



**STATE OF NEW JERSEY**

In the Matter of Lawrence Cattano,  
Police Chief (PM2330W), Perth  
Amboy

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

CSC Docket No. 2020-350

Bypass Appeal

**ISSUED: DECEMBER 6, 2019**

Lawrence Cattano, represented by Peter B. Paris, Esq., appeals the bypass of his name on the Police Chief (PM2330W), Perth Amboy eligible list.

The appellant, a non-veteran, took the subject promotional examination, achieved a passing score, and was ranked #1 on the resultant eligible list. The appellant's name was certified to the appointing authority on February 13, 2019. In disposing of the certification on July 10, 2019, the appointing authority bypassed the appellant, who was listed in the first position of certification PL1190180, and appointed the eligible in the second position, R.M., effective May 13, 2019.

On appeal to the Civil Service Commission (Commission), the appellant initially states that to his knowledge, "no explanation for bypassing" him was ever provided to the Commission. He also claims that the appointing authority, "just prior to making the promotion," was "prepared to inform the Commission that the position would remain vacant." In this regard, the appellant contends that failure to provide an explanation to the Commission when it disposed of the certification for bypassing him "is fatal to the improper promotion." Additionally, the appellant asserts that he was bypassed in retaliation for testifying against the sitting Police Chief. As such, he states that this aspect of his appeal is being brought pursuant to *N.J.A.C. 4A:2-5.1* and *N.J.A.C. 4A:2-5.2*, employee protection against reprisals. Specifically, he presents that he testified against the former Police Chief in a criminal trial and later in the former Police Chief's termination hearing at the Office of Administrative Law (OAL). He explains that the former Police Chief was suspended on December 15, 2014 after he was arrested, and, on that same day, the

Mayor asked the appellant to take over as “Temporary Acting Deputy Chief of Police’ in charge of all Police Operations.” Subsequently, he states that in June 2016, a waiver of promotional examination procedures was granted by this agency and he was “permanently appointed Deputy Chief as of October 9, 2015.”<sup>1</sup> Because every former Deputy Police Chief had become Police Chief, the appellant states that he, the Council, and “others” believed he would be the next Police Chief.

However, on December 6, 2016, three months after he testified at the former Police Chief’s criminal trial in August 2016, the appellant states that he was advised that the Mayor “suddenly decided to remove him from the head of the Department and to appoint Captain R.M. to be ‘acting Chief of Police’ effective immediately.” The appellant argues that this decision was shocking, given that R.M. deferred to his superior qualifications by declining to file for the Deputy Police Chief promotional examination. He also notes he resides in Perth Amboy and that by ordinance, preference in promotions is to be given to a local resident, and R.M. does not reside in Perth Amboy. Further, the appellant states that he has never been disciplined in his nearly 30 years of service, while R.M. received major discipline in the 1990’s. Of particular note, the appellant presents that between 2014 and 2016, he successfully ran the department, increased staffing and reduced violent and overall crime. He argues that this changed when he was essentially “demoted” by the Mayor and she retaliated against him for publicly testifying against the former Police Chief. The appellant also states that after he was “removed from running the Police Department,” he was relegated to a back-corner office and a junior Police Captain was named “Chief of Staff,” performed similar duties as a Deputy Police Chief, and was moved into his former office.

After the list for the subject appeal was issued, the appellant claims that discussions occurred among the Mayor, Business Administrator, and Council Members about the process of promoting the next Police Chief, assuming that the current one was not reinstated. He states that the outgoing Business Administrator sent an email listing positives and negatives attributes about him and R.M to the incoming Business Administrator, as well as the CFO. The outgoing Business Administrator purported to list numerous “positives” for the appellant, but numerous “negatives” about R.M. The appellant also states that the Mayor objected to any discussions with the Council or interviewing the candidates, since “[W]e already have an Acting Police Chief that passed the examine[sic] and I have no intentions [sic] of making changes that can possibly affect police moral [sic].” Further, the appellant maintains that his experience and management credentials

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<sup>1</sup> The promotional examination for Deputy Police Chief (PM0398U), Perth Amboy, was announced with a closing date of February 22, 2016. As such, it was not possible for the appellant to be permanently appointed as Deputy Police Chief effective October 9, 2015, almost five months prior to the closing date of the promotional announcement. Rather, agency records reflect that the appellant was provisionally appointed, pending promotional examination procedures to Deputy Police Chief effective October 9, 2015 and permanently appointed in accordance with *N.J.A.C. 4A:4-2.7* effective April 7, 2016.

are clearly superior than the two lower ranked eligibles on the list, and he has received multiple commendations and awards throughout his career. The appellant also claims that the appointing authority failed to dispose of the certification before the required disposition due date or provide supporting documentation justifying the bypass. Therefore, the appellant requests a hearing as well as any documentation regarding the testing and certification process for the Police Chief position in Perth Amboy.

In response, the appointing authority, represented by Peter J. King, Esq., states that while the appellant did testify in one of the criminal trials of the former Police Chief, that trial ended in an acquittal. Further, the hearing which upheld the removal of the former Police Chief from his position occurred at the OAL. In that hearing, both the appellant *and* R.M. testified *on behalf* of Perth Amboy for the former Police Chief's termination. Thus, if the Mayor were retaliating against people testifying against the former Police Chief, the appointing authority posits that she would not have appointed either the appellant or R.M. because they both testified against the former Police Chief. Had the Mayor been discriminating against employees who testified against the former Police Chief, the appointing authority states that it is only logical to assume that she would have appointed the #3 eligible, M.P., who testified *on behalf* of the former Police Chief at the termination hearing. Thus, it maintains that there was no discrimination against the appellant for his required testimony at either the criminal matter or at the OAL hearing. With respect to his argument that he is the more qualified candidate, as the appointing authority of the municipality, the Mayor has the discretion to appoint any of the top three candidates in accordance with *N.J.S.A. 11A:4-8*. In this case, the appointing authority maintains that it properly exercised that discretion by appointing R.M., who had served in the capacity of Police Chief for two years<sup>2</sup> and had shown the leadership and integrity required for the position.

## 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* 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)*, in conjunction with *N.J.A.C. 4A:4-4.8(b)4*, provides that the appellant has the burden of proof to show by a preponderance of evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper. As long as that discretion is properly utilized, an appointing authority's decision will not be overturned.

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 Civil Service Commission determines that a

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<sup>2</sup> According to agency records, R.M. received an interim appointment as Police Chief effective December 6, 2016.

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)*. 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).

Initially, the appellant is incorrect in his assertion that the appointing authority's failure to provide an explanation for bypassing him as the eligible in the first position when it disposed of the certification is fatal to R.M. appointment. In *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 *N.J.* 38 (2011), the Supreme Court held that, as bypassing a higher-ranked eligible is facially inconsistent with the principles of merit and fitness, the appointing authority must justify its selection of a lower-ranked eligible with a specific reason. At the time *Foglio* was decided by the Court, *N.J.A.C. 4A:4-4.8(b)4* stated that **in disposing of a certification**, an appointing authority must, when bypassing a higher ranked eligible, give a statement of the reasons why the appointee was selected instead of a higher ranked eligible or an eligible in the same rank due to a tie score. However, in response to *Foglio*, effective May 7, 2012, *N.J.A.C. 4A:4-4.8*, Disposition of a certification, was amended and the requirement for a statement of reasons, paragraph (b)4, of the rule, **was deleted**. *See 44 N.J.R. 1333(b)*.

In explaining its rationale for the amendment, the Commission indicated administrative review of the bypass would be moved from the disposition of the certification process to the appeal process. It found that when an eligible files a bypass appeal, this is the best time for the Commission to review a bypass, as the eligible has communicated the basis for the challenge and the appointing authority may then provide an explanation for the bypass. Additionally, if an eligible has a reason to challenge a bypass, this means that the eligible believes he or she was rejected for an improper reason. As such, the eligible thus provides the impetus for review. In this case, as noted earlier, the subject certification was issued on February 13, 2019. Therefore, the requirement that the appointing authority provide a statement of reasons for bypassing a higher ranked eligible was not required when the subject certification was disposed.

In the present matter, the appellant argues that the basis for his bypass was for an improper purpose, *i.e.*, retaliation for testifying against the then sitting Police Chief who was allegedly a longtime friend and political ally of the Mayor. In a case 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/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.

In this case, the appellant has not shown that by a preponderance of the evidence that he was bypassed in retaliation for testifying against the then sitting Police Chief. As noted by the appointing authority, while the appellant testified against the former Police Chief in a criminal matter, the former Police Chief was acquitted in that matter. Additionally, both the appellant and the candidate who was promoted from the list testified against the former Police Chief in his termination hearing. The former Police Chief's termination was upheld by the Commission. Thus, it is unclear, and the appellant does not explain in his written submissions, why the appointing authority would select the other candidate who also testified against the former Police Chief in the removal hearing. Indeed, he makes no assertion in his appeal submissions that R.M. is a friend or political ally of the Mayor. Other than his mere speculation that R.M. received the "acting" appointment to Police Chief three months after he testified in the criminal matter, the appellant provides no argument or evidence linking this appointment to retaliation for his testimony. As noted earlier, the former Police Chief was acquitted of the charges in that matter in September 2016. R.M. received the interim appointment to Police Chief on December 6, 2016, more than three months after the appellant states that he testified against the former Police Chief in August 2016. Thus, the appellant was not "suddenly removed from functioning as the Acting Chief" soon after the Mayor learned of the appellant's testimony in the criminal matter.

The appellant contends that "it appeared that just prior to making the promotion to Police Chief, the appointing authority was prepared to inform the Commission that the position would remain vacant" and that the Mayor "waited until completion of [the former Police Chief's] termination appeal before promoting [his] permanent replacement" suggests potential acts of misinformation that lend support to his appeal. The Commission disagrees. Although the former Police Chief was acquitted of the first set of criminal charges against him in September 2016, his appeal of the administrative charges in support of his removal from employment was still pending at OAL. Therefore, in accordance with *N.J.A.C. 4A:4-1.6(b)3*, the appointing authority opted to fill the position held by the permanent employee who had been removed for disciplinary reasons and was waiting final administrative action by the Commission on appeal, via an interim appointment.<sup>3</sup> The certification from the subject list was issued on February 13,

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<sup>3</sup> It appears that the appointing authority initially reported R.M.'s December 6, 2016 appointment to Police Chief as a provisional appointment. This provisional appointment resulted in the issuance of a promotional examination announcement for Police Chief (PM2184V), Perth Amboy, closing August 21, 2017. Upon receipt of the promotional announcement on August 1, 2017, the appointing authority contacted this agency and requested that the announcement be put on hold due to "pending litigation." Initially, this agency denied the appointing authority's request since a provisional appointment cannot exceed 12 months. See *N.J.S.A. 11A:4-13b*. However, it was

2019 and had a disposition due date of May 13, 2019. However, the Administrative Law Judge's initial decision was not issued until May 22, 2019 and the final administrative determination upholding the former Police Chief's removal was not rendered by the Commission until June 26, 2019. It would have made little sense for the appointing authority to make a permanent appointment from the outstanding certification when it did not know whether or not the Commission would grant the former Police Chief's appeal and order that he be restored to his permanent position. Rather, it appears from the record that once the appointing authority learned that the former Police Chief's appeal was denied, it promptly returned the certification on July 10, 2019. Further, there is no prohibition in Civil Service law or rule that precludes returning an interim appointee to his or her permanent title and reserving the position/title that was previously filled by an interim appointment as a vacant position/title. *See N.J.A.C. 4A:4-1.6(e)*.

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). The Commission has reviewed this matter and does not find that the appellant was bypassed for an invidious reason. Additionally, 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 his qualifications are superior than the candidate who was selected, 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, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name was proper and the appellant has failed to meet her burden of proof in this matter.

## ORDER

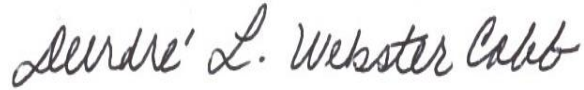
Therefore, it is ordered that this appeal be denied.

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subsequently determined that the former Police Chief had appealed the matter of his removal to the Commission and was awaiting final administrative action on that appeal by the Commission. As such, an interim, rather than a provisional appointment, could be made in this situation. Therefore, R.M.'s record was corrected to reflect an interim appointment and the promotional announcement for Police Chief (PM2184V) was cancelled effective August 17, 2017.

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 4<sup>TH</sup> DAY OF DECEMBER , 2019



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