



STATE OF NEW JERSEY

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

In the Matter of Craig Simko,
Sergeant Campus Police (PS5057J),
William Paterson University

Bypass Appeal

CSC Docket No. 2021-137

ISSUED: FEBRUARY 5, 2021 (HS)

Craig Simko, represented by Lori A. Dvorak, Esq., appeals the bypass of his name on the Sergeant Campus Police (PS5057J), William Paterson University eligible list. He also petitions for relief from alleged reprisal.

The appellant appeared as the fourth ranked non-veteran eligible on the subject eligible list, which promulgated on September 7, 2017 and expired on September 6, 2020. A certification, consisting of the names of six non-veteran eligibles only, was issued on April 15, 2020 (PS200381) with the appellant listed in the first position. In disposing of the certification, the appointing authority bypassed the appellant and appointed L.M. and J.C., the second and third listed eligibles respectively, effective July 18, 2020. The fourth and fifth listed eligibles were retained, and the sixth listed eligible was removed.

On appeal to the Civil Service Commission (Commission), the appellant asserts that while acting as President of PBA Local 278, he successfully grieved appointing authority action that constituted violations of the collective negotiations agreement and Civil Service law. According to the appellant, he was bypassed as a result of his union affiliation and the grievance, which was dated February 27, 2020. The appellant also states that his grievance resulted in four Campus Police Officers ceasing to work out-of-title as Sergeants Campus Police and requiring the appointing authority to fill shifts for four additional Sergeants Campus Police. However, the appellant argues, the appointing authority instead improperly bypassed him and forewent two needed Sergeant Campus Police promotions in reprisal for his grievance. This, the appellant maintains, causes significant overtime that is in excess

of any salary differential. Additionally, the appellant states that while acting as President of PBA Local 278, he participated in a meeting with management on ways to save money and advocated for the elimination of the Director of Public Safety (Director) position as a cost-saving measure. The appellant claims that, in turn, the Director was the “moving force” behind his illegal, pretextual bypass. He seeks retroactive promotion with seniority, back pay and benefits.

In response, the appointing authority denies taking any action contrary to Civil Service regulations in the promotion process. The appointing authority states that the interview committee consisted of three Lieutenants Campus Police from the University Police Department (Police Department) and the Chief Diversity Officer from the Office of Employment Equity and Diversity. The appointing authority explains that the Police Department has a strong community policing orientation in serving and protecting students, faculty and staff and that the interview committee based its selection of candidates on factors such as relevant training and experience that support that community policing focus. The appointing authority acknowledges that it settled a grievance filed by the PBA related to Campus Police Officers working in a Shift Leader “Corporal” role. In doing so, according to the appointing authority, the Police Department reviewed its staffing structure and exercised managerial prerogative and fiscal responsibility in determining how many Sergeant Campus Police positions could be filled at that time, in light of fiscal shortfalls during the height of the COVID-19 pandemic in the State. The appointing authority states that it was determined that two Sergeant Campus Police positions would be filled, and that there was never a commitment to fill a specific number of such positions. The appointing authority maintains that it applied the “Rule of Three” properly and in the spirit with which it was intended: to allow appointing authorities to consider additional factors unique to their organizations in addition to the baseline factors on which the promotional rankings are based.

In support, the appointing authority submits, among other documents, an interview evaluation form for each candidate and a memorandum dated July 15, 2020 memorializing the reasons for selecting L.M. and J.C. The stated purpose of the interview evaluation form, noted on the form itself, is as follows:

This evaluation is to standardize the recording of information collected during an interview and assist in evaluating and comparing different applicants when interviews are completed. Interviewers are encouraged to use the “comments” section to support each applicant’s rating.

The interview evaluation forms list the interviewers’ collective comments and ratings in the following criteria: experience as it relates to the position; education/training relevant to the position; computer skills; communication skills; interest in and knowledge of the position; presentation; and problem-solving skills. J.C.’s form indicates that he had nine years of Community Policing department experience; held

a Community Policing and Crime Prevention Certificate; and “displayed a fantastic knowledge of community policing strategies while answering each question.” L.M.’s form indicates that she held a Community Policing Certificate and “demonstrated an understanding of how to work with students during problem solving moments utilizing community policing strategies.” The appellant’s form indicated that he “could have included more emphasis on community policing and working with students in a teachable and educational way.” The July 15, 2020 memorandum, authored by one of the Lieutenants Campus Police who served on the interview committee, states that J.C. has been a member of the Community Policing Department for nine years; L.M., during the interview, expressed her cooperation with the Community Police Department during her tenure; and the appellant did not express his interaction or cooperation with the Community Policing Initiatives during his tenure. The memorandum states that J.C. and L.M.’s resumes in conjunction with their interviews revealed extensive Community Oriented Policing training, while the appellant’s resume and interview did not. The memorandum further states that during their interviews, J.C. and L.M. displayed extensive knowledge of and passion for a Community Policing ideology that is a prominent part of the Police Department’s mission statement and exhibited their willingness to embrace other modern policing strategies, while the appellant did not.

In reply, the appellant posits that the inclusion of the Chief Diversity Officer on the interview committee was inappropriate since this individual has no law enforcement training or experience. He also states that since there is only one composite interview evaluation form for each candidate rather than individual forms from each interviewer, all interviewers apparently collaborated and unanimously agreed to the same rating for each candidate in each category. The appellant proffers that such universal agreement on *all* candidates on *each and every category* is suspect on its face.

The appellant contends that in pointing to J.C. and L.M.’s strong community policing orientation, the appointing authority improperly applied a new eligibility criterion after issuance of the certification. In this regard, he argues that “community policing orientation” is not a good faith criterion because it is not listed as one of the “Knowledge and Abilities” in the Civil Service job specification for Sergeant Campus Police. Thus, according to the appellant, candidates were evaluated on a secret, assignment criterion chosen by the appointing authority to circumvent the merit-based promotion process. In addition, the appellant argues that the appointing authority’s statement that it only made two appointments from the certification due to fiscal constraints is disingenuous. Specifically, he claims that the appointing authority continues to require out-of-title work of Campus Police Officers, which costs additional money, and pays overtime to Sergeants Campus Police. The appellant maintains that these costs could have been saved by making additional appointments from the certification. The appointing authority’s decision to incur the costs by not

making sufficient additional appointments, according to the appellant, was in retaliation for his union activities.

The appellant also proffers that there was an additional act of retaliation for his union affiliation and activities and for filing the instant appeal. In this regard, the appellant points to a memorandum by the Director dated five days after the date of the instant appeal and addressed to "All Personnel." The subject of the memorandum is "Police Officer Transfers," and it states as follows:

Please be advised that we currently have a number of officers in the process of, or contemplating transferring to other Law Enforcement Agencies. The loss of too many personnel during a short period of time can adversely affect the William Paterson University Police Department's ability to perform its mission and obligations to the University Community. It can also affect the safety of our current officers. While this is very concerning for the future of the department, I understand the motivations and I will honor the requests from personnel whom I have already approved . . . Once these individuals leave, we will be at a critical staffing point.

Therefore, until further notice I will not approve any additional transfer requests. The future of approving such requests is dependent on many factors. Those factors include the process of advertising, selecting, hiring and training of new officers. This is also affected by the re-opening of the Passaic County Police Academy to provide Basic Police Officer Training. It appears that the Police Academies will also be affected [sic] by COVID-19 and when they reconvene they will be operating at a reduced class size and therefore we may have to spread out the training of new officers over a couple of classes thus delaying deployment of new officers to the field. I will not sign a transfer request until we have officers who have completed the academy.

It is not my desire to deny anyone an opportunity to improve their personal situation . . . However, I need to assure the integrity of university police operations.

The appellant argues that this memorandum disapproves all future intergovernmental transfer requests. He claims that by doing so, the appointing authority is retaliating against him, precluding him from any options to allow him to seek transfer employment with corresponding promotional and advancement opportunities. In support, the appellant submits, among other documents, copies of his grievance and Performance Assessment Review (PAR) for the July 1, 2019 to June 30, 2020 rating period. It is noted that J.C. is listed on the grievance form as a potential witness. It is also noted that one of the appellant's "Major Goals" indicated

on his PAR was to “[b]ecome more active with the campus community through outreach and community policing.”

In reply, the appointing authority, now represented by Laura S. Hertzog, General Counsel, maintains there was nothing untoward about the Chief Diversity Officer’s inclusion on the interview committee. This, according to the appointing authority, enhanced the Police Department’s ability to serve the community; provided a different perspective; and served to include an individual outside of the department who did not have personal relationships within the department and could provide an additional “arms’ length” analysis of candidates. Per the appointing authority, there was no rule prohibiting this, and the appellant’s experience was not unique. The appointing authority also contends that community policing is not a job skill but is rather a philosophy that underlies the execution of all of the job skills enumerated in the job specification. It maintains that the appellant did not provide any supporting evidence for his claim that he was bypassed due to his union activities. In the appointing authority’s view, his mere declaration that applying the “Rule of Three,” which is within its authority, “must” be retaliation is unsupported and implausible in the face of its history of supporting the appellant’s union activities. The appointing authority argues that any complaint that the Director retaliated against the appellant by bypassing him fails because the Director took no independent action in making the appointments; rather, he simply accepted the recommendation of the interview committee and made no separate judgment. As to whether the Director retaliated for the appellant’s suggestion that the Director position be eliminated, the appointing authority maintains that this allegation too lacks any underlying factual underpinning since the Director was not privy to the appellant’s suggestion.

The appointing authority further takes issue with the appellant’s suggestion that, in an effort to retaliate against him, it is incurring additional costs by not making sufficient additional appointments. In this regard, the appointing authority states that when it analyzes its budget, it needs to look not only at short-term costs, like overtime, but also at long-term costs of permanent personnel changes such as promotions. It was thus determined to be in the long-term fiscal interests to have only two. The appointing authority disputes the appellant’s suggestions that it would have been a better fiscal decision to make additional appointments and that the decision not to do so must have been animated by animus toward him. This, according to the appointing authority, is not a reasonable position to take and is unsupported by any actual facts.

CONCLUSION

Bypass

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).

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*, at 445, the court outlined the burden of proof necessary to establish discriminatory 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 discriminatory or retaliatory motive. In a case such as this, where the adverse action is failure to promote, the employer would then have the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

Since only non-veterans were listed on the certification, it was within the appointing authority's discretion to select any of the top three interested eligibles on the certification for each vacancy. Nevertheless, the appellant alleges that he was bypassed in retaliation for his union affiliation and activities. However, notwithstanding that it may have been the appellant's grievance that triggered the issuance of the certification, the appellant has not provided any substantive evidence beyond mere allegations that *his bypass* was connected to such improper reasons. The allegation that union activities were connected to the appellant's bypass is further undermined given that J.C., one of the appointees, was listed as a potential witness in the grievance. Moreover, the appointing authority has presented a legitimate reason for bypassing the appellant and selecting J.C. and L.M. In this regard, they, unlike the appellant, demonstrated experience and training that aligned with the Police Department's community policing organizational philosophy.

Neither has the appellant shown that the appointing authority's proffered reason was pretextual or that an improper reason more likely motivated the

appointing authority. The appellant contends that the appointing authority improperly applied the secret, new eligibility criterion of “community policing orientation” since this is not listed as one of the “Knowledge and Abilities” in the Sergeant Campus Police job specification. The Commission does not agree. For an appointing authority to apply a particular criterion in exercising its discretion under the “Rule of Three,” it is not necessary that such criterion be explicitly noted in the “Knowledge and Abilities” section of the job specification for the title at issue. As the New Jersey Supreme Court has stated, the reasons that an appointing authority may give for bypassing a higher ranked candidate are “endless—as varied as the candidates themselves.” *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 N.J. 38, 49 (2011). The “Rule of Three” “was not conceived as an immutable or total bar to the application of other important criteria in governmental employment practices.” *Terry v. Mercer County Bd. of Chosen Freeholders*, 86 N.J. 141, 150 (1981). There is no evidence that the appointing authority effectively deemed the appellant “ineligible” for the position and excluded him from any consideration due to some new, “secret” criterion. Rather, the appointing authority compared the candidates and selected those with experience and training that aligned with its community policing organizational philosophy. The appellant cannot be said to have been in the dark in this regard as his own PAR clearly states that one of his “Major Goals” was to “[b]ecome more active with the campus community through outreach and *community policing*” (emphasis added).

The appellant also claims that the appointing authority restricted the number of appointments to two not out of fiscal considerations but as retaliation against him. However, the determination as to whether a vacancy exists and/or will be filled is generally left to the discretion of the appointing authority. *See In the Matter of Michael Shaffery* (MSB, decided September 20, 2006). *See also, In the Matter of Todd Sparks* (MSB, decided April 6, 2005); *In the Matter of Deputy Fire Chief (PM3654F), Borough of Roselle* (MSB, decided March 23, 2005); *In the Matter of Institution Fire Chief* (MSB, decided January 12, 2005). Moreover, the appointing authority has articulated a reason for the number of appointments it made. In this regard, the appointing authority weighed both short-term costs, such as overtime, and long-term costs of permanent personnel changes and determined that it would be in its long-term fiscal interests to make only two appointments. Absent any specific evidence to suggest a connection between the appointing authority’s determination and an improper motive, the Commission has no basis to set aside the appointing authority’s explanation.¹

The appellant further argues that the inclusion of the Chief Diversity Officer on the interview committee was inappropriate and that it is suspect that there is only

¹ The appellant’s argument is problematic for the additional reason that it presumes that *he* would have been appointed even had the appointing authority determined to make four appointments rather than two. In this regard, the appointing authority would still have had the discretion to bypass the appellant and appoint the second through fifth listed eligibles consistent with the “Rule of Three.” *See N.J.A.C. 4A:4-4.8(a)3ii.*

one composite interview evaluation form for each candidate reflecting a single rating for each candidate in each interview criterion. Concerning the Chief Diversity Officer, the appointing authority offers several reasons for his inclusion on the interview committee, reasons that appear reasonable and that the Commission has no particular basis to question. The Commission only adds that the appointing authority has an obligation to “ensure equality of opportunity for all of its employees and applicants seeking employment.” *N.J.S.A.* 11A:7-1. As such, the Commission cannot take issue with the appointing authority’s decision to include on the interview committee its Chief Diversity Officer, a member of the Office of Employment Equity and Diversity. As to the composite nature of the interview evaluation forms, the appellant’s mere assertion that they are suspect does not make them so or otherwise call into question the integrity of the ratings. For example, the appellant does not offer specific evidence to suggest that any interviewer signed on to a rating that the interviewer did not genuinely believe in or that the ratings noted on the forms were not truly reflective of the committee’s view. Moreover, the candidates were treated alike in that all were evaluated using the same composite form.

It must be noted that the appointing authority had 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; *Foglio, supra* at 49. *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 the appointing authority’s discretion under the “Rule of Three.” Moreover, the appointing authority presented a legitimate reason for the appellant’s bypass that has not been persuasively refuted. Accordingly, a review of the record indicates that the appointing authority’s bypass of the appellant’s name was proper, and the appellant has not met his burden of proof in that regard.

Reprisal

N.J.A.C. 4A:2-5.1 generally provides that an appointing authority shall not take or threaten to take any reprisal action against employees in retaliation for an employee’s lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority or on the employee’s permissible political activities or affiliations. *See also, N.J.S.A.* 11A:2-24. The appellant alleges that the Director’s memorandum placing restrictions on transfers was an act of

reprisal against him. The Commission cannot agree. Appointing authorities may withhold consent for transfers. *See N.J.A.C. 4A:4-7.1(c)* and *N.J.A.C. 4A:4-7.1A(b)*. Moreover, the memorandum was directed to “All Personnel,” not the appellant singly, and there is no indication that the appellant had actually filed for a transfer. Further, the memorandum does not categorically bar all future transfers but only suspends them “until further notice” for the benign reason that a “critical staffing point” had been reached. Additionally, the memorandum does not seek to prevent anyone from pursuing career advancement via means other than transfer. In any event, the appellant has not presented any substantive evidence of a nexus between the issuance of the memorandum and any prior whistleblowing activity on his part.

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 3RD DAY OF FEBRUARY 2021

Deirdre L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

c. Craig Simko
Lori A. Dvorak, Esq.
Denise Robinson Lewis
Laura S. Hertzog, General Counsel
Division of Agency Services
Records Center