



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION

In the Matter of William Davis,  
Administrative Analyst 1 (PS8882G),  
Department of Environmental  
Protection

List Bypass Appeal

CSC Docket No. 2015-3199

ISSUED: NOV 16 2016 (SLK)

William Davis appeals the bypass of his name on the Administrative Analyst 1 (PS8882G), Department of Environmental Protection eligible list.

By way of background, on November 17, 2014 the subject list was certified (PS141477) and Davis, a non-veteran, was listed in the 3<sup>rd</sup> position.<sup>1</sup> In disposing of the certification, the appointing authority bypassed the eligible in the second position and the appellant and appointed the eligibles in the first, fourth, fifth, and sixth positions, effective November 17, 2014. It is noted that all of the eligibles who were appointed were serving provisionally in the subject title at the time of their permanent appointments and the two eligibles who were bypassed were not serving provisionally in the subject title. The appellant appealed the matter of the bypass of his name to the Division of Agency Services (Agency Services), which found that the appointing authority sustained its request.

On appeal, the appellant states that human resources advised him that the only reason that the four individuals who were appointed were chosen over him was because they were provisional appointees in the subject title. However, he argues that the appointing authority is obligated to provide a statement to demonstrate merit-based criteria for his bypass during the appeal process and that bypassing him for no other reason other than that the other candidates were provisionally serving in the subject title does not satisfy this obligation. The appellant maintains

<sup>1</sup> It is noted that the subject list promulgated on November 13, 2014 and expires on November 12, 2016.

that the appointing authority should have evaluated and compared all of the candidates' education, experience, and performance in order to justify its selection. In this regard, he asserts that he is more qualified than the other candidates as he possesses a Master's degree in Environmental Policy and that only one other applicant has a Master's degree. Further, he claims he has received more relevant training, such as GIS and Business Objects training, compared to the provisional appointees.

The appellant also argues that he has been employed by the appointing authority longer than three of the four appointees and that he has been employed in the announced unit scope and division longer than the appointees. The appellant also highlights several positions that he has held which he maintains provide him with the equivalent or greater experience than the appointees and notes that he has been serving in the Administrative Analyst title series longer than any other employee in his unit scope. He represents that he is largely responsible for the development of the strategic management system in the Office of Strategy Management, where five of the six eligibles worked, which resulted in the need to fill positions in the subject title. The appellant states that subsequent to the creation of this system, the other applicants had desk audits which resulted in their provisional appointments to the subject title and contends that if his position had been audited, it would also have been classified by the subject title. Regardless, the appellant argues that he was performing the same duties at the same level as the appointees and he submits an organization chart as evidence.

Additionally, the appellant indicates that he did not receive a full-year Performance Assessment Review (PAR) in 2013 or 2014 which he claims violated his union contract and Civil Service law. He asserts that without receiving a PAR, it was not possible for merit-based criteria to be used in the selection process. The appellant also maintains that his failure to receive a PAR prevented him from having his position audited or being provisionally appointed to the subject title. The appellant further represents that one of the appointees has not worked within his unit scope or the division for nearly two years when he took the examination. It is his understanding that she is on a temporary assignment and there are no plans to return her to his unit scope anytime soon. The appellant asserts that under his union contract, a temporary reassignment should be no greater than six months and that Civil Service law does not recognize temporary reassignments. As such, the appellant contends that this employee should not have been eligible for consideration.

In response, the appointing authority submits the returned certification as evidence that the appellant was properly bypassed under the rule of three. It also represents that although one of the appointees was on a temporary reassignment, she was still eligible for promotional opportunities in her permanent unit scope.

Thereafter, the Division of Appeals and Regulatory Affairs (DARA) contacted the appointing authority to get a further statement as to the reasons the appellant was bypassed. In reply, the appointing authority presents that the subject list contained six employees including four who were serving provisionally pending promotional procedures in the subject title. It indicates that the appellant was ranked third and the list was certified in order to permanently appoint the provisional employees who were all reachable. It reiterates that it was for this reason that the appellant and one other candidate were bypassed.

### CONCLUSION

*N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8(a)3 allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. *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.

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). As such, the appellant has not met his burden of proof in this matter, as he has not made an allegation that the appointing authority had an unlawful motive such as discrimination, retaliation, or other improper motive. Instead, the appellant argues that the appointing authority bypassed him in favor of other candidates solely on the basis that these candidates were provisionally serving in the subject title and did not use merit-based criteria in its appointments. However, it is reasonable that if provisional appointees were reachable under the "Rule of Three" that an appointing authority would want to permanently appoint its provisional appointees. See *In the Matter of Terrence Crowder* (CSC, decided April 15, 2009). See also *In the Matter of Donald Fillinger* (CSC, decided December 16, 2009) (Absent a showing that another individual was selected for an "acting" position based on an improper reason, Commission determined it was appropriate for appointing authority to rely on experience gained in the "acting" position when exercising its discretion under the "Rule of Three").

Regardless, absent any unlawful motive, the appellant does not possess a vested property interest in the position. 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). Other than his

mere allegations that the appointing authority did not use merit based criteria in making its selections and that he has superior qualifications, 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."

The appellant also argues that the appointing authority could not have used merit-based criteria in making its appointments since he did not receive a PAR in 2013 or 2014. Additionally, the appellant claims that he was prevented from filing a classification appeal because he did not receive a PAR<sup>2</sup> and maintains that his position would have been reclassified to the subject title if his position had been audited. The importance of strictly adhering to PAR procedures cannot be emphasized enough. That being said, however, it must also be underscored that there is no evidence that the appellant brought the issue concerning the lack of a PAR to anyone's attention previously nor is there any evidence that the appellant requested that the classification of his position be reviewed, but was denied because he did not receive a PAR. Further, it is speculation that his position would have been reclassified to the subject title if his duties had been audited. Regardless, the lack of a PAR does mean that the appellant was bypassed for an unlawful motive and a review of the examination record indicates that PARs were not a scoring factor for any of the applicants in this test. Moreover, the mere fact that the appellant has certain education, training, or experience does not automatically make the appellant a better candidate than the provisional appointees in the subject title, who were all reachable in accordance with the "Rule of Three." It is also noted that if the appellant feels his position is misclassified, he may submit a classification appeal.

Additionally, the appellant asserts that one of the appointees, who was ranked lower than him on the list, was not employed in the announced unit scope at the time of the announced closing date as she had been on reassignment for almost two years. The appellant submits her timesheets which he states were signed by supervisors who were outside of the announced unit scope and minutes from the New Jersey Clean Water Council which represent her as being part of the Division of Water Quality for time periods prior to the closing date as evidence. Therefore, he argues that she should have been determined ineligible. However, personnel records indicate that she was employed in the announced unit scope at the time of the closing date. Further, the appellant has not submitted any evidence that she would not be returning to the announced unit scope. The mere fact that she may have temporarily been reassigned and performed duties for another division or under supervisors who were not assigned in the announced unit scope did not mean that she was ineligible for promotional opportunities in her permanent unit scope. It is noted that she would not have been eligible for promotional opportunities in other unit scopes during these time periods and therefore it would have been unfair

---

<sup>2</sup> The appellant does indicate that he received a PAR after he was bypassed.

to deny her a promotional opportunity in her permanent unit scope. *See In the Matter of Gloria Acosta and Janet Caldero* (CSC, decided October 6, 2010) (Given the expectation that the appellants would return to their original unit scope after the end of their temporary appointments, Commission found that it would be intrinsically unfair for individuals in temporary positions, even if those positions are located in the announced unit scope, to compete with candidates who are permanently located in the announced unit scope).

**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 10<sup>th</sup> DAY OF NOVEMBER, 2016



Robert M. Czech  
Chairperson  
Civil Service Commission

Inquiries  
and  
Correspondence

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

Attachment

c: William Davis  
Robin Liebeskind  
Kelly Glenn  
Records Center



STATE OF NEW JERSEY  
CIVIL SERVICE COMMISSION  
AGENCY SERVICES  
P. O. Box 313  
Trenton, New Jersey 08625-0313

Chris Christie  
Governor  
Kim Guadagno  
*Et. Governor*

Robert M. Czech  
Chair/Chief Executive Officer

May 13, 2015

William A. Davis

Title: Administrative Analyst 1  
Symbol: PS8882G  
Jurisdiction: Environmental Protection  
Certification Number: PS141477  
Certification Date: 11/17/2014

**CSC Initial Determination:** Retain – Interested for future certification only

This is in response to your correspondence contesting the non-appointment of your name from the above-referenced eligible list.

I have reviewed the certifications in question for violations of Division of Appeals & Regulatory Affairs and have found that the Appointing Authority had properly disposed of the certification. In disposing of this certification, the Appointing Authority relied upon N.J.A.C. 4A:4-4.8(a)3 which allows the appointment of one of the top 3 interested eligible(s) (rule of 3).

After a thorough review of our records and all the relevant material submitted, we find that the Appointing Authority was in compliance to bypass your name from the eligible list. Therefore, you will remain on the list for future certifications and your appeal is moot, the Civil Service Commission's request to retain your name has been sustained, and your appeal is denied.

Please be advised that in accordance with Civil Service Rules, you may appeal this decision to the Division of Appeals & Regulatory Affairs (DARA) within 20 days of the receipt of this letter. You must submit all proofs, arguments and issues which you plan to use to substantiate the issues raised in your appeal. Please submit a copy of this determination with your appeal to DARA. You must put all parties of interest on notice of your appeal and provide them with copies of all documents submitted for consideration.

Please be advised that pursuant to P.L. 2010 c.26, effective July 1, 2010, there shall be a \$20 fee for appeals. Please include the required \$20 fee with your appeal. Payment must be made by check or money order only, payable to the NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c. 156 (C.44:8-107 et seq.), P.L. 1973, c.256 (C.44:7-85 et seq.), or P.L. 1997, c.38 (C.44:10-55 et seq.) and individuals with established veterans preference as defined by N.J.S.A. 11A:5-1 et seq. are exempt from these fees.

William A. Davis  
Page 2

Address all appeals to:

Henry Maurer, Director  
Appeals & Regulatory Affairs  
Written Record Appeals Unit  
PO Box 312  
Trenton, NJ 08625-0312

Sincerely,

A handwritten signature in cursive script, appearing to read 'T.D. Wilson', written in black ink.

T.D. Wilson  
Human Resource Consultant  
State Certification Unit

For Joe M. Hill Jr. Assistant Director  
Agency Services

c: Deni Gaskill

