



**STATE OF NEW JERSEY**

In the Matter of Philip Schena,  
Police Sergeant (PM0764V),  
Borough of Beachwood

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

CSC Docket No. 2020-1835

Bypass Appeal

**ISSUED: AUGUST 26, 2020 (JET)**

Philip Schena, represented by David J. DeFillippo, Esq., appeals the bypass of his name on the Police Sergeant (PM0764V), Borough of Beachwood, eligible list.

The appellant took the promotional examination for Police Sergeant (PM0764V), achieved a passing score, and was ranked on the subsequent eligible list. The appellant’s name was certified on October 9, 2019 (PL191439). In disposing of the certification, the appointing authority bypassed the appellant, who was the first ranked eligible on the certification, and recorded him as “retained, interested others appointed.” The appointing authority appointed Dennis Allen, the second ranked eligible.

On appeal to the Civil Service Commission (Commission), the appellant asserts that the vacancy for the subject examination occurred in December 2018, and the appointing authority did not appoint any candidates for one full year. The appellant contends that he has been serving as a Police Officer since September 2009, and he possesses four more years of experience than Allen. He adds that he possesses a college education and his experience includes active shooter response and juvenile interrogation. Further, the appellant explains that his job performance has been recognized on several occasions, and he has been distinguished on several occasions with awards, including two life-saving awards in 2013 and in 2015. The appellant adds that he created and supervised the Police Explorers program, and he served as President of the Policeman Benevolent Association (PBA) union. The appellant adds that he has been serving in the union in different capacities since 2012, where he has

frequently clashed with the appointing authority's current Police Chief over employment issues, including such matters as leave time, overtime payments, and light duty status.

The appellant argues that his duties as PBA President were the primary factor for the appointing authority's decision to bypass him on the subject list. Chief Tapp informed the appellant on December 1, 2019 that he was bypassed, and he explained that Allen was appointed as he was more qualified. The appellant claims that Captain DeMarco stated to the appellant that "you cause problems here." In this regard, the appellant believes that DeMarco was referring to the following incidents, including the appellant's insistence that the appointing authority reimburse out-of-pocket expenses he incurred; that the appellant replaced a spare tire on his patrol vehicle due to safety concerns; the appellant's pursuit of the PBA's request for 12-hour shift schedules, which was ultimately rejected by the appointing authority; questioning Captain DeMarco and Lieutenant Melillo regarding officers one hour early on certain shifts in order to work at outside employment jobs; filing a grievance against Captain DeMarco in November 2013; and questioning why Captain DeMarco assigned an officer to work a DWI shift the day after Thanksgiving. The appellant claims that Captain DeMarco also left a note encouraging another officer to complete an assignment so DeMarco could "throw it in [the appellant's] face." The appellant contends that his service in the union is the causal link for his bypass and Allen's promotion.

The appellant maintains he was the more deserving candidate for an appointment based on the objective criteria noted above. Additionally, the appointing authority was unable to provide a specific reason why Allen was deemed as more qualified. In this regard, the appellant states that DeMarco acknowledged the improper motivation for appointing Allen given the appellant's history of causing problems as PBA President. Moreover, the appellant argues that the appointing authority has not satisfied its burden of proof in this matter by showing that Allen is the more qualified candidate.

In response, the appointing authority, represented by Thomas G. Gannon, Esq., maintains that the appellant's bypass was proper. Specifically, the appointing authority asserts that Allen was appointed based on his leadership qualities, exemplary work record, and the opinions of him by the Police Chief and his superior officers. The appointing authority states that the Police Chief conducted an extensive review of the candidates' qualifications during the selection process. It adds that various Police Chiefs from other jurisdictions submitted letters of recommendation in support of Allen's promotion. Further, the appointing authority contends that Allen's experience includes service as a Field Training Officer (FTO), where he was responsible for training, supervising and evaluating other Police Officers from his jurisdiction. In contrast, the appellant's personnel record reflects an incident pertaining to an oral reprimand/counseling matter. Further, the appointing

authority explains that the appellant's bypass was not as a result of his service as PBA President, and in fact, it maintains it has previously appointed several individuals who served as PBA President. The appointing authority adds that Allen was a member of the union, and the appellant appears to be exaggerating certain events that occurred within the context of the appointing authority's relationship with the union. In this regard, the appointing authority contends that issues pertaining to sick leave and work-related injuries are common matters, and the incidents referred to by the appellant are frequently resolved without incident. Moreover, the appointing authority asserts that the appellant has not provided any substantive evidence in support of his claims.

In response, the appellant asserts that the appointing authority does not provide any evidence to show that Allen was more qualified, and it does not attempt to compare their qualifications. The appellant states that the appointing authority does not make such a comparison as it would have to conclude that he is the more qualified candidate. In this regard, the appellant reiterates his qualifications. The appellant adds that the appointing authority did not explain why it took a year to make an appointment since the subject vacancy has been available since December 2018. Rather, the appellant claims that the delay was the result of the appointing authority's unwillingness to promote him, as it views him as a "trouble-maker." The appellant contends that, with respect to the appointing authority's claim that it conducted an evaluation of the candidates over a period of time, it does not provide a copy of a promotional policy in support of its arguments. The appellant maintains that the appointing authority's claim that it conducted an evaluation is pretextual, as it did not indicate what it actually considered at the time, and he was the only candidate who was bypassed from a subject promotional list within a 20-year timeframe. In addition, the appellant explains that the appointing authority neither provided Allen's nor the appellant's personnel files for review in this matter. The appellant adds that the appointing authority gave too much weight to Allen's appointment as a FTO Officer, and it ignored the appellant's experience with radar, alco-testing, juvenile interrogation, Homeland Security, training, and his service as a D.A.R.E. Officer and as Senior Officer while assigned to various shifts in 2014 and 2019. Moreover, the appellant asserts that his duties while serving as PBA President included aggressive meetings with the appointing authority's current Police Chief.<sup>1</sup> The appellant explains that Allen only served short terms as the Recording Secretary and Treasurer for the local PBA union.

## 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 (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. As

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<sup>1</sup> The appellant claims that the Police Chief stated, "If you think you can question me, I'll start writing them up for what they do."

long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. *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 on 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 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* case 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. For the reasons set forth below, the appellant has not presented a *prima facie* case in this matter.

In this matter, the appellant has provided no substantial evidence to show that the bypass was improper. Initially, the appellant has not provided any substantive information to show that he is more qualified than Allen. Although he states he possesses more education and four years more experience than Allen, such information does not show that he was more qualified. Additionally, the appellant appears to be arguing that he was subjected to retaliation as a result of his service as President of the PBA, and such retaliation resulted in his bypass. He has provided no substantive evidence to show that the appointing authority considers him a problem due to such union-related activity. Additionally, the appointing authority confirms that Allen was selected as a result of his qualifications, and it indicated the appellant's personnel file contains a written reprimand, which the appellant does not dispute. As such, the appellant has not established in any way that he is more qualified, or that Allen was unqualified to be appointed as Police Sergeant. The appellant's mere possession of advanced education credentials and awards is insufficient to show that the appointing authority's selection discretion was abused without showing a direct nexus between the credentials and the position in question. The appellant's argument that the candidate evaluation was pretext is not persuasive, as it was conducted as a part of the appointment process. It is within an appointing authority's discretion to choose its selection method, and the record indicates that the candidates were ranked on the certification and the appointing authority then selected the candidate it determined was best suited for the position. The appointing authority provided a legitimate basis for not selecting the appellant, and in that regard, its legitimate statement of reasons were that Allen demonstrated superior leadership skills and served as a FTO Officer. Although the appellant ranked higher on the certification based on his examination score, that fact, by itself, is insufficient to establish that his bypass was improper given the discretion afforded an appointing authority under the Rule of Three. Moreover, the appellant was not

automatically entitled to an appointment simply because he ranked higher on the list. Other than his mere allegations, 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.

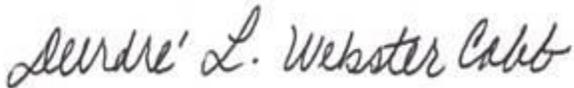
Accordingly, the appellant has not sustained his burden of proof in this matter.

**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 19<sup>TH</sup> DAY OF AUGUST 2020



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Deirdré L. Webster Cobb  
Chairperson  
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