



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Gary A. Charyak,
Environmental Specialist 3 (PS9652G),
Department of Environmental
Protection

List Bypass Appeal

CSC Docket No. 2022-480

ISSUED: MAY 23, 2022 (EG)

Gary A. Charyak appeals the bypass of his name on the Environmental Specialist 3 (PS9652G), Department of Environmental Protection eligible list.

By way of background, the appellant appeared as tied for first ranked non-veteran eligible on the subject eligible list, which promulgated on November 7, 2019 with 15 eligibles and expires on November 6, 2022. A certification of eight eligibles was issued on May 3, 2021 (PS210464) with the appellant listed in the second position. In disposing of the certification, the appointing authority bypassed the appellant, removed the other first ranked non-veteran eligible that had moved to a different unit scope, listed the third ranked eligible as retained not interested in an appointment at this time, bypassed the seventh ranked eligible, and appointed eligibles four, five six, and eight effective July 17, 2021.

On appeal to the Civil Service Commission (Commission), the appellant argues that candidates outside of the top three were interviewed and appointed from the subject certification. The appellant also contends that the appointing authority has failed to remove the names of candidates from future certifications who were certified and refused appointments to these positions for either disinterest or geographic preference. Further, the appellant asserts that the appointing authority's failure to backfill positions for a period of 10 years has resulted in him performing out-of-title duties.

In response, the appointing authority argues that it followed the “Rule of Three” as outlined in *N.J.A.C. 4A:4-4.8(a)3* in making appointments from the subject certification. It indicates that one employee was removed from the list since he had moved to a different unit scope. The other seven eligibles were interviewed. Further, it states that, “after all the interviews were held, and the panel members had the opportunity to expand on the location and the specific job duties of the position,” the third ranked eligible declined the position and indicated that she was only interested in future appointments. She was recorded as such on the certification as permitted by Civil Service regulations. In support of this contention, the appointing authority submits a copy of a form signed by the eligible indicating that she was only interested in future appointments. Further, the appointing authority asserts that it offered appointments to the four candidates that had received the highest ratings based on their responses to the questions in the interview. The appointing authority maintains that the appellant and another candidate were properly bypassed for appointment.

In reply, the appellant argues that the appointing authority should only have certified and interviewed interested individuals for the four open positions. He relies on *N.J.A.C. 4A:4-4.2(c)2* in claiming that there should only have been three individuals certified for the first position and one more individual certified for each of the additional positions, for a total of six individuals that should have been certified. The appellant asserts that the appointing authority’s preferred candidate, the eighth ranked eligible, should not have been certified and interviewed. Additionally, the appellant contends that the appointing authority handing out forms after the interview to solicit if the interviewees were still interested was unusual and so late in the process. He maintains that it was another example of the appointing authority targeting an individual outside the top three for appointment. Further, he argues that the individual refusing an appointment should have been removed from the eligible list pursuant to *N.J.A.C. 4A:4-4.7(a)3*. Moreover, the appellant asserts that the appointing authority has not addressed his claims of out-of-title work.

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. Moreover, the “Rule of Three” allows an appointing authority to use discretion in making appointments. See *N.J.S.A. 11A:4-8* and *N.J.A.C. 4A:4-4.8(a)3ii*. As long as that discretion is utilized properly, an appointing authority’s decision will not be overturned. 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). Additionally, *N.J.A.C. 4A:4-4.2(c)2* provides that an appointing authority shall be entitled to a complete certification for consideration in making a permanent appointment, which means: from promotional

and open competitive lists, the names of three interested eligibles for the first permanent appointment, and the name of one additional interested eligible for each additional permanent appointment. Further, *N.J.A.C.* 4A:4-4.7(a)3 indicates that the name of an eligible may be removed from an eligible list for any of the following reasons: inability, unavailability or refusal of eligible to accept appointment. An eligible who has declined appointment may, upon written request, have his or her name withheld from future certifications until available for appointment. 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).

Initially, since the appellant, a non-veteran, was tied in the first rank 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 filled. The appellant argues that pursuant to *N.J.A.C.* 4A:4-4.2(c)2, the eighth individual on the certification, who was among the eligibles to have been appointed, should never have been certified. However, the appellant has misinterpreted *N.J.A.C.* 4A:4-4.2(c)2. This rule provides the **minimum** number of interested individuals that must appear on a certification for the certification to be complete for consideration by an appointing authority. *N.J.A.C.* 4A:4-4.2(c)2 does not limit how many individuals can appear on a certification. *See e.g., In the Matter of Brian J. Bonomo* (CSC, decided September 6, 2017) (Appellant argued that only the minimum number of eligibles required for a complete certification should have been certified. However, *N.J.A.C.* 4A:4-4.2(c)2 does not limit the number of eligibles and additional names can be requested to account for contingencies, such as individuals not being interested or being removed for various reasons).

Further, the appellant argues that the individual who was not interested in an appointment and was retained for future certifications should have been removed pursuant to *N.J.A.C.* 4A:4-4.7(a)3. In this regard, the Commission notes that removing the individual rather than retaining them would not have changed the disposition of the other candidates on the certification in any way. Moreover, *N.J.A.C.* 4A:4-4.7(a)3 indicates that an appointing authority may remove an individual for refusal to accept an appointment, but it is not required to do so. Furthermore, individuals are permitted to decline interest in a certification and have their names retained for future certifications.

In addition, the appellant argues that the use of a form after interviews by the appointing authority to solicit the interest of candidates after the interview was not typical of the hiring process and was an example of it targeting an individual for appointment. Though the appellant claims that the use of the forms was not typical, it is common for individuals to change their minds about pursuing a position after they learn more about the position during the interview process. The use of such a form provides the appointing authority a mechanism to record a candidate's interest after possibly learning more about a position. Further, there are no Civil Service

rules or regulations prohibiting the use of such forms. Moreover, the appellant has indicated that he believes he has been performing out-of-title duties for numerous years. In this regard, the Commission notes that the established procedure for investigating out-of-title work duties is through a classification review pursuant to *N.J.A.C.* 4A:3-3.9. Furthermore, other than indicating he performed such duties, the appellant has not provided any arguments or evidence indicating how the alleged performance of such duties led to the improper disposition of the subject certification.

The appointing authority has indicated that it selected the candidates for appointment who scored highest during the interview process. In this regard, the appellant has not rebutted the appointing authority's assertions. Further, it is noted that appointing authorities are permitted to interview candidates and base their hiring decision on the interview. *See e.g., In the Matter of Wayne Rocco*, Docket No. A-2573-05T1 (App. Div. April 9, 2007) (Appellate Division determined that it was appropriate for an appointing authority to utilize an oral examination/interview process when selecting candidates for promotion); *In the Matter of Paul Mikolas* (MSB, decided August 11, 2004) (Structured interview utilized by appointing authority that resulted in the bypass of a higher ranked eligible was based on the objective assessment of candidates' qualifications and not in violation of the "Rule of Three").

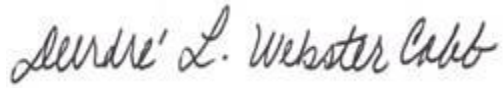
In addition, it is noted that the appellant does not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). 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 legitimate reasons for the appellant's bypass that have not been persuasively refuted. Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellant's name on the Environmental Specialist 3 (PS9652G), Department of Environmental Protection eligible list was proper, and the appellant has failed to meet 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 18TH DAY OF MAY, 2022



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