



**STATE OF NEW JERSEY**

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

In the Matter of Kevin P. Nally, Fire  
Officer 3 (PM1698S), City of Jersey  
City

Bypass Appeal

CSC Docket No. 2019-1465

**ISSUED: NOVEMBER 12, 2019 (ABR)**

Kevin P. Nally, represented by Brady M. Connaughton, Esq., appeals the bypass of his name on the eligible list for Fire Officer 3 (PM1698S), City of Jersey City.

By way of background, the subject examination was announced with a closing date of December 22, 2014. The subject eligible list, containing 13 names, promulgated on October 15, 2015 and expired on October 14, 2018. The appellant, a non-veteran, was tied at rank eight with another non-veteran eligible on the subject eligible list. A certification was issued on August 23, 2018 (PL181119), with the appellant's name listed in the fourth position. In disposing of the certification on October 10, 2018, the appointing authority requested the removal of the second and sixth listed eligibles. It also appointed the first (Gerard Fisher), third (William McClintock),<sup>1</sup> fifth (Henry Diguilio) and seventh (Robert Daly) listed eligibles and bypassed the appellant.

On appeal to the Civil Service Commission (Commission), the appellant, citing *In re Foglio*, 207 N.J. 38 (2002), argues that he was improperly bypassed, as the appointing authority did not notify him or the union representing him about his non-appointment or the appointments from the subject certification and it did not provide him with a statement of reasons as to his non-appointment, as required. As such, he requests that the appointing authority be ordered to appoint him to the subject title. Additionally, the appellant requests a hearing based upon the

<sup>1</sup> McClintock and Nally were tied with a rank of eight on the subject eligible list.

appointing authority's failure to provide him with a statement of reasons at the time of his bypass.

In response, the appointing authority, represented by Chaunelle Robinson, Assistant Corporation Counsel, argues that, in accordance with the "Rule of Three," it was justified in bypassing the appellant because of a then-pending disciplinary action involving a charge of conduct unbecoming a public employee which was sustained on November 16, 2018 after a departmental hearing.<sup>2</sup> It states that in the underlying March 8, 2018 incident, the appellant punched a civilian, his niece, while on duty and in uniform. It states that security cameras at the Jersey City Medical Center (JCMC) captured the entire incident. It maintains that prior Commission decisions and New Jersey case law support its bypass of the appellant because of the aforementioned disciplinary charge, as his actions in the underlying incident raised significant questions about his ability to perform calmly and safely under stressful conditions; traits which are crucial for a Fire Officer 3. It argues that the instant appeal must be denied, as the appellant's objections to his bypass do not demonstrate that it was unlawful, arbitrary or capricious. The appointing authority submits a certification from the Chief of its Division of Fire which details the March 8, 2018 incident and the subsequent disciplinary action against the appellant.

In reply, the appellant asserts that the decision to bypass him due to pending disciplinary charges for conduct unbecoming a public employee was incorrect, arbitrary and capricious, and that it was not supported by the record. In this regard, he asserts that he was not on duty and not in uniform at the time of the incident. Specifically, he states that because of a family emergency, he was relieved of duty approximately one hour before the incident and that he removed parts of his uniform prior to that event. He submits that his niece filed a complaint alleging that he committed simple assault, in violation of *N.J.S.A. 2C:12-1a(1)*, a disorderly persons offense, on March 23, 2018 and that he pled guilty to an amended charge of violating a Jersey City noise ordinance.

In response, the appointing authority argues that the minor discrepancies between the Chief's timeline of the incident at issue and that of the appellant do not demonstrate that the bypass was unwarranted and that his arguments concerning the underlying facts amount to an untimely challenge of his disciplinary action.

In further reply, the appellant maintains that the appointing authority is subjecting him to disparate treatment relative to other candidates. In this regard, he asserts that the appointing authority appointed J.P., to the position of Fire Officer 1 (Captain), effective November 21, 2018 despite the fact that he was the subject of a pending disciplinary matter involving an arrest for criminal sexual

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<sup>2</sup> The appellant was required to forfeit one compensatory day based upon the foregoing disciplinary action.

conduct, lewdness and harassment and J.P.'s subsequent entrance into the Pre-Trial Intervention Program (PTI). The appellant argues that this differential treatment is unfair, given that he was not adjudicated guilty of simple assault and no simple assault occurred. The records submitted by the appellant indicate that J.P. was suspended without pay, effective January 29, 2018, and reinstated, effective April 15, 2018. They further indicate that J.P. was promoted to the title of Fire Officer 1, effective December 5, 2018.

In response, the appointing authority argues that the appellant's disparate treatment claim is meritless and must fail because he has not pointed to any illegal or discriminatory basis for the alleged disparate treatment; he pled guilty to an offense, whereas the charges against J.P. were dismissed after he completed PTI; and its decision was proper under the "Rule of Three."

### CONCLUSION

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)*. As discussed below, 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).

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 the instant matter, the appellant, who was listed in the fourth position on the subject certification, argues that his bypass was improper because the appointing authority failed to provide him with the reason for his bypass at the time it bypassed his name for appointment. However, the Commission notes that in response to *In re Foglio, supra*, an amendment to *N.J.A.C. 4A:4-4.8* was approved which deleted the requirement under paragraph (b)4 that an appointing authority needed to provide a statement of reasons for a bypass at the time of the disposition of a certification. This change was based upon a determination that the best time for the Commission to review a bypass is when an eligible files an appeal of that action. *See In the Matter of Ryan Morgan* (CSC, decided November 21, 2018). Moreover, there is no requirement that the appointing authority personally notify the appellant that he was bypassed. Where bypasses are solely due to the

appointment of lower-ranked eligible based on an appointing authority's assessment that the lower-ranked eligible is more suitable based on factors such as qualifications, training, interviews, *etc.*, no Disposition Notice is provided. *See In the Matter of Craig G. Howlett and Lori A. Soares* (CSC, decided December 19, 2018).

The appellant also argues that the decision to bypass his name due to pending disciplinary charges for conduct unbecoming a public employee was incorrect, arbitrary and capricious, and that it was not supported by the record. Specifically, he challenges the underlying facts of the incident that was the basis of the discipline cited by the appointing authority. However, because the underlying incident culminated in minor discipline by the appointing authority, a municipal entity, the Commission cannot review a challenge to the appropriateness of that action, as the Legislature has limited such reviews to employees of State service. *See N.J.S.A. 11A:2-16. See also N.J.A.C. 4A:2-3.1(d)*. Further, as noted above, pursuant to the "Rule of Three" it was within the appointing authority's discretion to select any of the top three eligibles for each appointment absent any unlawful motive. Here, the appellant has not demonstrated that the appointing authority's exercise of this discretion was based upon an unlawful motive. Rather, the record clearly demonstrates that the appellant's bypass was based upon the appointing authority's determination that the March 8, 2018 incident raised significant questions about his ability to perform in line with the standards expected of a Fire Officer 3.

Finally, although the appellant maintains that he was subject to disparate treatment relative to J.P., a candidate for Fire Officer 1, the Commission disagrees. Notably, the appellant does not allege that his bypass occurred because of his membership in a protected class or as retaliation for engaging in a protected activity. Moreover, the title of Fire Officer 3 (Deputy Chief) is a higher-level title than the title of Fire Officer 1 (Captain) that J.P. was appointed to. As such, it was permissible for the appointing authority to hold him to a higher standard. Further, as noted above, at the time of the certification, the appellant had pending discipline which the Commission has previously found sufficient to uphold the bypass of a candidate. *See e.g., In the Matter of Michael Cervino* (MSB, decided June 9, 2004); *In the Matter of Gary R. Kern, et al.* (MSB, decided October 11, 2000). 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 6<sup>TH</sup> DAY OF NOVEMBER, 2019

*Deirdre' L. Webster Cobb*

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