



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

In the Matter of Scott Randolph, Police Sergeant (PM2590J), Township of Hazlet

CSC Docket No. 2015-999

Administrative Appeal

ISSUED: JUN 1 9 2015

(DASV)

Scott Randolph, represented by Steven A. Varano, Esq., appeals the certification of his name from the Police Sergeant (PM2590J), Township of Hazlet, eligible list.

By way of background, the appellant, a nonveteran, ranked ninth on the eligible list for Police Sergeant (PM2590J), Township of Hazlet, which promulgated on March 7, 2008 with 19 eligibles and expired on March 6, 2012. The appellant's name was certified on June 15, 2011, but it was removed due to his failure to respond to the Notice of Certification. The appellant subsequently appealed the decision to the former Division of State and Local Operations (SLO),1 which upheld On appeal to the Civil Service Commission (Commission), the the removal. Commission found that the appellant sufficiently rebutted the presumption of mailing by submitting a notarized statement under oath indicating that he never received the Notice of Certification. Thus, the Commission granted the appellant's appeal and restored him to the subject eligible list. However, since the eligible list was about to expire, the Commission ordered a revival of the eligible list at the time of the next certification for Police Sergeant in order for the appellant's "name [to] be placed on the next certification [for Police Sergeant], for prospective employment opportunity only." See In the Matter of Scott Randolph (CSC, decided February 22, 2012). Thereafter, on April 30, 2012 after the eligible list expired, the appellant's name was certified as the only eligible on the certification. The appointing

¹ SLO is now known as the Division of Agency Services.

authority then returned the certification, indicating that an appointment would not be made. It is noted that the appellant did not file an appeal at that time.

Prior to the April 30, 2012 certification, a February 7, 2012 certification of the subject eligible list had been issued with a disposition due date of May 7, 2012. It was returned to this agency on February 27, 2012 and recorded on March 29, 2012. Only the first ranked eligible on the certification was appointed, effective February 21, 2012. Jerry Burgos, who was listed in the second position on the certification,² was not appointed and filed suit in the United States District Court, District of New Jersey, against the appointing authority and other individuals regarding his failure to be promoted. Thereafter, the parties entered into a settlement by way of a Consent Order issued on August 18, 2014. The appointing authority agreed to request revival of the Police Sergeant (PM2590J) eligible list and appoint Burgos retroactive to May 1, 2012. Upon review, the Commission found good cause to revive the subject eligible list and record Burgos' appointment from the February 7, 2012 certification effective May 1, 2012.3 It was noted that Burgos was the highest ranked eligible at the time the subject eligible list expired on March 6, 2012. See In the Matter of Jerry Burgos (CSC, decided October 1, 2014).

On appeal,4 the appellant presents a letter, dated July 11, 2012, from the Municipal Administrator, advising him that the appointing authority did not request the April 30, 2012 certification and the certification was incomplete. Thus, it did not appoint the appellant. The Municipal Administrator further informed the appellant that "[i]t appear[ed] that [the certification] was issued by the Commission when it learned of the Township's intent to promote Detective Burgos. At that time, [Detective] Burgos was the top candidate on a certification which had been disposed of. As such, the Commission instructed the Township that it could not promote The Commission then issued the certification with [the Detective Burgos. appellant's name on it, as a result of [his] appeal to restore [his] name to the employment list for sergeant." Therefore, the appellant argues that he had no meaningful opportunity to be promoted from the April 30, 2012 certification. He contends that the subject eligible list should have been revived during the September 22, 2014 certification of a subsequent eligible list for Police Sergeant, Township of Hazlet (PM5096M), which promulgated on August 7, 2014 and expires on August 6, 2017, and he be certified as the number one eligible. He maintains that the foregoing action would comply with the Commission's prior order so that he may "be promoted as intended by the [Commission]." Accordingly, he requests that the September 22, 2014 certification be amended. It is noted that the appellant also

² Burgos ranked sixth on the eligible list.

³ N.J.A.C. 4A:4-4.9(a)3 provides that an eligible shall not be appointed and begin work after the expiration date of the eligible list except when the certification is made just prior to the expiration of the eligible list, in which case the date of appointment and the date the eligible begins work shall be no later than the disposition due date.

⁴ The appellant's request was received on October 2, 2014.

appears on the subsequent (PM5096M) eligible list and is ranked ninth. He is listed in the ninth position on the September 22, 2014 certification. In disposing of the certification, the appointing authority appointed the first three ranked eligibles effective October 28, 2014. The appellant was not reachable for appointment.

In response, the appointing authority, represented by Bruce W. Padula Esq., objects to any amendment to the September 22, 2014 certification. It contends that the Commission did not order that the appellant's name be placed on the top of the next certification. Thus, there is no basis to place his name first, given that his name appears in the ninth position.⁵ Moreover, the appointing authority asserts that "the Commission sua sponte" issued the April 30, 2012 certification containing only the appellant's name. It argues that there is no legal or factual basis to grant the appellant's requested relief. It maintains that the appellant initiated the instant matter when he ranked ninth on the subsequent (PM5096M) eligible list.

The appellant responds that he did not take action to enforce the Commission's prior order until the instant matter because the appointing authority did not request a certification until the September 22, 2014 certification. He reiterates that the failure to place him as the number one eligible on the certification renders the Commission's decision meaningless. The appellant notes that it is unlikely that the appointing authority will make additional promotions in the near future, given that it "made four promotions" (presumably the appointments of Burgos and the three eligibles). The appellant requests that he be considered for one of these four promotions, which he maintains should be deemed conditional until the outcome of his appeal. Additionally, he claims that the appointing authority's arguments are without merit, since only individuals ranked higher than him on the (PM2590J) eligible list could be placed ahead of him on the September 22, 2014 certification of the subsequent (PM5096M) eligible list. Otherwise, he should be placed in the number one position.

In reply, the appointing authority reiterates that there is no law, case, or rule that permits the relief requested by the appellant. It maintains that should the Commission "consider" the appellant's request regarding the four properly made promotions, the Police Sergeants in question must be notified and given an opportunity to respond.

⁵ Contrary to the appointing authority's argument, *N.J.A.C.* 4A:4-3.5(a)1 provides in relevant part that the Commission may consolidate successive eligible lists for a given title which result from successive open competitive or promotional examinations by placing the first name on the later list after the last name of the prior list. Thus, had the name of the appellant been certified on September 22, 2014 from the prior (PM2590J) eligible list, his name would appear twice on the certification in the first and ninth positions since he also appears as an eligible on the subsequent (PM5096M) eligible list.

The former Division of Classification and Personnel Management (CPM)⁶ responded to the appeal, indicating that contrary to the assertions in this matter, the appointing authority signed a Request for Certification form on April 25, 2012, following the Commission's order in *In the Matter of Scott Randolph, supra*. As a result of the request, the appellant was the sole eligible certified on April 30, 2012. A review of the form indicates that six names were requested from the (PM2590J) eligible list for one vacancy.

In reply, the appellant indicates that the fact that the appointing authority requested the April 30, 2012 certification, contrary to its representations, demonstrates its efforts to circumvent the Commission's prior order, thereby depriving him of a meaningful opportunity to be considered for promotion. The appointing authority did not further respond.

CONCLUSION

It is initially noted that the appellant did not file an appeal regarding the April 30, 2012 certification at the time of his non-appointment. In that regard, N.J.A.C. 4A:2-1.1(b) states that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. Thus, any challenge in that respect could be dismissed based on the untimeliness of the appellant's request. Nonetheless, since the appellant filed the instant matter within 20 days of the September 22, 2014 certification of the Police Sergeant, (PM5096M) eligible list and the issues in the matter also involve that certification. the Commission will address the appellant's claims.

N.J.S.A. 11A:4-6 and N.J.A.C. 4A:4-3.4 provide that an eligible list may be revived in order to implement a court order or decision of the Commission in the event of a successful appeal instituted during the life of a list, to correct an administrative error, or for other good cause.

In the instant matter, there is a dispute as to whether the appellant was appropriately certified and considered for appointment on the April 30, 2012 certification. The appellant asserts that he did not have a meaningful opportunity to be considered for promotion as a Police Sergeant on that certification. Additionally, he claims that the fact that the appointing authority actually requested the April 30, 2012 certification demonstrates its circumvention of the prior order of the Commission, thereby depriving him of a promotion as "intended" by the Commission. The appellant submits that he should have been placed as the number one eligible on the September 22, 2014 certification.

⁶ CPM is now known as the Division of Agency Services.

Initially, the Commission is troubled by the appointing authority's assertion that it did not request the April 30, 2012 certification. The Municipal Administrator's July 11, 2012 letter sets forth this claim and it was reiterated by the appointing authority in the instant matter. However, the Request for Certification form, which was signed on April 25, 2012, clearly rebuts this assertion. The appointing authority also did not further respond. Therefore, the Commission finds that the appointing authority requested a certification and, as explained further below, the appellant was appropriately certified as the only eligible.

However, the Request for Certification form does not evidence why the appointing authority requested a certification in the first place or that the request demonstrates the appointing authority's circumvention of the prior Commission order. Rather, based on the record before the Commission, it may have thought that Burgos could have been certified and appointed. The certification request on April 25, 2012 asked that six names be certified from the Police Sergeant (PM2590J) eligible list. Moreover, in In the Matter of Jerry Burgos, supra, the appointing authority advised that it intended to appoint Burgos, effective May 1. 2012, prior to the May 7, 2012 due date of the February 7, 2012 Police Sergeant (PM2590J) certification. Indeed, the Municipal Administrator's July 11, 2012 letter discusses Burgos' intended appointment. However, the Police Sergeant (PM2590J) eligible list expired on March 6, 2012 and the list had only been revived for the appellant. The eligible list was not revived for Burgos until the Commission's October 1, 2014 decision. Thus, although the appointing authority requested six names for certification, only the appellant's name could be certified on April 30, The subsequent eligible list for Police Sergeant (PM5096M) also did not promulgate until August 7, 2014 and could not be certified at the time. Thus, the appellant was appropriately the only eligible certified.

As to the appellant's non-appointment, it is noted that given that the appointing authority intended to appoint Burgos on May 1, 2012 and also stated its intention in its July 11, 2012 letter to the appellant, it was reasonable for the appointing authority not to have appointed the appellant from the April 30, 2012 certification, although it requested a certification for one vacancy. It is emphasized that Burgos was ranked higher than the appellant on the Police Sergeant (PM2590J) eligible list. Additionally, even though there may have been a vacancy, there was no legal obligation to fill that vacant position. See In the Matter of Paul Philipps (CSC, December 2, 2009) (Appointing authority not required to appoint eligible from an incomplete Deputy Police Chief certification even though a genuine vacancy existed); see also, In the Matter of Institutional Fire Chief (MSB, decided January 12, 2005).

Moreover, because the April 30, 2012 certification was incomplete with less than three names, the appointing authority was not required to make an appointment. It is well established that an appointing authority is not compelled to

make an appointment from an incomplete list. N.J.A.C. 4A:4-4.2(c)2 provides in relevant part 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. Furthermore, N.J.A.C. 4A:4-4.8(a)3 states in pertinent part that upon receipt of a certification, an appointing authority shall appoint one of the top three interested eligibles ("Rule of Three") from an open competitive or promotional list, provided that disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list, and if the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed. Thus, when fewer than three interested eligibles are certified, the appointing authority need not make a permanent appointment. See In the Matter of Jane Richards-Mercado (MSB, decided July 21, 1998) (An appointing authority is not compelled to make a permanent appointment from an incomplete list).

Therefore, based on the foregoing, the Commission finds that the appellant was appropriately certified on April 30, 2012. It must be emphasized that the Commission did not declare an intention to have the appellant promoted. Commission ordered that the Police Sergeant (PM2590J) eligible list be revived and for the appellant's name to be placed on the next certification for Police Sergeant, for prospective employment opportunities only. The next certification was the April 30, 2012 certification, and as set forth above, the discretion to appoint the appellant rested with the appointing authority. Accordingly, the appointing Consequently, the appellant authority complied with the Commission's order. would not be placed on the September 22, 2014 certification of the Police Sergeant (PM5096M) eligible list as the number one listed eligible since he was already provided with an opportunity to be considered for appointment from the Police Sergeant (PM2590J) eligible list. The Commission's prior order only provided one opportunity, which was completed as of the April 30, 2012 certification. In addition, the appellant indicates that he did not receive a meaningful opportunity to be considered for promotion from the April 30, 2012 certification. However, the fact that the appellant's name was certified again provided him with that meaningful opportunity, and it was clear that the appointing authority determined that it would not appoint him at that time. It is emphasized that the appellant does not possess a vested property interest in a 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).

Even assuming, *arguendo*, that the appellant, a nonveteran, had been listed as the number one eligible on the September 22, 2014 certification based on the revival of the Police Sergeant (PM2590J) eligible list, he could be bypassed pursuant to the "Rule of Three." *See N.J.A.C.* 4A:4-4.8(a)3. The "Rule of Three" provides the appointing authority with selection discretion, absent any unlawful

motive. See N.J.A.C. 4A:4-4.8(a)3. In this matter, the appellant has not alleged or presented any substantive evidence that would lead the Commission to conclude that the appointing authority circumvented or abused its discretion in not appointing him, regardless of whether it was from the April 30, 2012 certification or the September 22, 2014 certification. 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). Accordingly, there is not a sufficient basis in the record to grant the appellant's requested relief.

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 17TH DAY OF JUNE, 2015

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