



**STATE OF NEW JERSEY**

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

In the Matter of Domenico Sacca,  
Road Repairer 2/Sign Maker 2  
(PM2458W), Elizabeth

Bypass Appeal

CSC Docket No. 2020-2345

**ISSUED: OCTOBER 2, 2020 (HS)**

Domenico Sacca appeals the bypass of his name on the Road Repairer 2/Sign Maker 2 (PM2458W), Elizabeth eligible list.

The appellant appeared as the first ranked non-veteran eligible on the subject eligible list, which promulgated on September 12, 2019 and expires on September 11, 2022. A certification, consisting of the names of two non-veteran eligibles only, was issued on December 17, 2019 (PL191862) with the appellant listed in the first position. In disposing of the certification, Elizabeth bypassed the appellant and appointed J.D., effective February 3, 2020.

On appeal to the Civil Service Commission (Commission), the appellant states that J.D. had initially been deemed ineligible for the examination. The appellant claims to have been told that J.D. was allowed to appeal his ineligibility determination because he was on vacation during the 20-day appeal period. According to the appellant, however, J.D. disregarded his Notice of Ineligibility as he was “in work” during the 20-day appeal period. Thus, the appellant proffers that J.D. should not have been allowed to appeal his ineligibility determination. Additionally, the appellant argues that he should not have been bypassed since no other applicant possessed a diploma in computer-aided drafting or had “significant work experience” as of the examination closing date, and J.D. received discipline in December 2019. The appellant further claims that the Department of Public Works Director (Director) promised him appointment to the subject title.

In response, Elizabeth, represented by Raymond T. Bolanowski, First Assistant City Attorney, argues that it acted appropriately and in accordance with Civil Service regulations, particularly the “Rule of Three,” in appointing J.D. Elizabeth maintains that the appellant has not shown that its decision to bypass him was an improper exercise of its discretion. In this regard, it states that it properly considered the fact that J.D. had been serving provisionally in the subject title since October 2017.<sup>1</sup> Elizabeth also states that the Director denies that he promised the appellant appointment to the subject title.<sup>2</sup>

## CONCLUSION

Initially, the appellant contends that J.D. should not have been allowed to appeal his ineligibility determination essentially because he was at work during the 20-day appeal period and allegedly disregarded his Notice of Ineligibility. This argument is unpersuasive as the appellant lacks standing to challenge J.D.’s ability to appeal his own ineligibility determination. The appellant was not a party to that appeal. Moreover, Elizabeth was never prevented from appointing the appellant. However, even assuming the appellant has such standing, the appellant’s conclusion that J.D. should have been barred from appealing does not automatically follow from his arguments. In this regard, the appellant appears to presume that J.D.’s Notice of Ineligibility was mailed to his place of work, but there is no evidence in the record that that is what occurred. The foregoing aside, the appellant undoubtedly had standing to challenge his own bypass on the certification, and it is to that issue that the Commission will now turn.

*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).

Since only non-veterans were listed on the certification, it was within Elizabeth’s discretion to select any of the two interested eligibles on the certification. An appointing authority has the discretion to dispose of a certification within the guidelines of Title 11A of the New Jersey Statutes Annotated and Title 4A of the New Jersey Administrative Code. This discretion includes utilizing each candidate’s history and qualifications to determine the best candidate from a list of three (or fewer) eligibles, any of whom may be selected under *N.J.A.C.* 4A:4-4.8(a)3. In this case, Elizabeth’s bypass of the appellant and selection of J.D. for permanent appointment on the basis that he already held the title provisionally was a permissible exercise of its discretion. *See In the Matter of Terrence Crowder* (CSC, decided April 15, 2009) (The Commission noted that it was reasonable for appointing authorities to select provisional appointees reachable under the “Rule of Three” for

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<sup>1</sup> A review of personnel records confirms this.

<sup>2</sup> It is noted that the Business Administrator is the appointing authority for Elizabeth.

permanent appointments on the basis of their status as provisional appointees in the subject title.). The mere fact that the appellant possesses certain credentials or experience or even that J.D. has discipline in his background does not automatically make the appellant a better candidate than J.D. as both were reachable in accordance with the “Rule of Three.” See *In the Matter of William Davis* (CSC, decided November 10, 2016). This holds notwithstanding the Director’s alleged promise that the appellant would be appointed. Elizabeth denies that the promise was made. But even assuming that it was, the appellant has not established that such a promise would have had any binding effect, as the Business Administrator and not the Director, is the appointing authority for Elizabeth.

Additionally, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, Elizabeth 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, the appellant does not possess a vested property interest in the position. 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 Elizabeth’s discretion under the “Rule of Three.” Moreover, Elizabeth presented a legitimate reason for the appellant’s bypass that has not been persuasively refuted. Accordingly, a review of the record indicates that Elizabeth’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 30<sup>TH</sup> DAY OF SEPTEMBER, 2020

*Deirdre' L. Webster Cobb*

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