



STATE OF NEW JERSEY

In the Matter of Joseph Whittick,
County Correction Sergeant
(PC2075U), Camden County

CSC Docket No. 2019-1490

DECISION OF THE CIVIL SERVICE COMMISSION

Bypass Appeal

ISSUED: MARCH 29, 2019 (JET)

Joseph Whittick, represented by Robert K. Chewning, Esq., appeals the bypass of his name on the County Correction Sergeant (PC2075U), Camden County, eligible list.

The appellant took the promotional examination for County Correction Sergeant (PC2075U), achieved a passing score, and was ranked on the subsequent eligible list. The appellant's name was certified on December 13, 2017 (PL181172). In disposing of the certification, the appointing authority bypassed the appellant, who was the first ranked candidate, and appointed lower ranked candidates, Dennystor A. Nieves, the 4th ranked candidate, Jennifer S. Wescott, the 5th ranked candidate, John M. Furtado, the 6th ranked candidate, John F. Kamulda, III, the 7th ranked candidate, Patrick M. Comely, the 8th ranked candidate, and James F. Cale, Jr., the 9th ranked candidate. It is noted that the PC2075U list was certified two times and seven appointments were made.¹

On appeal to the Civil Service Commission (Commission), the appellant asserts, among other things, that the latest bypass is a continued pattern of bad faith toward the appellant throughout his career. Specifically, in 2005, the appellant went out on leave under the Family and Medical Leave Act (FMLA) but the appointing authority improperly denied his request for accommodations for his disabilities. As such, the appellant filed a complaint against the appointing

¹ The appellant was listed on the PL181172 and PL180065 certifications as, "Retained, Interested Others Appointed."

authority alleging FMLA violations on August 28, 2008, which was settled. The appellant adds that the appointing authority subjected him to discrimination for disciplining him for his sick time use when compared to other minority officers who were not similarly disciplined for using similar time. As a result, the appellant filed a complaint with the Federal Equal Employment Opportunity Commission (EEOC). Also, on September 9, 2005, the appointing authority terminated the appellant for his absences due to his alleged excessive absenteeism, which indicated that the appellant resigned not in good standing. The matter was settled at the Office of Administrative Law (OAL), and he was reinstated on June 1, 2009. The appellant states that he was ordered to work overtime in violation of his union contract, and although he filed a grievance about the matter, it was denied by the appointing authority. The appellant contends that the appointing authority retaliated against him by alleging he had assaulted an inmate after it had received notice of the aforementioned EEOC charges. The appellant contends he was found not guilty of the assault charge. Moreover, the appellant asserts that the appointing authority has retaliated against him for bypassing him on several promotional lists for Correction Sergeant since September 21, 2011. Further, the appointing authority continued to bypass the appellant after he was reinstated to employment in 2009, and such practice has demonstrated a pattern of bad faith against the appellant since 2000. He argues that the appointing authority has failed to establish a legitimate reason for bypassing him and did not provide any information to show that the appointed candidates were better qualified for the position. In fact, he contends that the appointing authority has demonstrated invidious motivation for bypasses, as it did not withdraw his discipline from 2005 as required by the settlement agreement. The appellant requests that he be appointed to Correction Sergeant or that the matter be submitted to OAL as a contested case.

In response, the appointing authority provides documentation indicating that the appellant received a four-day suspension on July 8, 2017; a warning letter on June 9, 2014; a five-day suspension on December 10, 2013; a counseling on May 26, 2012; a counseling² on May 4, 2011; a counseling on December 7, 2010; a written reprimand on September 30, 2010; a written reprimand on August 23, 2005; a warning letter on July 20, 2005; a counseling on May 12, 2005; a warning letter on December 13, 2004; a counseling in December 2004; a counseling on November 9, 2004; a counseling in November 2004; a counseling on October 20, 2004; a counseling on April 13, 2004; a counseling on April 11, 2004; a counseling in March 26, 2004; a counseling on March 3, 2004; a counseling on December 31, 2002; a counseling on October 24, 2001; a counseling on an unspecified date in 2001; a counseling on October 11, 2001; and a counseling on August 11, 1999. The appointing authority did not provide any other arguments or evidence in response to the appellant's appeal.

² It is noted that counselings and warnings are not considered official disciplinary action under Civil Service law and rules.

CONCLUSION

It is noted that bypass appeals are generally treated as reviews of the written record. *See N.J.S.A. 11A:2-6(b)*. Hearings are granted in those limited instances where the Commission determines that a 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)*. For the reasons set forth below, this case presents material issues of disputed fact. Based on a review of the record, the Commission is unable to determine from the written record if the appellant's bypass was consistent with the Rule of Three. *See N.J.A.C. 4A:4-4.8*. In this matter, the appointing authority did not provide any documentation pertaining to any of the candidates' experience and education, and other than indicating that the appellant's personnel record contains several minor disciplinary incidents, it did not explain or provide any information pertaining to how the candidates were selected. Moreover, it provided no information to refute the appellant's contentions that his bypass was for reasons other than merit and fitness. Given that the appointing authority has not provided the Commission with any additional information or arguments concerning this matter, in conjunction with the fact that the appellant was reachable for appointment consideration but six lower ranked eligibles were appointed, this matter cannot be decided on the written record. In this regard, the Commission notes that the Appellate Division has recently determined that when disputed issues of material fact exist which cannot be determined on the written record, a hearing is required in bypass matters. Therefore, in accordance with the Appellate Division decision, the Commission grants a hearing at the OAL. *See In the Matter of Robert Brown, Police Sergeant (PM0622N), City of Salem, ____ N.J. Super. ____ (2019)*. Therefore, the Commission refers this matter to OAL for a hearing concerning the appellant's allegations.

ORDER

Therefore, it is ordered that this matter be referred to the Office of Administrative Law for a hearing as a contested case. It is further ordered that the appointments of eligibles ranked below Joseph Whittick on certification PL181172 be designated conditional pending the outcome of this appeal.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 27th DAY OF MARCH, 2019



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