretion in this matter, nor has he established that the Chief was involved in the selection process.

Finally, the appointing authority has presented a valid business reason for bypassing the appellant; namely that Iannelli and Tanis had Detective Bureau experience which provided them with skills and experience which might leave them better prepared to understand the work of their subordinates and address situations that might arise during a work shift. Although the appellant asserts that he has some investigatory experience, he has not demonstrated that it equates to the level and scope of Iannelli's and Tanis' investigatory work in the Detective Bureau. As to the appellant's claim that the appointing authority has never used the "Rule of Three," even if true, it would not establish that its decision to bypass him would be improper. In this regard, the "Rule of Three" is not a "use it or lose it" power. Thus, even if the appointing authority had not previously exercised its "Rule of Three" discretion with past promotional eligible lists, it would still be permissible for it to bypass a higher-ranked eligible in favor of a reachable lower-ranked eligible, so long as its decision is not based upon an unlawful motive. Accordingly, the appellant has not sustained 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 23RD DAY OF OCTOBER, 2019

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